

Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel

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Of course, there are statutory offenses which demand a general court-martial, and these must be ordered by the division or corps commander; but, the presence of one of our regular civilian judge-advocates in an army in the field would be a first-class nuisance, for technical courts always work mischief.¹

1. Introduction

Like many other legal codes, the Uniform Code of Military Justice (UCMJ) is living and flexible in that it may be changed via legislation or judicial interpretation. Such adaptability is essential for its survival, as “[n]o legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society.”² The “needs and demands of society,” however, are much more complex for the military justice system than the civilian justice system, as the military justice system cannot focus solely on deterring and punishing crime.

The continual changes to the military justice system are made in a perpetual attempt to balance, but simultaneously promote, two potentially incompatible goals.³ Major General (MG) William A. Moorman, the former Judge Advocate General of the U.S. Air Force, aptly stated, “While ensuring good order and discipline in the force as a whole is a bedrock purpose for having a military justice system, promoting justice in individual cases is a second, equally important, purpose.”⁴ The continual struggle between these two goals can be seen in how the UCMJ has been changed in many areas, to include modifications over jurisdiction and appellate review.⁵ Some of the most striking modifications,

though, have been to a servicemember's rights to counsel and counsel of choice.

A servicemember's rights to counsel and counsel of choice expanded greatly during the mid-twentieth century. “[J]udge advocates before the Military Justice Act of 1968 grew to accept the thought of soldiers being confined for six months as the result of a special court-martial with no lawyers in the courtroom Now, of course, we look back in disbelief.”⁶ In 1968, servicemembers received the right to be represented by civilian counsel at all general and special courts-martial.⁷ This expansion has not been without controversy.

Following the conflict in Vietnam, numerous commentators proposed that a servicemember's nearly total right to civilian counsel at general and special courts-martial hindered a commander's ability to complete the mission.⁸ These commentators proffered solutions to the problems that they saw.⁹ The United States is now embroiled in major conflicts in Iraq and Afghanistan, and is again trying courts-martial in combat settings.¹⁰

Throughout Operation Iraqi Freedom and Operation Enduring Freedom, the impact that a servicemember's right to civilian defense counsel has had on the mission has been palpable. The unavoidable delays and logistical challenges that result from civilian defense counsel practicing in a deployed environment have the potential to negatively impact the military justice system's ability to fulfill its mission.

When a proper application of the UCMJ creates an unintended problem, a detailed analysis of the potential solutions is necessary. When a commander must solve a problem, he or she often implements a process to arrive at the appropriate solution. For example, when using observed,

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¹ WILLIAM T. SHERMAN, 2 MEMOIRS OF GENERAL W.T. SHERMAN 397 (1891).

² Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. REV. 185, 186 (2000).

³ *Id.*

⁴ *Id.*

⁵ See UCMJ art. 2(a)(10) (2008) (explicitly extending jurisdiction to certain civilians); H.F. “Sparky” Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 250 (2005).

⁶ Gierke, *supra* note 5, at 250.

⁷ UCMJ art. 38(b).

⁸ See *infra* Part V.A.

⁹ See *infra* Parts VI.A—VI.D.

¹⁰ For a detailed analysis of the court-martial system's application in Iraq and Afghanistan, see Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001-2009*, ARMY LAW., Sept. 2010 at 12–34.

indirect artillery fire against an enemy, an Army commander will use the procedures set forth in Field Manual 6-30.¹¹

Because a deployed servicemember's right to civilian defense counsel can undermine a command's ability to effectively use the UCMJ, the UCMJ should be amended to give a general court-martial convening authority (GCMCA) a process by which he or she may abrogate that right when required. While several solutions have been proffered, Precision-Targeted Abrogation is the proposal that most accurately targets the problems without causing excessive collateral damage to the military justice system or to an accused's individual rights.

II. Foundation of a Servicemember's Rights to Counsel and Counsel of Choice

A. The Right to Counsel

Since the right to counsel of choice dovetails with the broader right to counsel, a brief study of the foundation and framework on which both rights stand is necessary. A fundamental understanding of how broad a servicemember's right to counsel extends will provide a platform for analyzing how far the right to counsel of choice can be reduced.

1. Civilian Courts

The Sixth Amendment sets forth the fundamental right that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹² Although the Sixth Amendment's language may appear simple, the breadth and application of the right to counsel has expanded greatly since it was ratified in 1791.

The Supreme Court did not hold that an indigent defendant had a Constitutional right to counsel in all federal court cases until the landmark case of *Johnson v. Zerbst*.¹³ Prior to 1938, the Supreme Court was effectively silent on the issue of an accused's Sixth Amendment right to counsel.¹⁴ Until then, the only right in federal district court to court appointed counsel was statutory, and it extended

¹¹ See U.S. DEP'T OF ARMY, FIELD MANUAL 6-30, TACTICS, TECHNIQUES, AND PROCEDURES FOR OBSERVED FIRE (16 July 1991).

¹² U.S. CONST. amend. VI.

¹³ *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."). See *Powell v. Alabama*, 287 U.S. 45, 59-65 (1932) (providing a good description of the history of the right to counsel).

¹⁴ See S. SIDNEY ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL 57 (1970); see also 3-13 CRIMINAL CONSTITUTIONAL LAW § 13.01[1] (Matthew Bender 2008) [hereinafter CRIMINAL CONSTITUTIONAL LAW].

only to capital cases.¹⁵ These statutes were applied without disturbance for approximately 148 years. Prior to 1938, the constitutional right to counsel was a right to retain counsel, not a right to have counsel appointed.¹⁶

The last major expansion of the Sixth Amendment right to counsel in civilian courts came in 1963 when the Supreme Court decided *Gideon v. Wainwright*.¹⁷ In *Gideon*, the Court expanded the Sixth Amendment right to counsel to state courts via the Fourteenth Amendment Due Process Clause.¹⁸

The rationale for an accused having a right to counsel is relatively simple. In *Powell v. Alabama*, the Supreme Court reasoned:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.¹⁹

¹⁵ The Judiciary Act of 1789 states, "That in all the courts of the United States, the parties may plead for their own causes personally or by the assistance of such counsel or attorneys at law . . ." Ch. 20, § 35, 1 Stat. 73, 92 (1789). Additionally, the Punishment of Crimes Act of 1790 states that for treason and capital offenses, accused persons are entitled "full defense by counsel learned in the law," and that the court or judge is "authorized and required immediately upon his request to assign such person as such counsel . . ." Ch. 9, § 29, 1 Stat. 112, 118 (1790). For a more detailed outline and analysis of the history of the right to counsel until 1970, see ULMER, *supra* note 14, at 58.

¹⁶ See CRIMINAL CONSTITUTIONAL LAW, *supra* note 14, § 13.01[1].

¹⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁸ See *id.*

¹⁹ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

The Court reinforced this logic in *Gideon v. Wainwright*, stating that *Powell v. Alabama* was based on “sound wisdom.”²⁰ Now that it is relatively settled law that the Sixth Amendment guarantees a civilian the right to counsel prior to being deprived of “life or liberty,”²¹ a logical question remains: does that right also extend to servicemembers?

2. Military Courts-Martial

Every U.S. servicemember takes an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic; to bear true faith and allegiance to the same”²² Ironically, it is still unclear whether one of the constitutional rights that servicemembers vow to protect, such as the Sixth Amendment right to counsel, applies to Soldiers facing court-martial.

