

# Know Your Ground: The Military Justice Terrain of Afghanistan

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## Introduction

This Note from the Field is intended to complement the Note from the Field published by Captain Jason Neff in the January 2009 issue of *The Army Lawyer*, which focused on getting cases to trial in a timely way during a combat deployment to Iraq.<sup>1</sup> This note is intended to further the discussion with a focus on the challenges of rapidly and effectively bringing courts-martial to trial and delivering other military justice support in Afghanistan.

At the time of this writing, the Army Judge Advocate General's Corps has accumulated over seven years of continuous experience conducting legal operations and delivering legal advice in real-world combat environments of Iraq, Afghanistan, and elsewhere. Articles published in *The Army Lawyer*<sup>2</sup> and *Military Law Review*,<sup>3</sup> as well as the evolving curriculum at The Judge Advocate General's Legal Center and School (TJAGLCS)<sup>4</sup> during that interval show that our Corps has been a learning organization,<sup>5</sup> acquiring and sharing knowledge borne of experience about the full spectrum of deployed Army legal practice. Much of this knowledge has been gained in Iraq as a result of the large contingent of Army forces deployed to that theater since 2003. As the commander-in-chief and the Army shift focus to Afghanistan,<sup>6</sup> there may be some Afghanistan-specific lessons learned that may be useful to Army judge advocates and others whose base of experience was developed elsewhere. This note will address strategies for effective military justice prosecution in Afghanistan based on experience there from 2007 to 2009.<sup>7</sup>

## The Challenge of Afghanistan's Terrain

Military tacticians and strategists have long observed that success on the battlefield involves a recognition of the limitations and opportunities presented by the terrain.<sup>8</sup> Military justice practice in Afghanistan is the same, where time is of the essence both in collecting evidence and in getting the case to trial. Afghanistan features over two hundred camps, forward operating bases, combat outposts, firebases, and observation posts at which Soldiers live, work, and fight year-

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<sup>1</sup> Captain A. Jason Neff, Note from the Field, "Getting to Court: Trial Practice in a Deployed Environment," *ARMY LAW.*, Jan. 2009, at 51.

<sup>2</sup> See, e.g., Commander Gregory Raymond Bart, *Special Operations Commando Raids and Enemy Hors de combat*, *ARMY LAW.*, July 2007, at 33; Captain Christopher Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, *ARMY LAW.*, Dec. 2004, at 22; Major Timothy Austin Fuerin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, *ARMY LAW.*, Oct. 2008, at 1; Major Joshua E. Kastenber, *Tactical Level PSYOP and MILDEC Information Operations: How to Smartly and Lawfully Prime the Battlefield*, *ARMY LAW.*, July 2007, at 61; Neff, *supra* note 1; Lieutenant Commander Vasilios Tasikas, U.S. Coast Guard, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, *ARMY LAW.*, July 2007, at 45.

<sup>3</sup> See, e.g., Captain Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 *MIL. L. REV.* 92 (Fall 2006).

<sup>4</sup> See, e.g., INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, USAREUR SPRING 2007 OPERATIONAL LAW CONFERENCE COURSE MATERIALS (2007) (on file with the author); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, USAREUR FALL 2008 OPERATIONAL LAW CONFERENCE COURSE MATERIALS (2008) (on file with the author); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, USAREUR SUMMER 2009 OPERATIONAL LAW CONFERENCE COURSE MATERIALS (2009) (on file with the author).

<sup>5</sup> See generally PETER M. SENGE, *THE FIFTH DISCIPLINE* (London: Century Business 1990) (elucidating the term "learning organization" in detail).

<sup>6</sup> President Barack H. Obama, Presidential Press Briefing, Wash., D.C. (Mar. 27, 2009); see also Helen Cooper & Eric Schmidt, *Obama Afghanistan Plan Narrows U.S. War Goals*, *N.Y. TIMES*, Mar. 28, 2009, at A1; Anna Mulrine, *Obama Turns Focus to War in Afghanistan*, *U.S. NEWS & WORLD REP.*, <http://www.usnews.com/articles/news/2009/07/02/obama-turns-focus-to-war-in-afghanistan.html> (July 2, 2009).

<sup>7</sup> Generous assistance in preparing this article was provided by Captain Joshua Johnson, U.S. Army, 3d BCT, 1st Infantry Division, and Captain Ronald T. P. Alcalá, The Judge Advocate General's Legal Center and School. Captain Alcalá, the author, and Captain Johnson, respectively, served in succession as trial counsel for brigade combat teams headquartered at Forward Operating Base Fenty, Jalalabad, Afghanistan from January 2007 to July 2009.

<sup>8</sup> See, e.g., SUN TZU, *THE ART OF WAR* chs. 10–11; Carl von Clausewitz, *Die wichtigsten Grundsätze des Kriegführens zur Ergänzung meines Unterrichts bei Sr. Königlichen Hoheit dem Kronprinzen (Principles of War)* ch. II (Hans W. Gatzke trans., 1942) (1812); CARL VON CLAUSEWITZ, *ON WAR* bk. VI, ch. 3 (J.J. Graham trans., 1873) (1832); U.S. ARMY, *FIELD MANUAL 3-0, OPERATIONS* para. 3-48 (27 Feb. 2008).

