

## CHAPTER 22

### MILITARY JUSTICE IN OPERATIONS

#### REFERENCES

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter, MCM].
2. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, 3 October 2011.
3. U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, 6 June 2013. (See: Air Force Guidance Memorandum 51-201 dated 25 November 2013.)
4. U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT, 7 Nov. 2003. (See: Air Force Guidance Memorandum 51-202 dated 22 October 2013.)
5. JAGINST 5800.7E, Manual of the Judge Advocate General (JAGMAN), 26 June 2012.
6. THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCHOOL, PRACTICING MILITARY JUSTICE (APRIL 2013), available at <https://www.jagcnet.army.mil/tjaglcscrimlaw> [hereinafter, PRACTICING MILITARY JUSTICE].
7. OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPLOYING JUSTICE: A HANDBOOK FOR THE CHIEF OF MILITARY JUSTICE (June 2008) [hereinafter, DEPLOYING JUSTICE].

#### I. INTRODUCTION

A. Our military justice system was designed to be portable. It was designed with combat in mind. That is good news for military justice practitioners: when you deploy, you use the same exact system that you have been using in garrison. Over the last decade of conflict we have seen that our system functions downrange, although our system has seen criticism. For a good argument and counter-argument on how our system performs in a deployed environment, see Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, Army Law., Jan. 2012, at 6, and Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, Army Law., Sep. 2010, at 12. You should read both of these articles before you deploy.

B. The other good news is that you will generally have the time in a deployed environment to solve military justice problems by turning to your standard resources – the MCM, your service regulations, the Military Judge's Benchbook, etc. You should not use this chapter to try to solve complex problems. Use this chapter to familiarize yourself with some of the unique issues related to deployed environments and then go to the primary sources to work your way to the right answer.

C. Before you deploy, review this chapter. Then, download a copy of DEPLOYING JUSTICE. You need to use this resource when creating your jurisdiction documents. Last, you must read the military justice sections of the most recent CLAMO AARs. Within those, you will find expanded discussions of many of the points that are mentioned in this chapter.

#### II. ESTABLISHING THE JURISDICTIONAL SCHEME

A. The term "jurisdiction" is used here to describe GCMCA scheme, not to describe a court-martial's legal authority to render a binding verdict and sentence. *Getting your jurisdictional scheme right may be the most important "deployed justice" thing that you do!* Command and control relationships can be very complex in a deployed environment. The person who is commander of both a division and an installation may deploy, which creates the issue of who is the GCMCA forward (the division commander?) and who is the GCMCA in the rear (a new installation commander?). You will have to decide what to do with cases that have already been referred – take them forward, or transfer them to a different commander. Brigade combat teams may deploy in whole or in part, supported by slice elements and personnel, who may be supplied by sister units or even sister services. This is an area where attention to detail is critical. If you do not get the jurisdictional paperwork correct, you may have all of your courts-martial invalidated. Whether you are the Chief of Justice for an OSJA that supports a GCMCA, a brigade judge advocate (BJA), or a command judge advocate advising a battalion, you should start this planning as soon as you learn of the upcoming deployment.

B. Your primary resource for solving this problem is *DEPLOYING JUSTICE*. This publication was written by the Office of the Judge Advocate General, Criminal Law Division. If you need assistance, contact that office. They will help you to ensure that your jurisdictional schemes are properly created.

C. Under the UCMJ, any convening authority may refer any case to trial. As a general matter, the convening authority with administrative control (ADCON)<sup>1</sup> over the accused service member exercises primary UCMJ authority. However, your command may want to set up area jurisdiction. All Soldiers, whether deploying or not, should be assigned or attached to a unit that can dispose of criminal and administrative actions that may arise during the deployment period. The unit adjutant should initiate a request for orders to attach non-deploying Soldiers to a unit remaining at the post, camp, or station. For the Army, AR 27-10, para. 3-8, lists specific language that should be included in attachment orders to indicate a Soldier is attached to a unit for the purpose of Article 15.

D. This is an ongoing process as new Soldiers (and possibly members from other services) will be incoming to the command. This requires coordination with the appropriate G-1/S-1 staff elements. For units, it is useful to keep track of the tactical task organization (usually stated upfront in mission orders) in order to keep track of which subordinate units are operating under the control of which parent units. Consider creating a “jurisdiction chart” for all of the commands in your area of operations. Although the jurisdictional alignment for UCMJ actions may not directly track the tactical task organization, the task organization provides a good starting point.

E. Once the jurisdictional scheme is created, you will need to select panels for those GCMCAs. Again, reference *DEPLOYING JUSTICE* as well as other traditional resources like *PRACTICING MILITARY JUSTICE* to guide you through this process. This is a standard business practice – do it here just like you would do it in garrison. Remember, the system was designed to be portable. If you have a GCMCA with area jurisdiction that covers small, remote outposts, that GCMCA (or even a SPCMCA) can create a panel out of the Soldiers that are on that outpost and try the case right there.

F. Recognize that the commanders and senior non-commissioned officers of provisional units may not have much military justice training, and the commanders and leaders of Reserve and National Guard units may not have much experience in military justice. Arrange for them to receive training.

### III. LEGAL NONDEPLOYABLES AND PENDING ACTIONS

A. You will encounter a tension as your unit prepares to deploy – the tension between processing your legal nondeployable Soldiers quickly so that a replacement will arrive (which usually means a lower disposition), versus ensuring that serious offenses are resolved at the appropriate level (which usually means more processing time). Ultimately, the commanders own the system and they are the ones that resolve this tension. You should provide sound advice based on your experience with the system, to include understanding the norms that prevailed in our system before the current period of conflict, so that your commanders can strike the correct balance.