The Supreme Court has yet to decide whether or not the Sixth Amendment right to counsel applies at general and special courts-martial. In *Middendorf v. Henry*, a 1976 case addressing the right to defense counsel at summary court-martial, the Court states, “The question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved.”²³

The Court struggled with this question as early as 1963. In *United States v. Culp*, the two concurring judges both opined that they believed that the Sixth Amendment right to counsel applies to courts-martial.²⁴ Since *Middendorf v. Henry*, however, the Court of Appeals for the Armed Forces (formerly known as “Court of Military Appeals”) held that the Sixth Amendment right to counsel applies to special and general courts-martial, stating that the right attaches in most cases upon prefferral of charges.²⁵ From a practical standpoint, the current statutory and regulatory rights to counsel make the debate about the constitutional application of a servicemember’s right to counsel largely academic.

A servicemember’s statutory and regulatory rights to counsel eclipse the protections of the Sixth Amendment. Article 38(b), UCMJ, guarantees a servicemember the right

to be represented by counsel at a general or special court martial or article 32 investigation.²⁶ Article 27, UCMJ, guarantees a servicemember the right to be represented by a qualified lawyer at general courts-martial.²⁷ Article 27(c), UCMJ, guarantees a servicemember the right to be represented by a qualified lawyer at a special court-martial “unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies.”²⁸ Military Rule of Evidence (MRE) 305(e)(2) guarantees a servicemember the right to counsel prior to any post-preferral interrogation.²⁹ These statutory and regulatory rights, however, have not always been present. Understanding the history of a servicemember’s statutory right to counsel will help determine how much, if any, the current right to counsel of choice should be abrogated.

The term “judge advocate” is itself evidence that a servicemember’s right to counsel was once radically different.³⁰ Starting in 1786, judge advocates detailed to courts-martial both prosecuted and assisted the accused.³¹ “The judge advocate . . . shall prosecute in the name of the United States of America; [sic] but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea.”³² This system of dual representation continued until 1916, whereupon an accused was given the right to retain counsel for the first time.³³ The first right to an appointed defense counsel came during a revision of the Articles of War in 1920.³⁴ Defense counsel,

²⁰ See *Gideon*, 372 U.S. at 345.

²¹ *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

²² 10 U.S.C. § 502 (2006).

²³ *Middendorf v. Henry*, 425 U.S. 25, 33 (1976).

²⁴ See *United States v. Culp*, 14 C.M.R. 199, 217 (C.M.A. 1963) (Quinn, C.J., concurring in the result); *id.* at 219 (Ferguson, J., concurring in the result).

²⁵ See, e.g., *United States v. Wattenburger*, 21 M.J. 41, 43 (C.M.A. 1985) (stating that a servicemember’s Sixth Amendment right to counsel attaches upon prefferral of charges); *United States v. Annis*, 5 M.J. 351, 353 (C.M.A. 1978) (“From the earliest terms of this Court we have sustained the right of assistance of counsel prior to and during trial on criminal charges.”).

²⁶ UCMJ art. 38(b)(1) (2008) (“The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.”); *id.* art. 38(b)(2) (“The accused may be represented by civilian counsel if provided by him.”).

²⁷ *Id.* art. 27(a), (b).

²⁸ *Id.* art. 27(c).

²⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e)(2) (2008) [hereinafter MCM].

³⁰ See *United States v. Culp*, 33 C.M.R. 411, 422 (C.M.A. 1963) (“[A] judge advocate, as his name implies, had a dual capacity. He was a “judge” and he was an “advocate.”).

³¹ *Id.*

³² 1786 Articles of War, art. 6, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 972 (2d ed. 1920 reprint); 1806 Articles of War, art. 69, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 972, 982 (2d ed. 1920 reprint). Article 90 of the 1874 Articles of War continued the practice of dual representation. See 1874 Articles of War, art. 90, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 986, 993 (2d ed. 1920 reprint).

³³ See Articles of War, art. 17, 39 Stat. 650, 653 (1916); see also *Culp*, 14 C.M.R. at 210 (“The Articles of War were again revised by the Act of August 29, 1916, and, to my knowledge, defense counsel as such was mentioned for the first time”); ULMER, *supra* note 14, at 33 (“Thus between 1806 and 1916, the slight enlargement of the privilege which occurred in the Articles of War was not matched by activity in this area by the Supreme Court.”).

³⁴ See Articles of War, art. 17, 41 Stat. 787, 790 (1920); Articles of War, art. 11, 39 Stat. 650, 652 (1916).

however, did not have to be an attorney.³⁵ That standard held until the passage of the Elston Act in 1948.³⁶ The Elston Act, which represented “a radical departure from former provisions of both substantive law and procedure,”³⁷ was the first statute in U.S. history that required that a lawyer be provided, in limited circumstances, to an accused servicemember.³⁸ The Elston Act required both the trial and defense counsel at general courts-martial to be lawyers.³⁹ The UCMJ was passed shortly thereafter in 1950, containing the first versions of Articles 27 and 38, UCMJ.⁴⁰ The original version of Article 27, affording an accused at special court-martial the right to a lawyer only if the trial counsel was a lawyer, was amended to its current form in 1968.⁴¹

B. The Right to Counsel of Choice

1. Constitutional Basis

The Court has consistently held that the quality or meaningfulness of an accused’s relationship with his lawyer is not the focus of a Sixth Amendment right to counsel claim.⁴² The purpose of the Sixth Amendment right to counsel “is simply to ensure that criminal defendants receive a fair trial.”⁴³

Nonetheless, the Supreme Court has repeatedly acknowledged that an accused that has the means to hire his or her own counsel has some form of Constitutional right in terms of choosing his own counsel.⁴⁴ In *Wheat v. United States*, the Supreme Court explains:

Thus, while the right to select and be represented by one’s preferred attorney is comprehended by the *Sixth Amendment*, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.⁴⁵

More recently, the Court strengthened the view that the right to counsel of choice is constitutionally based. In *United States v. Gonzalez-Lopez*, the Court held that a trial court’s improper denial of one’s Sixth Amendment right to counsel of choice constitutes automatic grounds to overturn a conviction, and is not subject to any harmless error review on appeal.⁴⁶ The Court states that the Sixth Amendment “commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best.”⁴⁷ The Court further explains that “[t]he right to select counsel of one’s choice . . . has never been derived from the *Sixth Amendment’s* purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.”⁴⁸ Because the Court now holds that a “[d]eprivation of the right [to counsel of choice] is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants,”⁴⁹ a further inquiry into the statutory basis of the right to counsel of choice, as well as the Court’s precedential power over the military, are necessary to see what would be “erroneous” within the military courts.

2. Statutory Basis for the Military

The development of a servicemember’s statutory right to counsel of choice at general and special courts-martial is interwoven with the statutory right to representation by counsel. In 1916, as a part of its third revision of the Articles of War, Congress provided a military accused the statutory right to counsel of choice in general and special courts-martial, presuming such counsel was reasonably available.⁵⁰ Unfortunately, this right was unclear in practice and utility, as the statute did not clarify the key questions of

³⁵ See *Culp*, 33 C.M.R. at 425 (“[T]here was no attempt to provide members of the Judge Advocate Corps or persons qualified in the law as members of the court, trial judge advocate, or defense counsel.”).

³⁶ Elston Act, art. 11, 62 Stat. 627, 629 (1948) (“[T]he trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General’s Department or officers who are a member of a bar of a Federal court or the highest court of a state of the United States.”). This right to counsel also extended to pretrial investigations. See *id.* art. 46b, 62 Stat. at 633.

³⁷ *Culp*, 33 C.M.R. at 425.

³⁸ See *id.*; ULMER, *supra* note 14, at 57.

³⁹ Elston Act, art. 11, 62 Stat. at 629.

⁴⁰ See UCMJ arts. 27 & 38 (1950).

⁴¹ See 10 U.S.C.S. § 827 (LexisNexis 2010).

⁴² See, e.g., *Morris v. Slappy*, 461 U.S. 1 (1983) (“[W]e reject the claim that the *Sixth Amendment* guarantees a “meaningful relationship” between an accused and his counsel.”); *United States v. Cronin*, 466 U.S. 648, 657 (1984) (“[T]he appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such.”).