round.<sup>9</sup> Strings of small outposts in remote valleys are part of the strategy to confront the anti-Afghan insurgency.<sup>10</sup> As omnipresent as lawyers may seem to be in the modern Army, there are Army legal offices on only about fifteen installations in Afghanistan, and six of those are staffed by paralegals only.<sup>11</sup> As a result, most U.S. personnel deployed in Afghanistan are not co-located with any resident legal or law enforcement presence. For example, from 2007 to 2009, four provinces and over thirty installations were supported by only one organic legal office and a squad of National Guard military police, which performed customs and law-and-order duties.<sup>12</sup> A single Criminal Investigation Division (CID) office and a single Trial Defense Services (TDS) office serve the entire country from Bagram Airfield (BAF), the main U.S. military base in Afghanistan.<sup>13</sup> A military judge travels to BAF for a few days every month or two to hear motions and trials in a conference room converted to use as a courtroom.<sup>14</sup> In comparison, TDS operates five offices throughout Iraq,<sup>15</sup> and a military judge is regularly on assignment in Iraq, available to hear motions, conduct hearings, and try cases as necessary. The Victory Base Complex south of Baghdad alone boasts three dedicated courthouses. In short, most trial counsel (TC) in Afghanistan are physically remote from witnesses, evidence, and client commanders, and almost all TCs are located far from the country's only venue for Special and General Court-Martial proceedings.

The terrain not only dictates how many Soldiers and commanders have a legal or law enforcement presence on hand, it also dictates whether and how rapidly these assets can be moved around. Afghanistan's terrain<sup>16</sup> poses logistical challenges that can seriously hamper the movement of men and materiel across the battlefield. The aircraft and ground convoys that move personnel and equipment around the battlefield are limited, both in number and by the restrictive terrain.<sup>17</sup> Roads of any kind are few, and roads capable of carrying military vehicles are startlingly scarce. Consequently, some installations are difficult to access.<sup>18</sup>

Arranging travel can also be a challenge involving significant coordination up and down the chain of command. Travelling from one forward operating base (FOB) to another, even one five minutes down the road, requires organizing a convoy operation,<sup>19</sup> a process which can take a day or more even if the convoy is a high priority mission.

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<sup>9</sup> Combined Joint Task Force-101 (CJTF-101) Camp Tracker (May 2009) [hereinafter Camp Tracker] (on file with the author).

<sup>10</sup> Elizabeth Rubin, *Battle Company Is Out There*, N.Y. TIMES, Feb. 24, 2008, (Magazine), at 38, available at <http://www.nytimes.com/2008/02/24/magazine/24afghanistan-t.html?scp=2&sq=%22battle+company+is+out+there%22&st=nyt>.

<sup>11</sup> CJTF-101, Afghanistan Legal Personnel Contact Roster (6 May 2009) (on file with the author).

<sup>12</sup> CJTF-101, Task Organization Friendly Forces Laydown Briefing (11 Mar. 2009) (on file with the author).

<sup>13</sup> *Id.*

<sup>14</sup> This venue has been the only one available in Afghanistan for special and general court-martial hearings and trials since at least as far back as 2006. Preparing the spartan room for judicial proceedings involves piling tables and chairs to the ceiling at the back of the room, scrounging for pressboard desks to use as the military judge's bench and counsel tables, and setting up a small, round coffee shop table to serve as a witness stand. The court reporter must then run microphone wires across the floor and cover them with large Afghan rugs to prevent counsel from tripping on them. Conference rooms or offices in the adjacent building must be commandeered to serve as witness waiting rooms and a panel deliberation room.

<sup>15</sup> The TDS offices in Iraq are located at Camp Speicher (Tikrit), Joint Base Balad, Camp Liberty (Baghdad), Camp Victory (Baghdad), and Taji. REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 2007, TO SEPTEMBER 30, 2008, at 10, reprinted in ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, INCLUDING SEPARATE REPORTS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, THE JUDGE ADVOCATES GENERAL OF THE U.S. ARMED FORCES, FOR THE PERIOD OCTOBER 1, 2007 TO SEPTEMBER 30, 2008, available at <http://www.armfor.uscourts.gov/annual/FY08AnnualReport.pdf>. The Trial Defense Service also operates an office at Camp Arifjan, Kuwait. *Id.* In total, one regional defense counsel, seventeen trial defense counsel, and six paralegals were deployed throughout the Central Command (CENTCOM) area of responsibility (AOR)—which includes Iraq, Afghanistan, Kuwait, Qatar, Saudi Arabia, Djibouti, and Egypt—between 1 October 2007 and 30 September 2008. *Id.*

<sup>16</sup> At approximately 251,772 square miles, Afghanistan is almost as large as Texas. U.S. CENSUS BUREAU, UNITED STATES SUMMARY: 2000, POPULATION AND HOUSING UNIT COUNTS tbl.17 (Apr. 2004); see also <https://www.cia.gov/library/publications/the-world-factbook.htm> (last visited Aug. 28, 2009). The country is so mountainous that more than half of the land area is higher in elevation than Denver, Colorado's Mile High Stadium. See <http://countrystudies.us/afghanistan/32.htm> (last visited Aug. 28, 2009). Winter weather in the mountains periodically and unpredictably precludes air and/or ground transportation. See also Moises Saman, Afghanistan From the Air, <http://atwar.blogs.nytimes.com/2009/10/13/afghanistan-from-the-air/> (Oct. 13, 2009, 02:30 EST).

<sup>17</sup> See, e.g., CJTF-101 Ring Route Schedule for Rotary-wing Aircraft (version 45D) (May 2009).

<sup>18</sup> *Id.*; CJTF-101 Camp Tracker, *supra* note 9.

<sup>19</sup> See, e.g., STANDARD OPERATING PROCEDURE, INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF) 336, Annex A (Feb. 10, 2006) [hereinafter ISAF SOP]; U.S. ARMY, CENTER FOR ARMY LESSONS LEARNED, USSOCOM COMBAT CONVOY TACTICS, TECHNIQUES, AND PROCEDURES HANDBOOK 10-13 (Feb. 2005).