B. BJAs and trial counsel (TC) should monitor the status of those Soldiers within their jurisdiction who may be non-deployable for legal reasons. Judicial action by military or civil authorities may not necessarily be a bar to deployment for actual combat operations. BJAs should also advise commanders of those Soldiers who are not themselves the subject of legal action, but who are required to participate in legal proceedings (such as witnesses or

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<sup>1</sup> Administrative control (ADCON) as opposed to operational control (OPCON) is defined in JP 1-02 and FM 27-100 as follows:

JP 1-02 — Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.

FM 27-100 — Administrative Control (ADCON) is the direction or exercise of authority necessary to fulfill military department statutory responsibilities for administration and support. ADCON may be delegated to and exercised by service commanders at any echelon at or below the service component command. The secretaries of military departments are responsible for the administration and support of their forces assigned or attached to unified commands. The secretaries fulfill this responsibility by exercising ADCON through the service component commander of the unified command. ADCON is subject to the command authority of the combatant commander.

court or board members). The Commander, usually after coordination with the BJA, decides whether these Soldiers will deploy.

C. In the Army, personnel status is tracked using a Unit Status Report (USR). *See* U.S. DEP'T OF ARMY, REG. 220-1, UNIT STATUS REPORTING (15 Apr. 2010). Preparation of the USR at the battalion and brigade level is typically an additional duty for a staff officer. In practice, this means the USR officer may be prone to declaring any Soldier remotely connected with "JAG" as "nondeployable for legal" reasons. Judge Advocates should get directly involved in preparation of the USR to the extent necessary to prevent overcounting of "nondeployable for legal" Soldiers.

D. Judge Advocates must consider whether to take pending actions to the deployed setting or leave them in garrison. For courts-martial, this will largely be a function of the seriousness of the offense and whether the witnesses are primarily civilian or military. Serious criminal offenses or cases with primarily civilian witnesses often stay in the garrison. Similarly, Soldiers pending administrative separation normally should remain in garrison pending separation. NJP actions often go forward with the deploying force.

#### **IV. PERSONNEL AND EQUIPMENT**

A. Deploying personnel. Successful management of military justice actions during a deployment requires planning and training of key personnel. The size of the deployment will often dictate who deploys from a legal office. Deployed settings present difficult supervisory challenges, primarily caused by increased distances between JAs, communication and transportation limitations, and "imported" counsel (JAs crossing over from legal assistance, administrative law, operational law, or claims) who may be inexperienced with common military justice actions. Supervisors must therefore attempt to identify and train potentially deployable JAs before deployment to ensure they are knowledgeable about investigations, NJP procedures, court-martial procedures, and administrative separations.

B. Non-deploying personnel. A military justice supervisor in the rear detachment should prepare for military justice challenges in the rear because of fewer resources available. Also the supervisor should expect that rear detachment commanders have little to no experience in military justice actions and will need training and guidance, particularly in areas such as unlawful command influence. Rear detachment military justice supervisors must plan for and prepare legal briefings for all new OICs/commanders in the rear detachment and additional training as necessary.

C. Office equipment. Resources, to include electricity, phone lines, internet, e-mail, and fax capability, are ordinarily limited in deployed settings. Judge Advocates must deploy with relevant regulations and legal forms in electronic format and hard copy. Computers may help to eliminate the need for some hard copy resources. However, given the potential unreliability of computers in the harsh environment of a deployment, JAs must plan for the worst. Past Army deployments have demonstrated the need to deploy with a hardbound set of essential publications, including the Manual for Courts-Martial, AR 27-10 (with any relevant supplements), the Military Judges' Benchbook, AR 15-6, AR 635-200, a Military Rules of Evidence (MRE) hornbook, a Military Evidentiary Foundations book, *DEPLOYING JUSTICE*, and *PRACTICING MILITARY JUSTICE*.

#### **V. TAKING STOCK OF OUTSIDE RESOURCES AND BUILDING RELATIONSHIPS**

A. One of the most important things you can do to have a successful deployment is to build relationships with the other people that work within the system: trial defense attorneys; military judges; magistrates; law enforcement; Victim Advocates (VA) and Sexual Assault Response Coordinators (SARC); Victim-Witness Liaisons (VWL); Unit Prevention Leaders (UPLs); confinement facility commanders, etc. Find out who these people are or who they are going to be and start communicating with them now.

B. Trial defense and trial judiciary. Deployment support from trial defense and the trial judiciary should be coordinated early. Depending on the deployment, your OSJA may be responsible for the care and feeding of these Soldiers. If you intend to hold courts-martial at forward operating bases, you will need to coordinate early with the trial judiciary. Talk with the trial judiciary about their plan for part-time military magistrates and if they intend to limit their role or otherwise intend to create new SOPs for their use while deployed.

C. Law enforcement. Identify who will be providing law enforcement services (CID and MPI) in your area of operations and reach out to them. Find out how they plan to secure evidence while they are downrange and where they plan to have the evidence locker.

D. SHARP personnel. Likewise, reach out to the deployed VAs and deployed SARCs that will be working in your area of operations. Check on their training – they may not have received much before the deployment. Conduct battle drills for how you will respond to an allegation of serious misconduct, to include sexual assault allegations.

E. VWLs The rules still apply while you are downrange. Your VWL in garrison may be a civilian and so will not be going with you. Identify who your VWL will be IAW AR 27-10 and start training him or her. Plan now for how you are going to keep your defense and prosecution witnesses separate when you might be trying cases out of tents. You may even need to arrange for separate Porta-potties.