⁴³ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

⁴⁴ See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25 (1989).

⁴⁵ *Wheat v. United States*, 486 U.S. 153, 159 (1988). The Court also lists instances in which a defendant may not get his choice of counsel, such as when a defendant cannot afford a particular attorney and when an attorney represents an opposing party. *Id.* at 159–60.

⁴⁶ *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

⁴⁷ *Id.* at 146.

⁴⁸ *Id.* at 147–48.

⁴⁹ *Id.* at 148.

⁵⁰ See *supra* note 33 and accompanying text.

whether defense counsel would be civilian or military, as well as who was to pay the requisite costs.⁵¹

Some of these uncertainties were answered in a 1920 revision of Article 17 of the 1916 Articles of War.⁵² This revision to Article 17 gave an accused the right to be represented “by counsel of his own selection, civil counsel if he so provides, or military if such counsel be available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11.”⁵³ Although such a right seemed to be a large step to securing an accused the rights to counsel and counsel of choice, the new rule had little to no practical value. During World War II, approximately 80,000 servicemembers were convicted at general or special court-martial.⁵⁴ While many convictions were justified, abuses of the military justice system were overt, widespread, and alarming.⁵⁵ The resulting congressional attention resulted in the Elston Act and UCMJ.⁵⁶

Practically, the rights to counsel and counsel of choice firmly codified in the Elston Act and UCMJ did not immediately improve the functioning of the military justice system. The honor and value of defending a servicemember was not yet apparent to all military leaders, as the “lawyers for the accused before courts-martial were shunned by the military.”⁵⁷ They did, however, provide the foundation for the widely used and firmly rooted statutory right to counsel of choice that accused servicemembers enjoy today.

The Elston Act changed the landscape via two main vehicles. First, it required defense attorneys at general courts-martial.⁵⁸ Second, and arguably as important, it expanded the rights to counsel and counsel of choice to the newly-conceived pretrial investigation, which was a prerequisite to a general court-martial.⁵⁹ These expansions were successful in that the right to counsel of choice was vigorously exercised as soon as the early 1980s.⁶⁰ In 1981,

Article 38 was amended to give an accused a right to only one military counsel.⁶¹

Limiting an accused to only one military counsel demonstrates that Congress has the authority to further curtail a servicemember’s right to counsel. In *Gonzalez-Lopez*, the Supreme Court states that a “wrongful” denial of civilian counsel of choice may alone be a Sixth Amendment violation, even if the trial was fair.⁶² This holding, however, was for a defendant in an Article III court, making it potentially inapplicable to the military.⁶³ Even assuming that this rule applies to military courts-martial, Congress has the constitutional authority to determine when a denial would be “wrongful,” as courts-martial are organized under Article I of the Constitution.⁶⁴ As such, it is important to examine the purposes and values of the military justice system before discussing whether it should be changed.

III. The Value of an Efficient, Accurate, and Fair Military Justice System

A. Policy-Based Reasons

1. Historical Context

Attempts at military legal codes have been made “[a]t least since the time of Gustavus Adolphus.”⁶⁵ Even prior to the Revolutionary War, American commanders understood the value of discipline. In 1759, George Washington stated, “Nothing is more harmful to the service than the neglect of discipline; for that discipline, more than numbers, gives one army superiority over another.”⁶⁶

⁵¹ ULMER, *supra* note 14, at 34.

⁵² Articles of War, art. 17, 41 Stat. 787, 790 (1920).

⁵³ *Id.* art. 11.

⁵⁴ ULMER, *supra* note 14, at 50.

⁵⁵ See *id.* at 50–52 (outlining numerous specific incidents and reactions to miscarriages of the military justice system); *infra* notes 89–92 and accompanying text.

⁵⁶ See ULMER, *supra* note 14, at 52–53; *supra* notes 36–40 and accompanying text.

⁵⁷ *United States v. Culp*, 14 C.M.R. 199, 214 (C.M.A. 1963) (citing Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958)).

⁵⁸ See *supra* note 39 and accompanying text.

⁵⁹ Elston Act, art. 46b, 62 Stat. 627, 633 (1948). This right was retained in the new first version of the UCMJ. UCMJ art. 38(b)(1) (1950) (providing a right to counsel of choice at article 32 hearings).

⁶⁰ See *United States v. Gnibus*, 21 M.J. 1, 14 (C.M.A. 1985).

⁶¹ Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat. 1085, 1088. See *Gnibus*, 21 M.J. at 14 (explaining how the exercise of the right of counsel of choice led in part to the amendment).

⁶² *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

⁶³ See *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004) (“Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable.”). For a good synopsis of the interaction between the Supreme Court and the military justice system, see Anna C. Henning, *Supreme Court Appellate Jurisdiction Over Military Justice Cases*, CONG. RES. SERV., Mar. 5, 2009, at 5, available at <http://www.fas.org/spp/crs/misc/RL34697.pdf> (“[L]egal interpretations of the Supreme Court do not necessarily create binding precedent for Article I courts, and vice versa. . . . [M]ilitary courts sometimes reject even Supreme Court precedent as inapplicable in the military context.”).

⁶⁴ Congress’s authority to establish the military justice system is based on the U.S. Constitution. U.S. CONST. art. 1, § 8, cl. 14. *Chappell v. Wallace*, 462 U.S. 296, 300–01 (1983).

⁶⁵ General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL’Y 1, 3 (1980) (citing Code of Articles of King Gustavus Adolphus of Sweden 1621, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 972 (2d ed. 1920 reprint)).

⁶⁶ Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV.

Although military tactics have unquestionably changed over the past 250 years, discipline remains critically important. The Preamble to the *Manual for Courts-Martial* states, “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁶⁷ In other words, the military justice system is designed to protect national security by providing commanders with an efficient tool to ensure that orders are followed and good order and discipline is maintained. Justice also demands fair procedures and accurate results. An examination of how the American military justice system performed in prior conflicts will demonstrate that efficiency and accuracy do not always coexist peacefully. This conflict can lead to the perception that the system is “unfair.”

Creating a military justice system that strikes the proper practical balance between efficiency, accuracy, and other competing factors has proven difficult. General William Westmoreland (Westmoreland), former Commander of U.S. Military Assistance Command, Vietnam, and MG George S. Prugh (Prugh), formerly The Judge Advocate General, U.S. Army, explain, “There is a natural conflict between law and armed force. Both are competitors for authority.”⁶⁸ Westmoreland and Prugh further state, “The competition between law and armed force is not new. It is probably as old as man, and certainly dates no later than the recognition that law, not executive discretion alone, may limit force.”⁶⁹

The command and public must both have faith in the military justice system for it to remain relevant and trusted.⁷⁰ Westmoreland and Prugh believed that the military justice systems must “identify and adopt those procedures which ensure fairness and ‘due process’ while preserving the ability of the forces to achieve their mission.”⁷¹ They believed that this was a problem, as commanders and others “risking life and limb” would have little tolerance for sacrificing “mission effectiveness in order to achieve ‘due process.’”⁷²

185 (2002) (quoting Letter of Instruction from General George Washington to the captains of the Virginia Regiments (29 July 1759)).

⁶⁷ MCM, *supra* note 29, pt. I, ¶ 3.

⁶⁸ Westmoreland & Prugh, *supra* note 65, at 1. General William C. Westmoreland served as Commander, U.S. Military Assistance Command, Vietnam (MACV), from 1964–1968. *Id.* Major General George S. Prugh served as The Judge Advocate General, United States Army, from 1971–1975, and as Legal Advisor, MACV, from 1964–1966. *Id.* For a good account of Army Judge Advocates in Vietnam, see FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 3–57 (2001).