## “Front End” Challenges to UCMJ Administration in Afghanistan

These geographic and operational factors limit resources in ways not seen in garrison or other combat theaters. To overcome these limitations, the fundamentals of military justice practice should be rigorously applied with an eye towards finding timely solutions when resources are unavailable. First, the ability to collect and preserve evidence upon discovery of suspected misconduct is often limited. Indeed, TCs often do not learn about an incident until it is too late to influence the preservation of case evidence. This information gap can hamstring the preparation of a case from the beginning. As a result, TCs must be ready to handle every report of misconduct, from the discovery of the misconduct to the end of the investigation, and, as noted earlier, time is of the essence in the deployed military justice arena.<sup>20</sup> Exactly what deployed case preparation entails will inevitably vary over time, from place to place, and unit to unit, but some techniques to help mitigate the “front end” challenges of deployed military justice practice are worth mentioning.

### *Prepare Yourself*

Expect, plan, and prepare to actively coordinate evidence collection and preservation, not just analyze what investigators present for your review. Identifying and developing relationships with military police and CID personnel operating in the area will help you fully leverage their capabilities; however, understand that mission requirements, distance, weather, and other circumstances will often delay or preclude these organizations from providing adequate support. Trial counsel in Afghanistan should anticipate that support may be scarce and should proactively take a lead role in coordinating the preservation of evidence and the identification and interviewing of witnesses. Frequently, commander’s inquiries<sup>21</sup> or informal investigations, either written or oral, under AR 15-6<sup>22</sup> are typically the best vehicles to gather and preserve evidence that would otherwise be lost. Indeed, when assigning responsibility for various types of legal actions, a BCT legal office may assign investigations to the TC, rather than assign responsibilities along the traditional “military justice” and “administrative law” lines.<sup>23</sup>

### *Prepare Your Office*

The TC may benefit from assigning one or more paralegals (depending on how paralegals are deployed and employed by the unit)<sup>24</sup> various duties, including monitoring routine reports for investigation-triggering events (including suspected misconduct); generating initial appointment packets for investigating officers;<sup>25</sup> tracking the progress of investigations; supporting IOs by answering administrative questions and ensuring they meet important suspenses; reviewing investigations for administrative completeness prior to legal review;<sup>26</sup> and ensuring digital and hard copies of completed investigation are properly labeled, filed, or destroyed, as appropriate.<sup>27</sup> This task set is similar to, but more robust than, typical garrison military justice paralegal duties. A smoothly running BCT legal office can process three to four hundred investigations per

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<sup>20</sup> Neff, *supra* note 1.

<sup>21</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2008) [hereinafter MCM].

<sup>22</sup> See generally U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS ch. 4 (2 Nov. 2006) [hereinafter AR 15-6].

<sup>23</sup> See, e.g., ADMINISTRATIVE & CIVIL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S SCH., JA 280, BASIC COURSE DESKBOOK (Jan. 2004); CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S.SCH., BASIC COURSE CRIMINAL LAW DESKBOOK (Jan. 2004); see also U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY 4-13 through 4-17 (15 Apr. 2009) [hereinafter FM 1-04] (not specifically assigning 15-6 legal review and support duties to personnel organic to the BCT legal office, but allowing for situation-dependent flexibility in assigning duties).

<sup>24</sup> FM 1-04, *supra* note 23, para. 4-18.

<sup>25</sup> Such a packet typically consists of initial reporting of the investigation-generating event, results of any preliminary evidence gathering, and draft appointment memorandum for the appropriate commander’s signature.

<sup>26</sup> AR 15-6, *supra* note 22, para. 2-3b.

<sup>27</sup> Federal Records Act of 1950, 44 U.S.C. §§ 3101–3107 (2006); 44 U.S.C. §§ 3301–3314 (2006); Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501–3520 (2007); U.S. DEP’T OF ARMY, REG. 25-400-2, THE ARMY RECORDS INFORMATION MANAGEMENT SYSTEM (ARIMS) (2 Oct. 2007).

year without faltering in the execution of other duties,<sup>28</sup> if paralegal talent and energy are fully leveraged. For BCTs lacking adequate investigative agency support, these are realistic numbers.<sup>29</sup>

### *Prepare Your Unit*

United States Army doctrine identifies several pre-deployment tasks that facilitate the efficient administration of military justice during deployment.<sup>30</sup> In addition to these formal tasks, TCs should condition unit commanders to use commander's inquiries to investigate potential misconduct when other means of gathering evidence are unavailable. TCs should recognize when an AR 15-6 investigation is required and when merely an informal inquiry may be more appropriate. Training brigade, battalion, and company staff officers (the population from which AR 15-6 investigating officers<sup>31</sup> are invariably drawn) on investigative techniques, including the ability to recognize relevant evidence, interviewing techniques, and the correct preparation of paperwork, helps maximize investigation quality.<sup>32</sup> TCs should also ensure that every investigating officer (IO) receives a legal briefing prior to the investigation.<sup>33</sup> A legal briefing—which is usually conducted by telephone in Afghanistan—is often the best way to ensure the IO understands the tasks necessary to complete the investigation, recognizes the sequence of steps and techniques required to photograph and handle physical evidence, appreciates when and how to administer Article 31b rights to witnesses, and knows what the final investigation product should look like.<sup>34</sup> Following these simple preparatory steps pays huge dividends in the military justice landscape of Afghanistan.