F. Confinement facilities. With the exception of the Vietnam War, Army forces have typically not maintained confinement facilities in theater for U.S. personnel. Although jails run by U.S. or U.N. forces may exist for local nationals, they are not intended, and generally should not be used, for holding U.S. military personnel.<sup>2</sup> When the Soldier first goes into confinement, the unit may need to set up a holding area, separate from enemy prisoners of war, that does not have unduly harsh conditions. The Soldier is normally then shipped to the rear (Mannheim, Germany or CONUS). In mature theaters, confinement facilities may be created in theater. In OEF/OIF, a confinement facility was established at Camp Arifjan in Kuwait for pre-trial confinement and sentences of 30 days or less. Before deploying, learn the process for transporting inmates from the site of initial confinement to the local confinement facility to a rear confinement facility. You do not want to send a Soldier and his or her escorts on a week-long trip only to find out that you cannot check the Soldier into the facility.

G. Urinalysis. Based upon mission requirements and command guidance, you should ensure your units have the ability to conduct urinalysis testing in theater. Steroid use was a serious problem in Iraq and drugs have been a serious problem in Afghanistan. Some commanders will be resistant to conducting urinalysis screenings because of the length of time it takes to get results back – sometimes three or four months. However, testing is critical to both detecting criminal behavior and preventing it. Coordination should be made with unit Alcohol and Drug Control Officers (ADCOs), the Installation Biochemical Testing Coordinator and the relevant stateside lab prior to deployment to find ways to make the process more efficient. The unit needs to bring enough supplies (bottles, etc.) for the deployment because they may not be able to get the supplies downrange.

H. The outgoing MJ shop. Contact the outgoing MJ shop to find out what cases you may be inheriting. Get copies of the files now.

I. Gaining GCMCA or subordinate units. Start building relationships with the gaining command and units that may be subordinate to your GCMCA. You need to start building trust so that you can each provide each other with the necessary support and ensure that everyone has visibility on important actions.

## **VI. GENERAL ORDERS**

A. Consider the need for or the existence of a General Order (GO) for the operation. A GO is a commander's tool to promote mission accomplishment and protect deployed forces. Much like the Rules of Engagement (ROE), GOs are a flexible way for the command to centrally plan, but de-centrally execute the commander's intent. General orders include prohibitions on the use of privately owned weapons, alcohol, or entry into local religious or cultural buildings. GOs can be used to quickly get after unexpected misconduct, like the poaching of local wildlife or the introduction of designer drugs. A common area of concern is visitation by Soldiers of the opposite sex in housing units. See examples at the end of this chapter (GOs for operations in Desert Shield, Haiti, and Allied Force).

B. Based upon mission requirements and command guidance, military justice supervisors and TCs must draft the general order (GO) for the operation and have it ready for publication as soon as possible. The GO must be published and disseminated to all Soldiers prior to deployment. Violations of a properly published GO may be punished under Article 92, UCMJ. Even though the government need not prove knowledge of a lawful GO as an element of the offense, the contents of the GO should be aggressively briefed to all deploying Soldiers. Consider including the GO as part of the predeployment briefing and having each Soldier sign a copy of the GO.

C. A common problem with GOs is conflicting GOs. Before attempting to draft a GO, you must determine if the higher headquarters already published a mission or theater-specific GO. You should also see what GOs subordinate commanders have issued. Judge advocates must also be aware that the higher headquarters may also prohibit or limit the ability of lower headquarters to promulgate general orders. This often happens when different

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<sup>2</sup> See U.S. v. Wise, 64 M.J. 468 (C.A.A.F. 2007).

commands that occupy a single large base issue different regulations on things like housing visitation. To clear things up, the highest commander issues a policy and restricts lower commanders from more restrictive policies.

## VII. THE UCMJ DURING COMBAT OPERATIONS

### A. “Time of War” under the MCM.

1. The phrase “time of war” is a legal term of art. The phrase is not defined by Congress in the UCMJ, although Congress has defined it in other statutes. The President has defined it as “a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists.” (RCM 103(19)). For a complete discussion of “time of war,” see the analysis to RCM 103(19).

2. The definition applies only to the following portions of the MCM (It does not apply to statute of limitations and/or jurisdiction over civilians):

a. Offenses that can only occur during time of war: Improper use of a countersign (UCMJ art. 101), Misconduct as a prisoner (UCMJ art. 105), & Spying (UCMJ art. 106).

b. Offenses that may be punished by the death penalty only in time of war: Desertion (UCMJ art. 85), Assaulting or Willfully Disobeying a Superior Commissioned Officer (UCMJ art. 90), & Misbehavior of Sentinel or Lookout (UCMJ art. 113).

c. Aggravating Factor for some offenses: The maximum penalty that may be imposed by court-martial is increased in time of war for drug offenses, malingering, and loitering/wrongfully sitting on post by sentinel/lookout. The maximum period of confinement *may* be suspended in time of war for solicitation to desert, mutiny, misbehavior before the enemy, or sedition.

d. Nonjudicial Punishment. A commander in the grade of major/lieutenant commander or above may reduce enlisted members above the pay grade E-4 *two* grades in time of war *if* the Service Secretary has determined that circumstances require the removal of peacetime limits on the commander’s reduction authority. *See* MCM, pt. V, para. 5b(2)(B)(iv).

e. Statute of Limitations. UCMJ art. 43 extends the statute of limitations for certain offenses committed in time of war. There is no limitation on the prosecution of Desertion, Absence Without Leave, Aiding the Enemy, or Mutiny when these offenses occur in a time of war. Persons accused of these crimes may be tried and punished anytime. (UCMJ art. 43(a)). Also, murder, rape or sexual assault, and rape or sexual assault of a child, as well as any other offense punishable by death, may be punished at any time. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be inimical to national security or detrimental to the war effort; statute of limitations may be extended to six months after the end of hostilities. (UCMJ art. 43(c)). The statute of limitations is also suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the United States.<sup>3</sup>