⁶⁹ Westmoreland & Prugh, *supra* note 65, at 2.

⁷⁰ See Moorman, *supra* note 2, at 187–190.

⁷¹ Westmoreland & Prugh, *supra* note 65, at 6.

⁷² *Id.*

During and immediately following the Vietnam War, which coincided with the initial implementation of the changes of the Military Justice Act of 1968,⁷³ confidence within the military ranks for the military justice system was strong, but problems persisted. A 1971 survey of Army War College students was telling.⁷⁴ The survey found that 21.4% of students at least “slightly disapprove[d]” of the military justice system.⁷⁵ While the remainder of the students at least “slightly approve[d]” of the military justice system, approximately 80% of the students believed that “processing time delays in special and general courts-martial were excessive.”⁷⁶ A lack of trust in the military justice system was present at the highest ranks. Westmoreland and Prugh opined that the UCMJ “is not capable of performing its intended role in times of military stress.”⁷⁷ In their opinion, the military justice system failed to effectively prosecute those responsible for the massacres at My Lai.⁷⁸ Despite the fact that “the conduct of a substantial number of soldiers and their leaders was abhorrent to decent civilized people,” only six Soldiers faced court-martial, and only one was convicted.⁷⁹

Numerous commentators have opined why the prosecutions proceeded in the manner that they did.⁸⁰ According to Westmoreland and Prugh, the procedural and due process protections associated with courts-martial in a deployed environment posed “substantial problems in the administration of military justice. . . . The sheer bulk of the various investigations, numbers of witnesses, repeated interrogations of these witnesses by the batteries of counsel involved at the various stages, supply of counsel, investigators, travel funds, and reporters presented overwhelming difficulties.”⁸¹

More important than the specific problems exposed was the realization that to be respected, the military justice system must not only be both efficient and accurate, but also appear to be so. The process of going through the My Lai

⁷³ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in scattered sections of 10 U.S.C.).

⁷⁴ Colonel Joseph N. Tehnet & Colonel Robert B. Clarke, *Attitudes of the U.S. Army War College Students Toward the Administration of Military Justice*, 59 MIL. L. REV. 27 (1973).

⁷⁵ *Id.* at 41.

⁷⁶ *Id.* at 60.

⁷⁷ Westmoreland & Prugh, *supra* note 65, at 2.

⁷⁸ See *id.* at 61–66. For a detailed account of the purported facts of the My Lai massacre, see SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1970).

⁷⁹ Westmoreland & Prugh, *supra* note 65, at 61.

⁸⁰ See, e.g., MICHAL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 208–34 (2002); RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 373–98 (1971).

⁸¹ Westmoreland & Prugh, *supra* note 65, at 64.

investigations and trials, rather than any outrage over the verdicts themselves, exposed the shortcomings of the American military justice system at that time, and demonstrated the need for continued evaluation and improvement of the system.⁸² For the first time since the implementation of the UCMJ in 1950, “[m]ilitary justice was tested by the My Lai cases in an atmosphere of unparalleled publicity. . . .”⁸³ “My Lai and its related legal activities provide an opportunity to evaluate the functioning of the Code in terms of breadth and depth.”⁸⁴

Public confidence in the military justice system at that time was not strong. The fact that the military justice system was attacked by both those who supported and opposed accused Soldiers like First Lieutenant William L. Calley demonstrated the lack of confidence in the system.⁸⁵ Furthermore, the examination of the system was broad and profound. For example, a House Armed Services subcommittee issued a report to the full committee that included several proposals for changes to the UCMJ.⁸⁶ Additionally, several scholarly articles set forth numerous proposals for ways to improve the UCMJ.⁸⁷

Whereas Westmoreland and Prugh were dissatisfied with the “end product” of the legal actions resulting from My Lai, “even though one may conclude that the rights of the individual accused servicemen were scrupulously respected throughout the process,”⁸⁸ an almost total and complete lack for individual rights caused the problem with the military justice system in World War II.

When combined with “a greater public awareness of the war through advances in communication,” the largely unrestrained World War II military justice system under the Articles of War resulted in “severe criticism of the military justice system. . . .”⁸⁹ By 1945, at least 12 million people

had served in the American military during World War II. Over 1.7 million courts-martial were tried during the war, resulting in over 100 executions and 45,000 confined servicemembers.⁹⁰ In 1945, a panel led by Federal District Court Judge Matthew F. McGuire concluded, “It may be said categorically that the present system of military justice is not only antiquated, but outmoded.” McGuire opined that “the present system fails” for its failure to protect individual rights. McGuire also stated, “Certain basic rights vital in our viewpoint as a people, and by virtue of that fact inherent in, and essentially a part of any system, naval or otherwise that purports to do justice, must be accepted and safeguarded.”⁹¹

Abuses of the military justice system during World War II included punishment of court-members for unpopular verdicts, unduly harsh sentences on convicted servicemembers, and unqualified defense counsel.⁹² As was the case after My Lai, the President personally reviewed convictions and sentences, and Congress studied perceived flaws in the system.⁹³ Furthermore, Congress was “deluged with complaints of autocracy in the handling of these courts martial throughout the armed forces.”⁹⁴ Congress responded dramatically by overhauling the entire system with the Elston Act, and ultimately, the UCMJ.⁹⁵

These historical examples demonstrate that the military justice system must balance both efficiency and accuracy. Whereas the military justice system in World War II appeared to sacrifice accuracy in lieu of efficiency, the subsequent changes to the military justice system through 1968 implemented substantive and procedural safeguards that may have unnecessarily sacrificed efficiency in favor of accuracy.

2. Current Context

Lawmakers, American citizens, and military commanders now have an even more important vested interest in ensuring that the military justice system accomplishes its goals efficiently and accurately.⁹⁶ Unlike the U.S. military during World War II and the Vietnam War, today’s military is composed of an all-volunteer force.⁹⁷

⁸² In fact, the only Soldier convicted, First Lieutenant (1LT) William L. Calley, received overwhelming support from citizens and the President alike. See BELKNAP, *supra* note 80, at 191–215.

⁸³ Captain Norman G. Cooper, *My Lai and Military Justice—To What Effect?*, 59 MIL. L. REV. 93 (1973).

⁸⁴ Westmoreland & Prugh, *supra* note 65, at 61.

⁸⁵ Many Americans believed that the military justice system was simply assisting the government in “making a scapegoat out of a lieutenant in order to whitewash its own highest echelons.” BELKNAP, *supra* note 80, at 191–214.

⁸⁶ See ARMED SERVICES INVESTIGATING SUBCOMM. OF THE COMM. ON ARMED SERVICES, 91ST CONG., INVESTIGATION OF THE MY LAI INCIDENT 7–8 (Comm. Print 1970).

⁸⁷ See, e.g., Cooper, *supra* note 83, at 127; Captain Charles E. Bonney, The UCMJ in Future Hostilities: Towards a More Workable System (April 1974) (unpublished LL.M. thesis, The Judge Advocate General’s School) (on file with The Judge Advocate General’s Legal Center and School Library).

⁸⁸ Westmoreland & Prugh, *supra* note 65, at 65.

⁸⁹ JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980, at 77 (2001).

⁹⁰ *Id.*

⁹¹ *Id.* at 79 (quoting panel reports).

⁹² ULMER, *supra* note 14, at 50–53.

⁹³ President Nixon’s most notable military justice action was allowing 1LT Calley to serve his confinement at his Fort Benning, Georgia quarters. President Franklin D. Roosevelt established clemency boards “to review sentences of general court-martial prisoners by the thousands.” *Id.*

⁹⁴ See *id.* at 51–52 (quoting the Congressional Record).

⁹⁵ See *supra* notes 36–41, 59–61 and accompanying text.