Afghanistan produces most of the world's opium, and certain illicit drugs, including opium, heroin, marijuana, hashish, and prescription medications, are cheaply and easily available to Soldiers in theater.<sup>35</sup> Trial counsel should learn what these substances look like in Afghanistan and should consult unit surgeons, physician's assistants, or written resources for information on the symptoms of use and overdose associated with these drugs, when used both alone and in combination. Trial counsel should also become familiar with the effects of anti-opiate medications administered by the unit's aid stations and recognize how these medications affect patients under the influence of drugs. Understanding these issues can help guide investigating officers to ask crucial questions of witnesses in drug use or overdose cases. It can also help the TC ensure that suspected drug users are not questioned until the effects of the drug, the overdose experience, and medical treatment subside enough that answers will be admissible in UCMJ action.<sup>36</sup> Ensuring units thoroughly prepare Unit Prevention Leaders (UPLs)<sup>37</sup> and deploy with adequate urinalysis (UA)<sup>38</sup> supplies is also critical for preventive and investigative purposes.

Meanwhile, the distribution of forces across the battlespace can have significant consequences for UA inspection programs<sup>39</sup> that can affect the admissibility of evidence.<sup>40</sup> Geographical constraints may come into play in two ways. First,

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<sup>28</sup> See FM 1-04 *supra* note 23, ch. 5.

<sup>29</sup> This assessment is based on the experience of the legal offices of Task Force Bayonet (173d ABCT) from May 2007 to August 2008 and Task Force Duke (3-1 IBCT) in the Nangarhar, Nuristan, Kunar, and Laghman Provinces (N2KL) area from August 2008 to July 2009.

<sup>30</sup> See, e.g., FM 1-04 *supra* note 23, para. 5-13.

<sup>31</sup> AR 15-6, *supra* note 22, para. 2-1.c.

<sup>32</sup> See, e.g., U.S. Dep't of Army, DA Form 2823, Sworn Statement (Nov. 2006); U.S. Dep't of Army, DA Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1989); U.S. Dep't of Army, DA Form 1574, Report of Proceedings by Investigating Officer/Board of Officers (Mar. 1983); see also Memorandum from Undersecretary of Defense for Personnel and Readiness to Secretaries of the Military Departments, subject: Directive Type Memorandum (DTM) 07-015-USD(P&R)—“DoD Social Security Number (SSN) Reduction Plan” (28 Mar. 2008).

<sup>33</sup> AR 15-6, *supra* note 22, para. 3-1. Cf. *id.* fig.2-4 (not identifying a legal advisor or direct the IO to get a legal in-brief); *id.* fig.2-5 (identifying a legal advisor but not expressly directing the IO to get a briefing from the legal advisor).

<sup>34</sup> UCMJ art. 31b (2008); AR 15-6, *supra* note 22, para. 3-7.d; see also MCM, *supra* note 21, MIL. R. EVID. 305(c) (excluding evidence gathered in violation of Article 31, UCMJ, from consideration by the Court); United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

<sup>35</sup> See Sabrina Tavernise, *U.S. and Afghan Forces Seize Biggest Drug Cache to Date*, N.Y. TIMES, May 24, 2009, at A24.

<sup>36</sup> UCMJ art. 31d; MCM, *supra* note 21, MIL. R. EVID. 304, 305(g); United States v. Morris, 44 M.J. 841, 844 (A. Ct. Crim. App. 1996), *aff'd* 49 M.J. 227 (1998).

<sup>37</sup> U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM paras. 2-14, 4-9, 9-6 (2 Feb. 2009) [hereinafter AR 600-85]; see generally U.S. DEP'T OF ARMY, COMMANDER'S GUIDE AND UNIT PREVENTION LEADER'S HANDBOOK (June 2006) [hereinafter UPL HANDBOOK].

<sup>38</sup> AR 600-85, *supra* note 37, at 144.

<sup>39</sup> *Id.* ch. 4; see generally UPL HANDBOOK, *supra* note 37.

the dispersion of troops across multiple locations and the intermixing of disparate units may mislead a commander into mistaking the extent of his authority to order an inspection.<sup>41</sup> This can also arise when reserve component elements serve alongside or incorporated within active duty command structures, as frequently happens in Afghanistan.<sup>42</sup>

Understanding the disposition of troops on the ground can also affect the conduct of probable cause searches. For example, the first time a unit discovers that a Soldier may have overdosed on opium should not be the first time the TC considers where a UPL may be found; whether the unit has the appropriate bottles, labels, and sealing tape to conduct a proper UA; how a UA specimen may be transported to a lab for analysis; or where a military working dog<sup>43</sup> team may be located. Additionally, living and working conditions, which can vary significantly from base to base, can affect whether and where Soldiers have a reasonable expectation of privacy for Fourth Amendment purposes.<sup>44</sup> Accordingly, when advising commanders on probable cause search authorizations, the TC must avoid making assumptions about a location to be searched and should, instead, methodically gather details about the place, including what it looks like, how it is used, who has access to it, and what command policies apply at the location.

An effective TC will think creatively and proactively and utilize the brigade judge advocate (BJA), senior trial counsel, and chief of military justice in the preparation process. As an officer on the brigade staff,<sup>45</sup> the BJA can be the proponent of the Fragmentary Order (FRAGO)<sup>46</sup> necessary to bring a plan to life, both prior to and during the deployment. Brigade-level FRAGOs that could directly affect the administration of military justice include FRAGOs implementing the BCT's UA program, withholding or delegating certain classes of UCMJ authority and investigation approval authority, establishing requirements for investigations into certain types of incidents, requiring IOs to receive legal briefings, requiring battalions to provide standing pools of potential investigating officers, and directing the allocation of battalion paralegals during the deployment.