B. Article 134, UCMJ. The three clauses of Article 134 have considerable utility for misconduct while deployed that is not addressed by the other enumerated articles in the UCMJ or those offenses the President has listed under Article 134. However, Clause 3 of Article 134 should be exercised with extreme caution, if at all, while deployed. In order to use Clause 3 of Article 134 in a location outside of the United States, the statute must either (1) apply in the location where the conduct occurred, or (2) apply to the misconduct regardless of where it occurs. Practitioners must look to the specific language in the statute to determine which category of federal crime they are dealing with. In the first category, practitioners must determine where the conduct occurred and whether the statute applies in that location. The second category is very narrow. The two examples of federal crimes of unlimited application that are provided in the MCM are counterfeiting (18 U.S.C. § 471) and frauds against the Government not otherwise covered by Article 132.<sup>4</sup> In cases where the MCM or UCMJ do not address the alleged misconduct at issue, clauses 1 and 2 of Article 134 (as well as Article 133 where applicable) generally provide an adequate means of punishing misconduct without resorting to Clause 3.

E. Violations of the Law of War. While the UCMJ and the MCM empowers courts-martial to try violations of the law of war in certain circumstances, persons subject to the UCMJ should ordinarily be charged with a specific violation of the UCMJ, rather than an offense under the law of war. *See* RCM 307(c)(2) discussion.

<sup>3</sup> UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.

<sup>4</sup> MCM, pt. IV, para. 60(c)(4); *see also* United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005).

F. Wartime Offenses. Certain violations of the UCMJ penalize conduct unique to a combat environment. As described above, several offenses may occur only in time of war or have increased punishments in time of war. Understand that these offenses may attract both political and media attention when charged. This warning is not provided either to encourage or to discourage charging these offenses, but to alert the practitioner that a strategy for prosecuting one of these offenses must necessarily address political and media concerns. The following crimes need not occur in time of war to be criminal, but they have elements that may occur only in a wartime situation:

1. Misbehavior Before the Enemy (UCMJ, art. 99).
2. Wrongful Destruction of Private Property (UCMJ, art. 109).
3. Wrongful Taking of Private Property (UCMJ, art. 121).
4. Mutiny or Sedition (UCMJ art. 94).
5. Subordinate Compelling Surrender (UCMJ art. 100).
6. Improper Use of Countersign (UCMJ art. 101).
7. Forcing a Safeguard (UCMJ art. 102).
8. Aiding the Enemy (UCMJ art. 104).
9. Spying (UCMJ art. 106).
10. Misbehavior of a Sentinel (UCMJ art. 113).
11. Malingering (UCMJ art. 115).
12. Offenses by a Sentinel (UCMJ art. 134).
13. Straggling (UCMJ art. 134).

## VIII. COMMON DEPLOYMENT ISSUES

### A. Joint Military Justice.

1. The key for working in a joint environment is to build relationships. You need to understand the discipline culture of the other services and work closely with them to solve discipline problems. Even if your command clearly has the command discipline responsibility for the servicemember involved, you should closely coordinate your actions with the legal representative of the other service. In many cases, senior joint commanders set up subordinate sister-service commands to handle discipline issues that arise out of each service.

2. Commanders may refer court-martial cases on personnel of other services assigned or attached to their units, however they must take care to follow the service regulations of the accused.<sup>5</sup> Commanders may also impose NJP on personnel of other services assigned or attached to their units; however, commanders must do so IAW the accused servicemember's service regulation.<sup>6</sup>

### B. Civilian misconduct.

1. Civilian misconduct can come from several angles: US government employees that accompany the force; contractors that accompany the force; host-country nationals that commit misconduct; and even third country nationals that commit misconduct. With US citizens, a common problem is that some of them may not follow the General Order and may consume alcohol or drugs or have relations with the opposite sex.

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<sup>5</sup> See UCMJ art. 17 (2000) and RCM 201(e); United States v. Egan, 53 M.J. 570 (A. Ct. Crim. App. 2000).

<sup>6</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, para. 14c (14 May 2007). Service regulations provide service-specific procedures for non-judicial punishment (AFI 51-202, para 2, 2.2.1; Navy and Marine JAGMAN 0106d; Coast Guard MJM, Art 1-A-3(c); AR 27-10, para 3-8c). JAs must note certain differences in procedures. For AF personnel, a joint commander may only impose NJP on AF personnel if the offense "arises from a joint origin or has joint forces implications." Other service procedures must also be followed. For example, the AF provides 72 hours to consult with counsel. The Navy/Marine burden of proof is a preponderance of the evidence. Also, appeals typically proceed through the servicemember's parent service. Coordination, therefore, must be made with the servicing Judge Advocate. This list of procedural differences is not exhaustive. JAs should consider consultation with other service JAs to understand the impact of NJP on other service personnel.

2. Your commander has some powerful tools short of prosecuting civilians. Your commander can bar the person from the base, and if the civilian is a contractor, your commander can work with the contracted company (the Contracting Officer Representative) to seek discipline.