⁹⁶ See *supra* notes 65–69 and accompanying text for the broad goals of the military justice system.

⁹⁷ Conscription into the U.S. military ceased on 1 July 1973, and has not been revived since. See 50 U.S.C. app. § 467(c) (2006).

Operation Iraqi Freedom and Operation Enduring Freedom are the first major, prolonged overseas conflicts in which we have used an all-volunteer force. Unless the draft is re-implemented, a public perception of an inaccurate and unfair military justice system could lead to potential volunteers choosing not to join an organization in which they will not receive a fair hearing if accused of misconduct.⁹⁸ The resulting recruiting shortage could negatively impact national security in the form of a weaker military.⁹⁹ For the first time, the perceived accuracy and fairness of the military justice system now has a direct, albeit difficult to gauge, effect on the military's ability to ensure national security.¹⁰⁰

Additionally, a military justice system that portrays itself as inefficient or inaccurate could damage the credibility within society that servicemembers have labored to create. The military is now one of the most respected institutions and professions in the United States.¹⁰¹ An efficient and accurate military justice system only serves to improve this image, and thereby improves a commander's ability to perform his or her mission.

B. Practical Reasons for Commanders

1. Preventing Misconduct

An efficient and accurate military justice system is critical to prevent criminal and disruptive misconduct, particularly conduct that jeopardizes mission success. Although the threat of punishment is never the only thing that deters improper acts, “[h]istory teaches there must be punishment for disobedience or order of cowardice, and that the punishment must be severe enough and certain enough to deter.”¹⁰²

Soldiers must be disciplined and follow all legal orders that a commander gives, regardless of how perilous the consequences of such obedience may be. Soldiers must also

follow the UCMJ. The very oath of enlistment explicitly sets forth these duties.¹⁰³

Even though many of the punitive articles of the UCMJ mirror those found in the civilian sector, the UCMJ justifiably criminalizes various acts and omissions that are not criminal outside of the military justice system. For example, desertion, absence without leave, and malingering are enumerated offenses in the UCMJ based on conduct that is not criminal in any other context.¹⁰⁴ George Washington succinctly explained the rationale for needing military-specific discipline in a 1776 letter to the President of Congress by stating, “A Coward, when taught to believe, that if he breaks his ranks, and abandons his Colors, will be punished by death by his own party, will take his chance against the enemy.”¹⁰⁵ Westmoreland and Prugh state, “The costs of misconduct in combat are truly incalculable. The risks of harm resulting from misconduct in combat are such that almost any step is justifiable to prevent that misconduct.”¹⁰⁶

A commander's need to prevent misconduct goes beyond preventing desertion to maintain unit strength, as certain other misconduct that is not punishable in the United States could greatly jeopardize a unit's safety and mission accomplishment. For example, on 9 May 2008, an American Soldier used a Qu'ran for target practice while serving in Baghdad, Iraq.¹⁰⁷ This act, which was potentially criminal because it was prejudicial to good order and discipline and service discrediting,¹⁰⁸ angered many Iraqis. Residents who attended a ceremony in which MG Jeffery W. Hammond, commander of 4th Infantry Division (Mechanized) and Multi-National Division—Baghdad, apologized for the crime, chanted, “Yes, yes to the Quran,” and “America out, out.”¹⁰⁹ Such sentiment may have fueled anti-American insurgents, thereby hindering mission accomplishment.

⁹⁸ See Moorman, *supra* note 2, at 188-89.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ A U.S. Army website states, “Today, because of our Soldiers and our record of accomplishment, the American people regard the Army as one of the Nation's most respected institutions. We will maintain this trust.” The Army Vision: Relevant and Ready Landpower in Service to the Nation, <http://www.army.mil/aps/07/vision.html> (last visited Jan. 5, 2010). In 2006, *Forbes* magazine stated that the military was the sixth most respected profession in America. Tom Van Riper, *America's Most Admired Professions*, FORBES, July 28, 2006, http://www.forbes.com/2006/07/28/leadership-careers-jobs-cx_tvr_0728admired.html.

¹⁰² Westmoreland & Prugh, *supra* note 65, at 46 (quoting Colonel Archibald King, *Changes in the Uniform Code of Military Justice Necessary to Make It Workable in Time of War*, 22 FED. B.J. 49, 51 (1962)).

¹⁰³ Upon enlistment or re-enlistment, every American Soldier must swear or affirm that he or she will “obey the orders of the President of the United States and the orders of the Officers appointed over me, according to regulations and the Uniform Code of Military Justice.” Enlistment Oath, 10 U.S.C. § 502(a) (2006).

¹⁰⁴ For the elements and explanations of the offenses of desertion, absence without leave, and malingering, see UCMJ arts. 85, 86, and 115 (2008), respectively.

¹⁰⁵ ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 98 (1996) (quoting Letter from George Washington to the President of Congress (Feb. 9, 1776)).

¹⁰⁶ Westmoreland & Prugh, *supra* note 65, at 48.

¹⁰⁷ Kim Gamel, *Soldier Who Shot at Quran Removed from Iraq*, ARMY TIMES, May 20, 2008, http://www.armytimes.com/news/2008/05/ap_quran_051808/.

¹⁰⁸ See UCMJ art. 134 (2008).

¹⁰⁹ *Id.*

Determining how a military justice system should address these offenses can be troubling. Westmoreland and Prugh thought a “particularly thorny problem” lied in deciding “an effective yet fair way” of punishing an act which is criminal in a military, but not civilian, context.¹¹⁰ Westmoreland and Prugh believed that inaccurate punishments in their era caused a problem.¹¹¹ They explained, “What underlies this problem is the fact that punishment imposed for the commission of the military offenses is frequently less severe than the consequences of military duty performance. In short, such punishment lacks meaningful deterrent power.”¹¹² This perceived failure caused them to ask, “is the civilian criminal law system an appropriate model for the military code?”¹¹³

Regardless of whether or not this “civilianized” military justice system is ideal, it is firmly ingrained in American culture.¹¹⁴ Even back in 1980, Westmoreland and Prugh acknowledged that there is “no concerted, knowledgeable, and persuasive opposition to the steady civilianization of the military justice system.”¹¹⁵ Accordingly, any modifications to the system designed to prevent misconduct must not value efficiency to the degree that it sacrifices procedural accuracy.

2. *Maintaining Good Order and Discipline*

Crimes are committed in the military every day despite the severe potential punishments set forth in the UCMJ, and those crimes must be addressed. For example, if a commander fails to properly address a situation in which a servicemember steals from another servicemember, the morale and trust within a unit could crumble. How those crimes are handled is as important as whether the final result is accurate and obtained efficiently.

American commanders must use the military justice system if they seek to impose formal punishment. Because commanders in the U.S. military are charged with maintaining good order and discipline,¹¹⁶ they are given

control of the military justice system.¹¹⁷ Unfortunately, with this power comes the potential for abuse.

The proper use of a military justice system that contains numerous individual rights and procedural protections prevents a tyrant or pushover who holds a leadership position from negatively impacting mission readiness by undermining collective confidence in the unit. When choosing an available disciplinary tool, commanders must understand “the importance of avoiding injustice by getting all the facts straight, and tempering blind justice with judgment.”¹¹⁸

A military justice system must provide safeguards designed to protect the substantive and procedural rights of the accused, increase the likelihood of an accurate result, and promote the perception of fairness.¹¹⁹ One such protection under the American military justice system is the provision for civilian counsel of choice under Article 38(b), UCMJ.¹²⁰

C. How Do Civilian Defense Counsel Improve the Military Justice System?

1. *Actual Improvement*

Civilian defense counsel play a vital role in the military justice system in that they actually improve it. Because objective statistical data does not exist to clearly explain how civilian counsel presence in the military justice system actually improves the efficiency, accuracy, and fairness of the system, the viewpoint of an experienced military justice practitioner provides valuable input.