Taking charge of evidence development is both a natural role for the TC and a potentially risky one. Specifically, when building a case for trial, TCs should avoid becoming witnesses in their own cases, a circumstance which almost always

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<sup>40</sup> MCM, *supra* note 21, MIL. R. EVID. 313(b) (providing that evidence, including urine, gathered as part of an inspection to ensure security, military fitness, readiness, or good order and discipline is admissible.); *United States v. Gardner*, 41 M.J. 189, 190 (CMA 1994) (holding that a urinalysis is a constitutionally permissible inspection). Geographical constraints come into play in two different ways. First, dispersion of troops across multiple locations and intermixing with other units may lead a commander to mistake the extent of his authority to order an inspection. *See United States v. Miller*, 66 M.J. 306, 308 (C.A.A.F. 2008) (holding that evidence gathered at an inspection ordered by somebody lacking actual command authority over the person or place to be inspected is inadmissible). This can also arise when reserve component elements serve alongside or within active duty command structures, as frequently happens in Afghanistan.

<sup>41</sup> *See Miller*, 66 M.J. at 308 (holding that evidence gathered at an inspection ordered by somebody lacking actual command authority over the person or place to be inspected is inadmissible).

<sup>42</sup> *See United States v. Dimuccio*, 61 M.J. 588, 592–93 (A.F. Ct. Crim. App. 2005). Also, attempts by a commander of geographically dispersed elements to maximize the effectiveness or reach of an inspection—or failure to do so—could constitute impermissibly manipulating the set of troops inspected. *See United States v. Clements*, No. ACM 31957, 1996 CCA LEXIS 355 (A.F. Ct. Crim. App. Nov. 19, 1996) (citing *United States v. Bickel*, 30 M.J. 277, 286 (C.M.A. 1990) (stating non-discrimination, not mathematical randomness, in the selection of troops to be inspected makes an inspection valid); *United States v. Parker*, 27 M.J. 522, 527 (A.F.C.M.R. 1988) (explaining excusal of persons scheduled for an inspection could make the inspection invalid, depending on the facts of the case); *id.* at 526 (holding legitimacy of an inspection would be suspect if deliberately timed to include some personnel but not others). This could present a challenge, for example, when scheduling an inspection of company personnel constantly rotating among multiple remote firebases and the company headquarters for refit; the commander would have no choice but to choose certain personnel to be included and certain personnel to be exempted. *Cf. United States v. Pappas*, 30 M.J. 513, 515 (A.F. Ct. Cr. App. 1990) (holding that when geographical dispersion of randomly selected personnel affected the set of personnel who were actually inspected, the commander's *inadvertent* failure to subsequently inspect the absent personnel did not invalidate the inspection of the others). The *Pappas* decision leaves open the possibility that if the commander had acted knowingly and intentionally, the results of the inspection would have been inadmissible. *Id.*

<sup>43</sup> U.S. DEP'T OF ARMY, PAM. 190-12, MILITARY WORKING DOG PROGRAM paras. 2-34, 3-28 (30 Sept. 1993).

<sup>44</sup> U.S. CONST. amend. IV; MCM, *supra* note 21, MIL. R. EVID. 311(a); *Katz v. United States*, 389 U.S. 347 (1967) (the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures); *United States v. McCarthy*, 38 M.J. 398, 402 (C.M.A. 1993) (citing RCM 302(e)(2) for the proposition that the legal concept of “private dwelling” for Fourth Amendment purposes does not extend to barracks or military encampments regardless of whether or not subdivided into individual units). *But cf. United States v. Conklin*, 63 M.J. 333, 337 (2006) (stating that barracks do not provide the same protections as a private room but not declaring there is no reasonable expectation of privacy); *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) (noting that CAAF “has relied on Supreme Court civilian precedent, but has also specifically addressed contextual factors involving military life” when determining whether a reasonable expectation of privacy exists).

<sup>45</sup> FM 1-04, *supra* note 23, para. 4-1.

<sup>46</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION paras.1-19, 3-5, G-20 (20 Jan. 2005).

requires the TC to withdraw from the trial.<sup>47</sup> Trial counsel should not write a legal review for an investigation he was substantially involved in conducting.<sup>48</sup> Trial counsel should also be wary of becoming too heavily invested in building a case if it could result in diminished objectivity and impair the TC's ability to safeguard procedural rights and give impartial advice to the chain of command.<sup>49</sup> Although these dangers are not unique to Afghanistan, TCs, BJAs, and chiefs of military justice should be especially attuned to these circumstances in theater because of limited resources.<sup>50</sup> The BJA or another lawyer can always step in to assist with these tasks on a case-by-case basis, but requiring other attorneys to perform the TC's job can strain already limited resources.<sup>51</sup>

### Bringing the Case to Court-Martial

Gathering and preserving evidence is just one consideration in getting a case to trial. The Afghan terrain and operating environment frequently affect the TC's ability to assemble the personnel required to conduct judicial proceedings. These "back end" challenges can be mitigated by vigorous coordination during the court-martial preparation process.

#### *Securing the Witnesses*

United States forces operating in Afghanistan work under several distinct "stovepipe" chains of command,<sup>52</sup> some of which include reserve component units. This means that FOBs often feature U.S. servicemembers from different chains of command working side-by-side. Some units, particularly those stationed at BAF or in the Kabul area, may also operate alongside multinational personnel, both military and civilian, under the auspices of the International Security Assistance Force (ISAF).<sup>53</sup> The intermingled character of these command relationships and the staggered time horizons of deployment cycles significantly increases the possibility that key witnesses may not fall under the command of the convening authority, an Army element, an active-duty unit, or even a U.S. commander at the time of the alleged crime or at the time of trial. Promptly and accurately identifying the unit and chain of command of witnesses, as well as their status, expected redeployment date, and follow-on contact information, is therefore important.