3. There are three jurisdictional “hooks” available for prosecuting civilians who commit crimes while employed by, accompanying, or serving with the armed forces: The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Art. 2(a)(10), UCMJ, and the U.S. Government “missions or entities in foreign States” provision<sup>7</sup> of the Special Maritime and Territorial Jurisdiction (SMTJ) statute. MEJA provides for federal (not military) jurisdiction, and Art. 2(a)(10) provides for court-martial jurisdiction. Commanders seeking to prosecute civilians or have DoJ prosecute civilians are required to follow certain procedures. This is another area where you want to build relationships early, this time with the Department of Justice. Get a copy of the most recent DoJ SOP for handling MEJA cases, and get a copy of the current DoJ/DoD MOA, if one exists. These problems are not rapid fire drills and often have high-visibility – find the correct resource and work the problems carefully if they arise.<sup>8</sup>

C. Conducting courts-martial. Trying cases downrange can be difficult, but it can be done. As a sample of the issues that arise, consider: witness travel; for that matter, any travel; judge availability; translators; witnesses from the armed forces of our partners; pretrial confinement issues; post-trial confinement issues; funding civilian witness travel; providing for experts; getting country clearances; getting security clearances for civilian defense counsel; keeping prosecuting and defense witnesses separate while you are operating out of tents. The list goes on and on – but that is why we joined the JAG Corps. Not everyone can do these things. You can. Read the CLAMO AARs to see how others have dealt with these issues and read Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, Army Law., Jan. 2012, at 6. For some cases, it may not make sense to try them downrange – but be an advocate to your commander for trying the appropriate cases downrange.

D. Handling sexual assault cases. You must be prepared to deal with allegations of sexual assault in theater. These investigations necessarily involve many players to include the command, CID, Deployed Sexual Assault Response Coordinator, Deployed Victim Advocates, and the legal office. Handling all of the procedural hurdles associated with these allegations requires close coordination. Prior to deployment, you should run through battle drills for responding to an allegation of sexual assault.

E. Deployment-related misconduct. You will see misconduct downrange that you don’t normally see in garrison or to the same degree. You will see a lot of crimes where the evidence is stored in a digital medium – and when that happens, you may see a significant delay in processing that evidence. You will also see drug use, in particular, steroids, prescription drugs, designer drugs, marijuana and hashish, and even alcohol consumption. You need an active urinalysis program to get after that problem, and also recognize that if the accused does not plead guilty and you want to try that case downrange, you will need to bring in some lab techs as witnesses. You will also see a lot of negligent discharge cases.

F. Summary courts-martial. Summary courts-martial are a great tool for the commander to use downrange – but for them to be effective, you need a confinement facility. If you plan to use this tool, work out the confinement piece before you get there.

G. Training downrange. Military justice training cannot stop just because you are downrange. Very often, you will have junior trial counsel working these actions and trying these cases in a very difficult environment. Find ways to train, even if that only involves watching TJAGLCS videos online. One enterprising judge advocate was even able to run a four-day trial advocacy course in Iraq.

H. Synchronization calls. Many successful units in Iraq and Afghanistan set up weekly MJ synchronization calls among the different MJ shops in theater. By doing so, they could quickly see the current issues and could shift resources among themselves to run an efficient system.

I. Searches and seizures, and, health and welfare inspections.

1. Commanders downrange do (and should) conduct a lot of health and welfare inspections. Some may move aggressively against certain problems. For example, contraband like alcohol and designer drugs often come through the mail; therefore, commanders may want to open incoming mail. However, a commander may only

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<sup>7</sup> 18 U.S.C. § 7(9) (2001); *United States v. Passaro*, 577 F.3d 207 (2009).

<sup>8</sup> *Also see*, Major Aimee M. Bateman, *A Military Practitioner’s Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations*, ARMY LAW., Dec. 2012, at 4

inspect mail containers, and shall not, through inspection procedures open individual parcels. See DoD 4525.6-M paras. C10.7.6.1.2 and C10.7.9. This does not prevent commanders who are conducting inspections from using reasonable technological or natural aids (such as drug detection dogs) during the inspection of mail containers.

2. One of the other big issues that arises is whether the commander can conduct a health and welfare inspection or a search of a contractor's living quarters or a business that is operating within the fence line. Generally, the garrison or base commander has the inherent authority to conduct inspections and searches within the fence line; however, that power may have been limited by contract or policy. Find out what the policy is for where you are going. In addition, in some jurisdictions, the military judge may limit the magistrate's ability to issue search and seizure authorizations when civilians are involved. You need to know if any restrictions are in place.

## **IX. REDEPLOYMENT**

A. One of the key decisions is what to do with cases that are referred downrange. One option is to transfer the accused and the case to the incoming unit; the other is to take the accused and the case back to garrison. This decision will likely be based on such factors as the complexity of the case, the length of time until trial, the availability of witnesses (are they in the redeploying unit or are they from the local population), etc. If you hold the trial in theater, you also need to be prepared to extend the deployments of key witnesses.

B. Upon redeployment/demobilization, the military justice supervisor must ensure the following is accomplished: return to the original convening authority structure; end provisional units; units and personnel are assigned/attached back to appropriate organizations for administration of military justice; designations of home station convening authorities are revoked; individual cases are transferred to the appropriate CA for referral or initial action;<sup>9</sup> and the general order for the operation is rescinded.

## **APPENDIX**

Sample General Orders Number 1

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<sup>9</sup> See *U.S. v. Newlove*, 59 M.J. 540 (A. Ct. Crim. App. 2003).

**GENERAL ORDERS**

**UNITED STATES CENTRAL COMMAND  
OFFICE OF THE COMMANDER  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIR FORCE BASE, FLORIDA 33621-5101**

CCJA

MAR 13 2006

**GENERAL ORDER NUMBER 1B (GO-1B)<sup>1141</sup>**

**TITLE:** Prohibited Activities for U.S. Department of Defense Personnel Present within the United States Central Command (USCENTCOM) Area of Responsibility (AOR).