Colonel (Ret.) Calvin L. Lewis, U.S. Army, a former judge advocate and military judge who has served in a variety of criminal law, academic, and leadership positions during his military and civilian careers, believes that civilian defense counsel bring valuable experience to the military justice system.¹²¹ For example, Colonel (Ret.) Lewis has witnessed experienced civilian defense counsel function as superior trial advocates when compared to their lesser-

¹¹⁰ See Westmoreland & Prugh, *supra* note 65, at 5 (“What is an effective and yet fair way of dealing with . . . the one who through deliberate or grossly negligent action makes himself unfit for duty, or even worse, endangers his comrades, his unit, his nations interests?”).

¹¹¹ See *id.* at 5.

¹¹² *Id.* at 5–6.

¹¹³ *Id.* at 5.

¹¹⁴ See Moorman, *supra* note 2, at 188 (“Safeguards to ensure justice in individual cases are firmly established in our military justice system.”). Cf. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (2001) (“[T]he UCMJ has failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world, in 2001.”).

¹¹⁵ Westmoreland & Prugh, *supra* note 65, at 16.

¹¹⁶ See 10 U.S.C. § 3583 (2006).

¹¹⁷ The UCMJ vests almost all critical decisions in commanders, not JAs. See UCMJ *passim* (2008).

¹¹⁸ U.S. DEP’T OF DEF., THE ARMED FORCES OFFICER 69 (2006).

¹¹⁹ See Westmoreland & Prugh, *supra* note 65, at 49 (“[T]he disciplinary power is expected to be used justly, fairly. And this fairness is not merely expected to exist but to appear to exist, as well. It is likewise true that, in the last analysis, service discipline must be just and appear to be just.”).

¹²⁰ See *supra* note 26.

¹²¹ Telephone Interview with Colonel (Ret.) Calvin L. Lewis, Associate Dean for Student Affairs and Diversity, Texas Tech University School of Law (Mar. 2, 2010) [hereinafter Lewis Interview]. For a more detailed biography of COL (Ret.) Lewis, see Professor Calvin Lewis: Professor Biographies, <http://www.law.ttu.edu/faculty/bios/Lewis/> (last visited 4 Oct. 2010).

experienced military counterparts.¹²² Additionally, many civilian defense counsel have a military-related background, which can be a huge advantage in that they are “in tune with the military system” and can “connect quickly with court members.”¹²³

Some may argue that despite certain benefits, the presence of civilian defense counsel actually detracts from the military justice system. For the purposes of this paper, however, the quality of a particular civilian defense counsel is not relevant. It is indisputable that numerous talented civilians properly represent their clients and do so to the great satisfaction of all parties involved in the case, most importantly the accused. When analyzing whether or not a command should have the right to abrogate a servicemember’s right to civilian defense counsel, the subjective ability of the chosen counsel cannot be a factor, as such cannot be adequately and objectively measured. Both the analysis of whether or not to abrogate the right to civilian defense counsel and a command’s choice to do so, if such were possible, must be made on the assumption that the retained civilian defense counsel would provide the accused with the best possible representation.

2. Appearance of Fairness

Sir William Slim, a British military officer who fought in both World Wars, stated:

The popular conception of a court martial is half a dozen bloodthirsty old Colonel Blimps, who take it for granted that anyone brought before them is guilty . . . and who at intervals chant in unison, “Maximum penalty – death!” In reality courts martial are almost invariably composed of nervous officers, feverishly consulting their manuals; so anxious to avoid a miscarriage of justice that they are, at times, ready to allow the accused any loophole of escape. Even if they do steel themselves to passing a sentence, they are quite prepared to find it quashed because they have forgotten to mark something “A” and attach it to the proceedings.¹²⁴

This quote shows that military justice systems are often misunderstood. It also demonstrates that a transparent and well-understood military justice system could be well-respected and admired. Some commentators indicate that

the American military justice system has achieved a respected status.¹²⁵ A servicemembers’ right to retain civilian defense counsel undoubtedly contributes to a proper understanding of the system.

Regardless of the actual effectiveness of civilian defense counsel, allowing servicemembers to retain civilian attorneys serves the vital role of increasing the perception that the military justice system is transparent and fair. Historically, military members have respected the system more because of their right to hire civilian defense counsel. The aforementioned 1972 Army War College survey demonstrates that respect for the military justice system is based in part on the ability to hire civilian defense counsel.¹²⁶ Despite the fact that almost eighty percent of the respondents expressed some degree of approval with both the military justice system and company grade JAs, fifty-eight percent of the respondents indicated that they would rather be represented by civilian counsel.¹²⁷ While part of this disparity could be attributed to a misunderstanding of a military defense counsel’s duty,¹²⁸ the authors believed that these disparities raised “serious issues of the perception of Judge Advocate trustworthiness. . . .”¹²⁹ The subsequent advent of independent trial defense services may have alleviated some misperception of defense counsel loyalty. Nonetheless, the fact that more experienced and higher-paid senior officers preferred civilian counsel, despite the general approval for the system, demonstrates how civilian defense counsel can improve the perception of fairness.

Civilian attorneys continue to play a similar role in improving the perception of military justice system in both the military and civilian communities.¹³⁰ For example, some servicemembers do not trust military defense counsel.¹³¹ Although military defense attorneys are now typically assigned to independent defense organizations,¹³² it is understandable that some accused may wish to hire an attorney not ultimately employed by the same sovereign attempting to convict them. Some servicemembers and civilians believe that trial defense attorneys are still

¹²² Lewis Interview, *supra* note 121.

¹²³ *Id.*

¹²⁴ ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS*, 72 (1966) (quoting FIELD-MARSHAL SIR WILLIAM SLIM, *UNOFFICIAL HISTORY* (1959)).

¹²⁵ See, e.g., Moorman, *supra* note 2, at 187 (2000) (“Thus, the last fifty years has seen orderly, incremental, and evolutionary changes, some quite significant, which have assured the validity of, and continued respect for, our system.”).

¹²⁶ See Tehnet & Clarke, *supra* note 74, at 41–50.

¹²⁷ *Id.*

¹²⁸ The survey indicated that over one-third of respondents either did not believe or were not sure whether military defense counsel were ethically bound to seek an acquittal for a guilty client. *Id.* at 48.

¹²⁹ *Id.* at 50.

¹³⁰ Lewis Interview, *supra* note 121.

¹³¹ *Id.*

¹³² For example, U.S. Army defense counsel are assigned to the U.S. Army Trial Defense Service, an independent organization headquartered in Arlington, Virginia. See U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-1(d)(11) (30 Sept. 1996).

somehow subject to the pressures of the command.¹³³ Because a military defense counsel's duties and independent rating chain are largely unknown to both the military and civilian communities, allowing civilian attorneys to participate in the process supports the concept and perception that the military justice system is fair and open.

Many servicemembers and civilians also believe that civilian attorneys are superior to their military counterparts.¹³⁴ To add to the perception of civilian defense counsel superiority, many civilian attorneys represent that servicemembers may benefit from hiring civilian counsel when compared to proceeding with detailed counsel alone.¹³⁵ Although the superiority of civilian defense counsel is debatable, the mere fact that an accused can hire who he believes will best represent him helps lends credibility to the military justice system.¹³⁶

Even though the presence of civilian defense counsel in the military justice system is beneficial, the unchecked requirement to produce retained civilian defense counsel to cases in deployed environments has the potential to undermine the military justice system's ability to handle certain cases. Examining the logistics of producing civilian defense counsel to Iraq and Afghanistan serves as a useful starting point to better understand the potential issues.