Coordinating witness availability can be an administrative challenge. Expert witnesses or other civilians from the United States require special approval to travel on military aircraft and to stay at BAF. For active duty witnesses, TCs should coordinate with the legal office supporting the witness's chain of command to secure the witness's presence at trial. National Guard personnel who have returned to civilian status should be recalled to active duty in order to testify in Afghanistan; this

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<sup>47</sup> U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.7 (1 May 1992) [hereinafter AR 27-26].

<sup>48</sup> *Id.* R. 1.7b.

<sup>49</sup> *See id.* R. 1.10, R. 1.13, R. 2.1, R. 3.7, R. 3.8, R. 4.3.

<sup>50</sup> *Id.* R. 5.1.

<sup>51</sup> *Id.* R. 8.5. This is especially true in Afghanistan, where the Office of the Staff Judge Advocate of the sole General Court-Martial Convening Authority (GCMCA) in the country has a chief of military justice but no other trial counsel. All trial counsel are attached or assigned to units separate from the headquarters and are usually geographically dispersed from one another. In short, finding another TC to take over a case may be prohibitively difficult.

<sup>52</sup> "Stovepipe" is a colloquial term that implies that two or more chains of command do not share a higher headquarters, either on their base or in Afghanistan, and as a result do not have control over one another. With the recent establishment of the U.S. Forces–Afghanistan (USFOR-A) headquarters under the command of General Stanley A. McChrystal, this dynamic may start to be alleviated.

<sup>53</sup> *See* Command Relationships as of 01SEP08, CJTF-101 CAMPLAN Brief Abridged (on file with the author). In some parts of Afghanistan, platoon-, company-, and battalion-sized National Guard units fall under the operational control (OPCON) of active duty chain of command. An active-duty TC is well advised to be mindful of the specific legal needs of Reserve and National Guard elements that are attached to the BCT upon arrival in the combat zone. Developing relationships with them, and being mindful of circumstances involving Reserve- and National Guard-specific procedures or approval processes will enable the active-duty TC to best meet the legal needs of these units. *See generally e.g.*, U.S. DEP'T OF ARMY, REG. 135-175, ARMY NATIONAL GUARD AND ARMY RESERVE SEPARATION OF OFFICERS (28 Feb. 1987); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-7b (6 June 2005); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-7 (19 Nov. 2008). The same can be said about the multi-service provincial reconstruction teams (PRTs) that are designated as summary court-martial convening authorities (SCMCAs) and draw legal support from an Army BCT, which is also the special court-martial convening authority (SPCMCA) for the PRT. Provisional reconstruction team commanders are usually Air Force or Navy O-5s with limited experience with their own service's military justice apparatus, much less those of other services. The TC must be prepared to determine the best way to implement military justice in accordance with the correct service's procedures. *See* Memorandum from Headquarters, CJTF-101, to all CJTF-101 Personnel, subject: CJTF-101 Policy Memorandum—Military Justice (Apr. 21, 2008); U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (21 Dec. 2007); U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT (7 Nov. 2003); U.S. DEP'T OF NAVY, JAGINST 5800.7E, MANUAL OF THE JUDGE ADVOCATE GENERAL (21 Dec. 2007).

not only gives the witness service credit for the time spent testifying, it also ensures the witness's presence complies with existing agreements with Afghanistan, facilitates travel on military aircraft on military orders, and ensures the witness has all the benefits of active duty status in case of injury or death. This process requires coordination with the National Guard personnel office in Washington, D.C. (USARNG G-1) and the approval of the relevant state National Guard Adjutant General. Depending on how long the witness is required and the length of time since the witness was last activated for federal service, an uncooperative witness may be able to block or delay activation to testify in Afghanistan, so maintaining good relationships with witnesses can be especially important. The approved recall to active duty and orders to testify at trial are implemented by the witness's local National Guard chain of command.<sup>54</sup> Similarly, the availability of third-country military witnesses must be coordinated with the witness's chain of command and national military authorities. Witness procurement is one of the reasons that some cases will be tried "downrange" or not at all, reinforcing the need for TCs to speedily prepare cases for trial during deployments.

As in Iraq or Kuwait, calling a witness for one hour of testimony may require the witness to be absent from his unit and normal place of duty for a week or more.<sup>55</sup> This significant time commitment applies both to witnesses traveling from outside and from within Afghanistan, so it is important to prepare and manage witnesses efficiently. Given these time constraints, putting the Government's entire sentencing case into a stipulation of fact, rather than using live sentencing witnesses, for a guilty plea is often an effective use of resources. Informing commanders well in advance which witnesses will be called (and periodically reminding them) will also help ensure witness availability for trial. For the same reason, trial counsel should also encourage the defense to identify witnesses as early as possible, and experienced defense counsel will generally cooperate, understanding they face the same logistical constraints as the Government. The parties may also find the use of stipulations of expected testimony<sup>56</sup> mutually expedient in theater.

### *Prepare the Witnesses*

Arranging for local national (LN) witnesses to testify at courts-martial and judicial proceedings presents a variety of special challenges. First, organizing transportation for LNs, especially for LNs traveling from outside the Bagram area, will often require the use of military vehicles, aircraft, and personnel. Coordinating a proper convoy operation can take time, as discussed above. In comparison, witnesses traveling on their own may require room and board, provided on the economy, which must be arranged well in advance. Finally, once LN witnesses have successfully arrived at BAF, they must be granted access to the installation in order to attend trial. The TC must ensure that each LN has a letter, usually from the convening authority, authorizing him to enter the installation; once granted access, the witness may be required to remain under armed guard in a segregated lodging facility if he does not already possess a BAF access badge. Additionally, LN witnesses may not be authorized to enter U.S. dining facilities, and arranging suitable meals must take into account Afghan dietary mores. Trial counsel must coordinate with the chief of military justice early and must manage witnesses' expectations to ensure these administrative issues are handled efficiently.