**PURPOSE:** To identify and regulate conduct that is prejudicial to the maintenance of good order and discipline of forces in the USCENTCOM AOR.

**AUTHORITY:** Title 10, United States Code, Section 164(c) and the Uniform Code of Military Justice (UCMJ), Title 10, United States Code, Sections 801-940.

**APPLICABILITY:** This General Order is applicable to all United States military personnel, and to all civilians, including contingency contractor personnel (as defined in DoD Instruction 3020.41, dated October 3, 2005), serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR except for personnel assigned to: Defense Attaché Offices; United States Marine Corps Security Detachments; sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments.

1. **STATEMENT OF MILITARY PURPOSE AND NECESSITY:** Current operations and deployments place United States Armed Forces within USCENTCOM AOR countries whose local laws and customs may prohibit or restrict various activities which are generally permissible in western societies. Adhering to restrictions upon such activities is essential to preserving U.S./host nation relations and ensuring the success of combined operations between U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by U.S. forces in the region make it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum force readiness.

2. **PROHIBITED ACTIVITIES:**

a. Purchase, possession, use, or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

b. Entrance into a Mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation. This provision may be made more restrictive by Commanders when the local security situation warrants.

c. Introduction, purchase, possession, sale, transfer, manufacture or consumption of any alcoholic beverage within the countries of Kuwait, Saudi Arabia, Afghanistan, Pakistan, and Iraq. In all other countries of the USCENTCOM AOR, U.S. military and civilian personnel will conform to their respective component restrictions on alcohol, and maintain appropriate deportment by respecting host-nation laws and customs. In order to maintain good order and discipline and ensure optimum readiness, in all locations where alcohol is not prohibited by this General Order, Commanders and unit chiefs are directed to exercise discretion and good judgment in promulgating and enforcing appropriate guidelines and restrictions. Guidelines should recognize

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<sup>1141</sup> This General Order supersedes General Order Number 1A, dated 19 December 2000 (See Paragraph 7).

that in some countries although alcohol consumption may be legal within certain facilities such as hotels, personnel, upon any consumption, may be presumed to be under the influence upon leaving the facility or upon operating a motor vehicle (e.g., Qatar, UAE). Alcohol consumption guidelines and restrictions should be regularly reviewed to ensure that they are commensurate with current or foreseen operations, threats and host country actions.

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances. Prescription drugs must be accompanied by the original prescription label which identifies the prescribing medical facility or authority.

e. Introduction, purchase, possession, transfer, sale, creation, or display of any pornographic or sexually explicit photograph, video tapes or CDs, movie, drawing, book, magazine, or similar representation. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets located within the USCENTCOM AOR. This prohibition also shall not apply within the areas exclusively under the jurisdiction of the United States, such as aboard United States Government vessels and aircraft, which shall remain subject to service rules.

f. Photographing or filming detainees or human casualties, as well as the possession, distribution, transfer, or posting, whether electronically or physically, of visual images depicting detainees or human casualties, except as required for official duties. "Human Casualties" are defined as dead, wounded or injured human beings, to include separated body parts, organs and biological material, resulting from either combat or noncombat activities. This prohibition does not apply to the possession of such visual images acquired from open media sources (e.g., magazines and newspapers), nor is the distribution of these unaltered images, subject to copyright markings or notices. Additionally, possession and distribution of open media source images is not prohibited if required for official duties. Finally, with their express consent, the photographing and possession of images of wounded personnel while within medical facilities and during periods of recovery is also not prohibited.

g. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service component regulations.

h. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures. (See also 2.1.(3) below).

i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

j. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

k. Proselytizing of any religion, faith or practice.

l. Taking or retaining of public or private property of an enemy or former enemy, except as granted by applicable USCENTCOM waivers and as noted below:

(1) Individual War Souvenirs may only be acquired if specifically authorized by USCENTCOM. Absent such express authorization, no weapon, munitions, or military article of equipment obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the USCENTCOM AOR for personal retention.

(2) Private or public property may be seized during exercises or operations only on order of the Commander, when based on military necessity.

(a) Private property will be collected, processed, secured and stored for later return to the lawful owner. The wrongful taking of private property, even temporarily, is a violation of Article 121, Uniform Code of Military Justice.

(b) Public property lawfully seized by U.S. Armed Forces is the property of the United States. The wrongful retention of such property is a violation of Article 108, Uniform Code of Military Justice. Unit retention of historical artifacts must be specifically approved by USCENTCOM.

(3) This prohibition on acquiring the property of an enemy or former enemy applies to enemy war materiel even if such materiel could be lawfully purchased through commercial or private means. Such items can only be acquired as Individual War Souvenirs and then only to the extent specifically authorized. This

prohibition does not preclude the lawful acquisition of other items as tourist souvenirs if such items can be legally imported into the United States.

3. **PUNITIVE ORDER:** Paragraph 2 of this General Order is punitive. Persons subject to the UCMJ may be punished thereunder. Civilians serving with, employed by, or accompanying the Armed forces of the United States in the USCENTCOM AOR may face criminal prosecution or adverse administrative action for violation of this General Order. In the case of contingency contractors, DoD Instruction 3020.41, dated October 3, 2005, provides guidance on administrative actions.

4. **INDIVIDUAL DUTY:** All persons to whom this General Order is applicable are charged with the individual responsibility to know and understand the prohibitions contained herein. All such persons are further charged with the responsibility to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official duties. Acts of disrespect or violations of host nation laws, regulations and customs may be punished under applicable criminal statutes and administrative regulations.

5. **UNIT COMMANDER RESPONSIBILITY:** Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that ALL PERSONNEL are briefed on the prohibitions and requirements of this General Order. Commanders may further restrict their forces as they deem necessary.