IV. Producing Civilian Defense Counsel to Iraq and Afghanistan

The mechanics of civilian defense counsel production are typically not memorialized in any operations order, fragmentary order, or other written guidance, and are subject to change based on operational considerations.¹³⁷ Commands are generally willing to assist in the production of a civilian defense counsel so long as he or she has a

legitimate reason to be present and the security situation allows it.¹³⁸ To prevent later confusion and unnecessary effort, most commands, investigating officers, and military judges require a civilian defense counsel to submit some form of written documentation of case acceptance and intent to travel into theater prior to assisting the civilian defense counsel.¹³⁹

The government must put forth significant effort to produce a civilian defense counsel to Iraq or Afghanistan.¹⁴⁰ The government's efforts typically must begin weeks in advance of the civilian defense counsel's flight to the theater entry-point of Kuwait.¹⁴¹ The government must first coordinate with the corps-level command, the theater-level command, and the U.S. Department of State to obtain the requisite country clearances and travel orders. This initial coordination typically takes one month to complete.¹⁴²

Once the civilian defense counsel arrives at Kuwait International Airport (KWI), the government assumes all logistical responsibility for the civilian defense counsel.¹⁴³ The government will arrange transportation from KWI to Ali Al-Salem Air Base, Kuwait.¹⁴⁴ The civilian attorney will then receive the required security briefings and protective equipment prior to the flight into Iraq or Afghanistan.¹⁴⁵ The length of a civilian defense counsel's stay in Kuwait, which is typically between forty-eight hours and one week, largely depends on weather and flight availability.¹⁴⁶

Once the civilian defense counsel arrives in theater, the servicing Office of the Staff Judge Advocate (OSJA) assumes the logistical responsibility for the civilian defense

¹³³ See Thorn Lawrence, P.L., Benefits of Civilian Counsel, available at <http://www.thornlawrence.com/Military-Law/Benefits-of-Civilian-Counsel.shtml> (last visited Jan. 13, 2010) ("In reality, one wonders whether all military attorneys who get a paycheck from Uncle Sam and function in an environment where they must be evaluated and promoted by others to survive truly have the ability and freedom to advance all arguments as far and as loudly as necessary to champion your cause and defend you in the most important case of your life.").

¹³⁴ Lewis Interview, *supra* note 121. This comment is also based on the author's professional experiences while serving in the United States Army from 18 May 1998 to present [hereinafter Professional Experiences].

¹³⁵ See, e.g., Gagne, Scherer & Langemo, LLC, Why You Need a Civilian Military Lawyer, available at <http://www.gslattorneys.com/civilian-military-lawyer.asp> (last visited Jan. 9, 2010) ("But in our experience, people who choose to hire a good civilian military attorney are generally far better off and have a much better shot than those who don't.").

¹³⁶ Lewis Interview, *supra* note 121.

¹³⁷ This comment is based on the author's professional experiences while serving as the Chief, Military Justice for 4th Infantry Division and Multi-National Baghdad from 27 November 2007 to 10 February 2009 [hereinafter Deployment Experiences].

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* For an account of the situation in Afghanistan, see Eric Hanson, *Know Your Ground: The Military Justice Terrain in Afghanistan*, ARMY LAW., Nov. 2009, at 36, 41-42.

¹⁴¹ Telephone Interview with Sergeant First Class Corey L. Brann, Operational Law Noncommissioned Officer in Charge (NCOIC), 4th Infantry Div. (Mechanized), Fort Carson, Colo. (Jan. 11, 2010) [Brann Telephone Interview]. Sergeant First Class Brann was the 4th Infantry Division (Mechanized) and Multi-National Division-Baghdad Military Justice Division NCOIC from 15 August 2008 through 10 February 2009. *Id.* A civilian defense counsel coordinates his or her own privately-funded travel arrangements into Kuwait. *Id.*

¹⁴² *Id.* Although it is possible to expedite the process with proper justification and prior coordination, the time saved during Operation Iraqi Freedom 07-09 was usually measured in terms of days, not weeks. *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Sandstorms, which ground most aircraft, are common in Kuwait, Iraq, and Afghanistan throughout much of the year. See, e.g., Muhanad Mohammed, *Sandstorm Blankets Iraq, Sends Hundreds to Hospital*, available at <http://www.reuters.com/article/idUSL5652707> (last visited Jan. 13, 2010).

counsel.¹⁴⁷ In addition to coordinating lodging and meals, the OSJA will coordinate with units to ensure that the civilian defense counsel is able to travel to where he or she needs to go.¹⁴⁸ If a civilian defense counsel needs to go off of a Forward Operating Base (FOB), the government must coordinate such travel with the unit responsible for that area.¹⁴⁹

It ordinarily takes over one month to satisfy all of the administrative, travel, and security prerequisites for producing civilian defense counsel into Iraq or Afghanistan.¹⁵⁰ This involved and time-consuming process can impact a case in a number of different ways.

V. Conflicts Between Military Operations and the Right to Civilian Defense Counsel

A. Prior Concerns

1. *The Vietnam War: Westmoreland and Prugh*

Because of the enactment of the UCMJ and the Military Justice Act of 1968, the Vietnam War was the first conflict in which an accused had a statutory right to civilian defense counsel in both general and special courts-martial.¹⁵¹ Westmoreland and Prugh believed that the military justice system at the time of the Vietnam War was not “combat tested.”¹⁵² They concluded that the military justice system used in Vietnam was “particularly inept” during contingency operations, as it is “too slow, too cumbersome, too uncertain, too indecisive, and lacking in the power to reinforce accomplishment of the military missions, to deter misconduct, or even to rehabilitate.”¹⁵³

Westmoreland and Prugh believed that a deployed servicemember’s unlimited right to civilian defense counsel of choice contributed to delays that made the system “slow” and “cumbersome,” and therefore ineffective.¹⁵⁴ When describing the military justice process in Vietnam, they explained, “Many commanders found the procedures less than satisfactory because of the difficulties in performing their operational tasks and at the same time meeting the time restrictions imposed by the military justice system.”¹⁵⁵ Westmoreland and Prugh stated that “knowledgeable

commanders” pointed to “[t]he extension of the right to counsel from the United States” as one of the reasons that certain worthy cases were not referred to court-martial.¹⁵⁶ Westmoreland and Prugh reasoned, “[a]n accused in a trial must be afforded competent counsel, but that does not require that the counsel be a civilian attorney transported halfway around the world in order to represent an accused in a foreign station during combat when competent military counsel is available at the trial forum.”¹⁵⁷

Because the military justice system has not significantly changed since Westmoreland and Prugh’s article, their observations are still valid despite the fact that they were made almost three decades ago. Their observations were not unique.

2. *Post-Vietnam War: Wartime Legislative Task Force*

In 1982, MG Hugh J. Clausen, The Judge Advocate General of the U.S. Army, feared that the military justice system “might not operate efficiently during major combat operations.”¹⁵⁸ In response, he created the Wartime Legislative Task Force (WALT) “to evaluate the military justice system and to make recommendations for improving its effectiveness in wartime.”¹⁵⁹ The WALT’s primary objective was “to ensure that the military justice system in an armed conflict would be able to function fairly and efficiently, without unduly burdening commanders, or unnecessarily utilizing resources.”¹⁶⁰

The WALT was particularly concerned with the increasing role that lawyers played in the military justice process.¹⁶¹ “Discipline in the armed forces has come to depend more and more on the actions of lawyers and the provision of legal advice, with a concomitant decline in the scope of commander’s disciplinary authority.”¹⁶² One of the specific areas that WALT addressed was the impact of a servicemembers right to civilian defense counsel.¹⁶³

As were Westmoreland and Prugh, WALT was primarily concerned with the delays that producing civilian defense counsel could cause. The WALT explained, “[d]elays are sometimes encountered because the accused has not made arrangements for representation, but expresses

¹⁴⁷ Brann Telephone Interview, *supra* note 141.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *supra* notes 26–28, 73 and accompanying text.