In addition to the logistical difficulty involved in securing Afghan witnesses for trial, TCs must also prepare for unique challenges in the courtroom. Afghanistan's rugged terrain has produced a population that is as linguistically fractured as the land itself.<sup>57</sup> It is therefore crucial to identify interpreters in advance who speak the same language and dialect as the witnesses. Interpreters should also be familiar with the subject matter of witness testimony. Finally, trial counsel should carefully explain to the interpreter his role at a court-martial prior to trial. Many new interpreters have a tendency to summarize witness statements—and counsel questions—rather than provide verbatim translations. Counsel accustomed to working with experienced German interpreters in USAREUR or certified Spanish interpreters in the United States may find working with their Afghan counterparts challenging. In the author's experience, multilingual Afghans experienced as *translators* did not immediately grasp the distinct task of interpreting testimony in court, and courtroom interpretation

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<sup>54</sup> Documents on file with the author.

<sup>55</sup> Neff, *supra* note 1, at 51.

<sup>56</sup> MCM, *supra* note 21, R.C.M. 405(g) (use of stipulations for Article 32 investigations); *id.* R.C.M. 811 (use of stipulations at trial).

<sup>57</sup> See U. S. MIL. ACADEMY DEP'T OF GEO. & ENV. ENG., AFGHANISTAN: A REGIONAL GEOGRAPHY 46–50 (Oct. 5, 2001); U. S. DEP'T OF ARMY, OEF AFGHAN SOCIOLOGICAL DEMOGRAPHICS: DATA CUTOFF 5 JAN. 2005, at 5; ORGANIZATION FOR SURVEYING AND CARTOGRAPHY, NATIONAL ATLAS OF THE DEMOCRATIC REPUBLIC OF AFGHANISTAN, Languages map (GEOKART 1985), available at [http://www.aims.org.af/maps/national/national\\_atlas/01/languages.jpg](http://www.aims.org.af/maps/national/national_atlas/01/languages.jpg) (last visited Oct. 29, 2009); Afghanistan Information Management Services, Afghanistan Physical Map, [http://www.aims.org.af/maps/national/physical/physical\\_Map\\_32.pdf](http://www.aims.org.af/maps/national/physical/physical_Map_32.pdf) (last visited Oct. 29, 2009).

literally had to be practiced before trial. These interpreters had sufficient command of the languages to perform the task;<sup>58</sup> they simply had no idea what a court-martial proceeding was supposed to look and sound like. Interpreters were inclined to summarize the testimony of witnesses on the stand or engage in clarifying conversations with witnesses which, although a valued skill when accompanying a commander to a key leader engagement,<sup>59</sup> is insufficient in a court-martial setting.

Eliciting testimony from Afghan witnesses is also complicated by the Afghan unfamiliarity—a result of Afghanistan’s historical geographical remoteness—with the flow of U.S. or Western-style court proceedings.<sup>60</sup> Unlike Americans raised on a steady television diet of Perry Mason,<sup>61</sup> Law and Order,<sup>62</sup> and “you can’t handle the truth!”<sup>63</sup> Afghans are keepers of a vibrant oral storytelling tradition. Afghan witnesses—especially those with less-than-cosmopolitan life experiences—find it unnatural and disconcerting to constrain themselves to answering only the question asked and to break up the flow of a story to enable an interpreter to catch up or to allow counsel to ask more questions. Many Afghans are not accustomed to giving testimony multiple times and are unprepared to be challenged over minor variations between each telling. A TC may anticipate some measure of frustration from an Afghan witness who has told his story to a U.S. commander, then is questioned by an investigator, questioned again by the same investigator looking for a written statement, interviewed by the TC while preparing for the Article 32 hearing, questioned again at the Article 32 hearing, interviewed yet again by the TC at the courtroom prior to the beginning of the court martial, and finally examined by the TC during the court proceeding itself. Careful explanation to the Afghan witness of what it means to “swear” or “affirm” the truth of testimony may also be appropriate. Some Afghans consider it bad luck to swear to the accuracy of one’s own statement, and perceive that the asking for such assurances is an affront to the declarant’s honor and reputation for truthfulness.

### *Prepare the Convening Authority*

Witnesses are not the only logistical hurdle that the successful TC must address. In recent years, the General Court-Martial Convening Authority (GCMCA) in Afghanistan has been a single two-star commander of a division headquarters element that is not the organic higher headquarters of all the BCTs in Afghanistan, and the GCMCA headquarters has not been on the same deployment schedule as those BCTs.<sup>64</sup> These jurisdictional alignments and overlapping deployment schedules make it a challenge to maintain a valid standing panel. The convening authority might not certify a panel until and unless a case requires it, as is his statutory prerogative.<sup>65</sup> In addition to the usual panel composition considerations,<sup>66</sup> Afghan geography and its attendant logistical constraints may tempt the convening authority to select members who already live and work at BAF. In some cases, choosing only members from BAF may actually be grounds for a defense objection to the entire panel.<sup>67</sup> (For example, the defense might successfully argue that a Soldier accused of committing a crime at the end of

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<sup>58</sup> See MCM, *supra* note 21, R.C.M. 502e(1).

<sup>59</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL 3-24.2, TACTICS IN COUNTERINSURGENCY para. 7-63 (Apr. 2009) [hereinafter FM 3-24.2].

<sup>60</sup> See generally ROSANNE KLASS, LAND OF THE HIGH FLAGS: AFGHANISTAN WHEN THE GOING WAS GOOD (Odyssey 2007) (1964).

<sup>61</sup> See generally <http://www.erlestanleygardner.com> (Mar. 30, 2007) (documenting the fictional defense attorney and main character of eighty whodunnit courtroom novels by Erle Stanley Gardner published in the United States between 1933 and 1969, a U.S. syndicated radio crime serial from 1943 to 1955, and a television series from 1957 to 1966 and 1973 to 1974).