6. **CONFISCATION OF OFFENDING ARTICLES:** Items determined to violate this General Order may be considered contraband by command or law enforcement authorities if found in the USCENTCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their servicing judge advocate. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel prior to departure from the AOR and return to CONUS.

7. **EFFECTIVE DATE:** This General Order is effective immediately. GO-1A, dated 19 Dec 00, as amended on 30 Nov 01 and 9 Aug 03, and all waivers granted pursuant to GO-1A, are hereby rescinded and superseded. USCENTCOM Policy Memo Prohibiting Photographing or Filming Detainees or Human Casualties or Possessing, Distributing, or Posting Visual Images Depicting Human Casualties, dated 21 Oct 2005, is hereby rescinded and superseded.

8. **EXPIRATION:** This General Order will expire when rescinded by the Commander, USCENTCOM, or higher authority.

9. **WAIVER AUTHORITY:** Authority to waive or modify the prohibitions of Paragraph 2 of this General Order is hereby delegated to the Deputy Commander, USCENTCOM and to the Chief of Staff, USCENTCOM. No further delegation is authorized.

//signed//  
JOHN P. ABIZAID  
General, USA

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**GENERAL ORDER NUMBER I (GO-1)**

**TITLE:** Prohibited Activities for U.S. Department of Defense Personnel Assigned to the Multi-National Corps-Iraq (MNC-I) or Present Within the MNC-I Area of Responsibility (AOR).

**PURPOSE:** To identify conduct that is prejudicial to the maintenance of good order and discipline of all forces and select civilians assigned to MNC-I or present within the MNC-I AOR.

**AUTHORITY:** The Uniform Code of Military Justice (UCMJ); Title 10, United States Code (U.S.C.) Sections 801-940; and United States Central Command (USCENTCOM), General Order 1B (GO-1B), dated 13 March 2006.

**APPLICABILITY:** This General Order is applicable to all United States military personnel while assigned to MNC-I while present in the MNC-I AOR, and while under operational control of the Commander, MNC-I in Iraq or Kuwait performing such duties to include, but not limited to, pre-deployment site surveys, leader recons, and advance party deployments. This General Order is also applicable to all civilians serving with, employed by, or accompanying the Armed Forces of the United States in the capacity stated above. This General Order does not apply to the following personnel expressly excluded under USCENTCOM GO-1B: "Defense Attaché Offices, United States Marine Corps Security Detachments; sensitive intelligence and counter intelligence activities that are conducted under the control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments." This General Order is not applicable to any personnel located outside the USCENTCOM AOR.

1. **STATEMENT OF MILITARY PURPOSE AND NECESSITY:** Current Operations and deployments place the United States Armed Forces into areas where local laws and customs prohibit or restrict certain activities that are generally permissible in western societies. Restrictions upon these activities are essential to fostering U.S./host nation relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with the hazardous duty faced by MNC-I Soldiers and other U.S. forces in the MNC-I AOR make it necessary to restrict certain activities in order to maintain good order and discipline and to ensure optimal readiness.

2. **PUNITIVE ORDER:** Paragraph 3 of this General Order is punitive. Persons subject to the Uniform Code of Military Justice (UCMJ) may face administrative, nonjudicial, or judicial action under the UCMJ for violating this Order. Civilians serving with, employed by, or accompanying the Armed Forces of the United States in the USCENTCOM AOR may face criminal prosecution, adverse administrative action, termination of employment, or redeployment for a violation of this General Order. In the case of contingency contractors, DoD Instruction 3020.41, dated 3 October 2005, provides guidance on administrative actions.

3. **PROHIBITED ACTIVITIES:** In accordance with, and in addition to, USCENTCOM GO-1B, the following activities are prohibited:

a. Purchase, possession, use, or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR. See Rule for Courts-Martial 103, Manual for Courts-Martial 2008.

b. Entry into a Mosque or other site of Islamic religious significance by non-Moslems unless lawfully directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of proper military authorities and the host nation.

c. Introduction, purchase, possession, sale, transfer, manufacture, or consumption of any alcoholic beverage within the MNC-I AOR. This prohibition also includes the introduction, possession, sale, transfer, manufacture, or consumption of any alcoholic beverages by military personnel or civilians serving with,

employed by, or accompanying the Armed Forces of the United States, while assigned to or under the operational control of the Commander, MNC-I and present for duty in Kuwait or Iraq. This prohibition does not apply to the intended use of personal hygiene items (e.g., mouthwash) commercially available for sale by AAFES in the MNC-I AOR, nor does it apply to the use of alcohol for authorized religious ceremonies.

d. Controlled substances, drug paraphernalia, and prescription medication:

(1) Introducing, purchasing, possessing, using, selling, transferring, manufacturing, or consuming any controlled substances, or drug paraphernalia. "Drug paraphernalia" is defined as any device possessed for the purpose of consuming illegal controlled substances or the residue or remnants of illegal controlled substances.

(2) Introducing, purchasing, possessing, using, selling, transferring, manufacturing, or consuming any prescription medication without a valid current prescription. For purposes of this order, "prescription medication" includes substances for which U.S. state or federal law requires a valid prescription for dispensing. This Order does not apply to acts performed in the execution of official duties.