<sup>62</sup> See generally [http://www.nbc.com/Law\\_and\\_Order](http://www.nbc.com/Law_and_Order) (last visited July 1, 2009). The television series created by Dick Wolf and broadcast in the United States on the NBC television network since 1990 is an hour-long, weekday evening program which portrays the investigation and prosecution of crimes in New York City. *Id.*

<sup>63</sup> See generally A FEW GOOD MEN (Columbia Pictures 1992). This line by Colonel Nathan Jessup (Jack Nicholson) to Lieutenant Junior Grade Daniel Kaffee (Tom Cruise) was ranked the twenty-ninth best line in the history of American cinema by the American Film Institute in 2005. AMERICAN FILM INSTITUTE, AFI’S 100 YEARS. . . 100 MOVIE QUOTES, <http://connect.afi.com/site/DocServer/quotes100.pdf?docID=242> (last visited Oct. 29, 2009).

<sup>64</sup> See Headquarters, CJTF-101, to all CJTF-101 Personnel, subject: CJTF-101 Policy Memorandum—Military Justice (May 12, 2008).

<sup>65</sup> UCMJ art. 25(d)(2) (2008).

<sup>66</sup> Article 25(d)(2) of the UCMJ states, “When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” *Id.* Geographic convenience is not listed as a consideration.

<sup>67</sup> See *id.* Deviation from the stated criteria is permissible to form a more representative panel but is not permissible to create a less representative panel. *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988) (applying *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964)). Geography may also serve as a convenient proxy for other prohibited considerations intended to achieve a specific result in a case. See *Smith*, 27 M.J. at 250 (citing *United States v. McClain*, 22 M.J. 124, 132 (C.M.A. 1986)).

a fifteen-month combat tour in a remote, highly contested valley<sup>68</sup> cannot receive a fair trial if the convening authority selects a panel of newly arrived staff personnel, from unrelated units, who have never set foot outside BAF). Such a panel could also become a potential public relations liability to the command, the JAG Corps, or the Army in view of the well-documented academic and civilian unease with the court-martial panel selection process.<sup>69</sup> Identifying these issues well in advance and raising them to the attention of the chief of military justice should ensure the selection and certification of a proper panel and avoid delay in trying the case.

## Conclusion

Military justice is a tool for maintaining good order and discipline in order maximize the effectiveness of the military and the security of the United States.<sup>70</sup> Perhaps ironically, the tools of good order and discipline seem heavier to wield in the midst of deployed combat operations, though that may be when they can have the greatest effect. Undoubtedly, there are many reasons for the apparent difficulty or reluctance to strictly enforce military justice during deployments; the phrase “T.I.A.” (meaning “this is Afghanistan”)<sup>71</sup> has been appropriated more than once to describe the seemingly endless barriers to getting things done in Afghanistan. Nevertheless, the common misconception that military justice is too difficult to implement or is too distracting to enforce during combat should be corrected. As a result, the most valuable service a deployed TC can provide may not be the advice he gives commanders on military justice matters. Rather, the deployed TC’s true value may come from ensuring the dust of the deployed environment does not weigh so heavily on the tools of military justice that commanders become discouraged from using them when Justice demands. In other words, knowing what should be done is terrific, but knowing how to make it happen swiftly within the constraints Afghanistan presents is no less valuable. With luck, the information provided in this note will assist TCs, DCs, BJAs, chiefs of military justice, and all judge advocates involved in the administration of military justice to effectively confront the challenges Afghanistan presents.

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<sup>68</sup> As an illustration, consider the Korengal (Koranagal) Valley, Konar (Kunar) Province as described in open source reporting. See, e.g., C. J. Chivers, *Korangal Valley Memo: In Bleak Afghan Outpost, Troops Slog On*, N.Y. TIMES, May 14, 2009, at A6; C. J. Chivers, *A Blast, an Ambush, and a Sprint to Escape a Taliban Kill Zone*, N.Y. TIMES, Apr. 20, 2009, at A1; C. J. Chivers, *Turning Tables, U.S. Troops Ambush Taliban with Swift and Lethal Results*, N.Y. TIMES, Apr. 17, 2009 at A6; C. J. Chivers, *Arms Sent by U.S. May be Falling into Taliban Hands*, N.Y. TIMES, May 20, 2009, at A1; C. J. Chivers, *A Young Marine’s Dream Job*, N.Y. TIMES, May 1, 2009, at A1; Embedded at Firebase Vimoto, [http://www.nytimes.com/slideshow/2009/04/30/world20090430FIREBASE\\_index.html](http://www.nytimes.com/slideshow/2009/04/30/world20090430FIREBASE_index.html) (last visited Oct. 29, 2009); Subduing the Korengal Valley, [http://www.nytimes.com/slideshow/2008/02/21/magazine/0224-AFGHAN\\_index.html](http://www.nytimes.com/slideshow/2008/02/21/magazine/0224-AFGHAN_index.html) (last visited Oct. 29, 2009); Elizabeth Rubin, *A Bloody Stalemate in Afghanistan*, Feb. 25, 2008, <http://www.nytimes.com/2008/02/25/world/asia/25iht-24afghanistant.10345845.html>; Rubin, *supra* note 10.

<sup>69</sup> Major Christopher Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 193–95 (2003).

<sup>70</sup> See MCM, *supra* note 21, pt. I, ¶ 3 (2008).

<sup>71</sup> See BLOOD DIAMOND (Warner Bros. 2006) (employing the term “T.I.A.” to mean “this is Africa” in much the same sense that it is now used in Afghanistan).