(3) Consuming, inhaling, ingesting, sniffing, or otherwise taking into the body any substance that could prove harmful and is not used for its intended purpose, such as, but not limited to: substances in aerosol containers, compressed air, glue and glue-like products, solvents, adhesives, nitrates, cleaning agents, and other gases.

e. Introducing, purchasing, possessing, transferring, selling, creating, or displaying any pornographic or sexually explicit material contained on any electronic media storage device, photograph, poster, drawing, book, or magazine. The prohibitions contained in this subparagraph shall not apply to American Forces Radio & Television Service Broadcasts or commercial magazines, CD/DVD or other videotapes distributed and/or displayed through AAFES or MWR outlets within the MNC-I AOR.

f. Photographing or filming detainees or human casualties, as well as the possession, distribution, transfer, copying, or posting, whether electronically or physically, of visual images depicting detainees or human casualties, except as required for official duties such as: unit casualty reporting, battle damage assessments, law enforcement purposes, and/or investigations. "Human Casualties" are defined as dead, wounded, or injured human beings, to include: disconnected human body parts, organs, and biological matter, regardless of cause. Subject to applicable copyright markings or notices, this prohibition does not apply to the possession or distribution of such visual images acquired from open-source media (e.g., magazines and newspapers). Photographing and maintaining images of wounded personnel admitted to medical treatment facilities is not prohibited provided the images are for treatment purposes and the facility obtains the express consent of the wounded individual.

g. Photographing or filming of military installation access points, gates, guard towers, checkpoints, or any security measures, as well as possessing, distributing, transferring, copying, or posting, whether electronically or physically, visual images depicting the same, except as required for official duties and/or with the express permission of the person responsible for security.

h. Gambling of any kind, including sports pools, lotteries, and raffles, unless permitted by host nation laws and applicable service component regulations. This prohibition does not apply to MWR sponsored activities.

i. Removing, possessing, selling, defacing, or destroying archeological artifacts or national treasures.

j. Selling, bartering or exchanging any currency other than at the official host nation exchange rate.

k. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

l. Proselytizing of any religion, faith, or practice.

m. Taking or retaining of public or private property of an enemy or former enemy, except as granted by applicable USCENTCOM waivers and as noted below:

(1) Individual war souvenirs may only be acquired if specifically authorized by USCENTCOM. Absent such express authorization, no weapon, munitions, or military article of equipment, obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the MNC-I AOR for personal retention.

(2) Private or public property may be seized during exercises or operations only on order of the Commander, MNC-I, or his designated representative, when based on military necessity and in accordance with the rules of engagement.

(a) Private property will be collected, processed, secured, and stored for later return to the lawful owner. The wrongful taking of private property, even temporarily, is a violation of Article 121, UCMJ.

(b) Public property lawfully seized by U.S. Armed Forces is the property of the United States. Wrongful retention of such property is a violation of Article 108, UCMJ. Unit retention of historical artifacts must be specifically approved by USCENCOM.

(3) This prohibition on acquiring the property of an enemy or former enemy applies to enemy war materiel even if such materiel could be lawfully purchased through commercial or private means. Such items can only be acquired as individual war souvenirs and then only to the extent specifically authorized.

(4) This prohibition does not preclude the lawful acquisition of souvenirs that can be legally imported into the United States. The following items have been approved as authorized souvenirs: helmets and head coverings; bayonets; uniforms and uniform items such as insignia and patches; canteens; compasses; rucksacks; pouches: load bearing equipment; flags; military training manuals; books and pamphlets; posters; placards; photographs; or other items that clearly pose no health or safety risk, and are not otherwise prohibited by law or regulation. All acquired items are subject to the war souvenir retention process and must be approved by the appropriate reviewing officer. In accordance with MNC-I FRAGO 076, dated 9 January 2005, each company commander or person in the rank of Lieutenant Colonel (O-5) or above is designated as a reviewing officer.

n. Taking or retaining any found or seized currency for personal use. Such currency will be identified, collected, recorded, secured, and stored until it can be delivered to the appropriate authority.

o. Possessing, operating, purchasing, using, selling, or introducing into the MNC-I AOR of any motor vehicle not owned or leased by the U.S. Government or any company or agency engaged in contracting with the U.S. Government.

p. Possessing, touching, or using without legal authority unexploded ordnance of any kind. "Ordnance" is defined as any destructive or explosive material, including, but not limited to, bombs, rockets, missiles, grenades, mines, blasting caps, detonating cord, booby traps, flares, and ammunition of any caliber.

q. Sexual contact of any kind with Iraqi nationals, foreign nationals, or local nationals who are not members of coalition forces.

r. Cohabitation, residing, or spending the night in living quarters of any kind with a member of the opposite sex. The following exceptions apply:

(1) Subject to the availability of adequate accommodations, lawfully married spouses are permitted to reside in the same living quarters; and

(2) In situations of military exigency, mixed residency may be required (e.g., transient housing at air terminals).

4. **INDIVIDUAL DUTY:** All persons subject to this General Order are charged with the individual responsibility to know and understand the prohibitions contained herein. All such persons are further charged with the responsibility to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of official duties. Those disrespecting or violating host nation laws, regulations, and customs may be punished under applicable criminal statutes and/or administrative regulations.

5. **UNIT COMMANDER RESPONSIBILITY:** Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that all personnel are briefed on the prohibitions and requirements of this General Order. Commanders may further restrict their forces as they deem necessary.

6. **CONFISCATION OF OFFENDING ARTICLES:** Items determined to violate this General Order may be considered contraband by command or law enforcement authorities if found in the USCENCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their

servicing judge advocate. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel prior to departure from the USCENTCOM AOR and return to CONUS.

7. **EFFECTIVE DATE:** This General Order is effective immediately. MNC-I General Order Number 1 (GO-1), dated 14 February 2008, is superseded and hereby rescinded.

8. **EXPIRATION:** This General Order will expire when rescinded by the Commander, Multi-National Corps-Iraq, or higher authority.

//signed//  
CHARLES H. JACOBY, JR.  
Lieutenant General, USA

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