¹⁵² See Westmoreland & Prugh, *supra* note 65, at 53.

¹⁵³ *Id.* at 52–53.

¹⁵⁴ See *id.* at 53, 60.

¹⁵⁵ *Id.* at 60.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 83.

¹⁵⁸ Lieutenant Colonel E. A. Gates & Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 141 (1984).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Gates & Casida, *supra* note 158.

¹⁶² *Id.*

¹⁶³ *Id.* at 155–57.

a desire to do so, or the accused and his civilian counsel have not come to terms, or the civilian counsel is not available on the trial date.”¹⁶⁴ The WALT believed that the effects of these problems, while “common” and “manageable” during peacetime, are “substantially more adverse” during times of conflict.¹⁶⁵

B. Current Concerns

Interestingly, commentary discussing the potential impact of a servicemember’s right to civilian defense counsel largely ceased after the WALT report in 1984. One likely contributing factor is the small number of courts-martial tried in deployed settings between the end of the Vietnam War and the current conflicts in Iraq and Afghanistan.¹⁶⁶ The reintroduction of courts-martial in deployed settings has once again brought the issue to the forefront.

Even though the availability of commercial and military flights may have reduced the logistical challenges involved with producing civilian defense counsel in Iraq and Afghanistan, other unavoidable issues are still problems today. For example, the diversity of jurisdictions in which many civilian defense counsel practice can cause scheduling conflicts that result in delays to military cases. Whereas most military defense counsel are substantially engaged in military cases within a particular command or district, thereby reducing potential scheduling conflicts, civilian defense counsel often carry substantial case loads in other federal and civilian courts.¹⁶⁷

As a result, the overwhelming majority of cases that require bringing a civilian defense counsel into theater will involve a delay because of scheduling conflicts or administrative requirements.¹⁶⁸ For example, during

Operational Iraqi Freedom 07-09, the average delay in the U.S. Army’s 4th Infantry Division and Multi-National Division—Baghdad directly attributable to scheduling conflicts and administrative coordination was approximately two months.¹⁶⁹ These unavoidable delays, along with other difficulties resulting from producing civilian defense counsel into a war zone, must be examined when evaluating proposals to reduce a servicemember’s right to civilian defense counsel.

1. Operational Dangers

Aside from the resources that paralegals, attorneys, and units devote to bringing a civilian defense counsel into theater, the actual presence of the civilian defense counsel in a war zone can negatively impact a unit’s ability to carry out its mission.

First and foremost, the fact that a civilian defense counsel may have little to no military training could add additional strain to a unit charged with the mission of escorting and protecting him or her. Take, for example, the case of a civilian defense counsel with no prior military training or experience who must investigate an alleged crime scene in an unsecured and dangerous area of Baghdad. Whereas a military defense counsel would be armed and trained on his or her assigned weapon, a civilian defense counsel would not be armed at all. In addition, a military defense counsel would have received prior training in military operations, tactics, and terminology. This training would help the military defense counsel better understand how to implement unit drills and standard unit responses in the event of enemy contact. Despite an increased civilian presence on the battlefield,¹⁷⁰ introducing untrained civilian personnel to a battlefield could increase the risks to both the unit charged with his or her protection and also the civilian defense counsel.

Second, commentators overlook the possibility that a situation may arise where a convening authority does not want a civilian attorney present for operational or physical security reasons.¹⁷¹ Although this scenario may seem

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 155–56.

¹⁶⁶ Although some courts-martial were tried in Southwest Asia during Operation Desert Shield and Operation Desert Storm, the number pales in comparison to the number of cases tried during Operation Iraqi Freedom and Operation Enduring Freedom. For example, Army Forces Central Command, the theater-level command for Operation Desert Shield and Operation Desert Storm, “prosecuted only one court-martial during DESERT SHIELD and DESERT STORM.” BORCH, *supra* note 68, at 142. The U.S. Army’s 1st Armored Division conducted three general courts-martial and one special court-martial. *Id.* As a comparison, during Operation Iraqi Freedom 07-09, which lasted from 19 December 2007 through 10 February 2009, the U.S. Army’s 4th Infantry Division and Multi-National Division – Baghdad alone conducted fifteen general and special courts-martial. Deployment Experiences, *supra* note 137. As of 10 February 2009, there were at least three fully-functioning courtrooms in Iraq dedicated solely to trying American courts-martial. *Id.*

¹⁶⁷ For example, deployed U.S. Army defense counsel are stationed in theater with the deployed forces, and are primarily detailed to cases in that particular area. Deployment Experiences, *supra* note 137.

¹⁶⁸ It is important to note that delays based on scheduling conflicts and administrative coordination will not always result in an overall delay to case

resolution. For example, a civilian defense counsel may choose to demand speedy trial or advise a client to plead guilty, whereas the military counsel would have attempted to delay the case as much as possible. A civilian attorney may also be able to convince the government to dismiss charges based on evidentiary flaws when the detailed military attorney does not have the skill to do so. Professional Experiences, *supra* note 134.

¹⁶⁹ Deployment Experiences, *supra* note 138.

¹⁷⁰ See *Frontline: Private Warriors* (PBS television broadcast June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warrior/s/view/> [hereinafter *Private Warriors*].

¹⁷¹ Such operational and physical security reasons are not to be confused with the complications and challenges faced in cases containing classified evidence. These concerns refer to a commander’s belief that civilian counsel presence could compromise a mission or simply be too dangerous.

unlikely in Iraq and Afghanistan, where there are as many civilians present accompanying the force as there are servicemembers,¹⁷² a situation may arise where a convening authority wants to restrict an area to all military members.

2. Operational Dangers Example

Assume a servicemember at a remote FOB in Afghanistan is charged with larceny of a fellow servicemember's iPod. The accused, through email, retains civilian defense counsel. The FOB at which the accused is stationed and where the crime occurred is in a very dangerous, intelligence-sensitive area, but neither the unit's location nor any of the evidence is formally classified. The convening authority determines that she does not want any civilians present in this area for fear of their safety, as reliable intelligence indicates that enemy forces are looking to kidnap foreign civilians in order to seek ransoms from their employers. The convening authority is also concerned about the disruption to other missions that the civilian's presence would cause, as the civilian defense counsel would have to be escorted everywhere for physical and operational security reasons. The convening authority's resources are also stretched thin, as there is no way to augment the unit with additional personnel. A military defense counsel is available to represent the accused, and a military judge is available and has determined that the FOB has adequate facilities to try a court-martial.

Under the current military justice system, the convening authority would have to make a difficult choice. If the convening authority moved the court-martial to a larger FOB, the unit would be hamstrung in that the accused and all witnesses would have to leave the remote FOB, thereby sacrificing security and the ability to perform other missions.¹⁷³ If the convening authority chose to produce the civilian defense counsel to the unit location, the unit would be hamstrung in that the civilian defense counsel would present a security risk, as well as a strain on unit resources.

In this era of increased civilian presence on the battlefield,¹⁷⁴ some may argue that these operational security concerns are either misplaced or overstated. Civilian attorneys are routinely produced to Iraq and Afghanistan and return home safely.¹⁷⁵ Future conflicts, however, may have a different operational flavor. Regardless of how one weighs the likelihood of potential operational risks, a servicemember's right to civilian defense counsel has

created numerous challenges to the administration of justice in Iraq and Afghanistan.

3. Witness Availability

When combined with the current deployment rotations in Iraq and Afghanistan, the delays inherent in producing civilian defense counsel enables an accused to use his or her statutory right to civilian counsel of choice as a sword rather than a shield.¹⁷⁶ Because Army Soldiers often face the longest continuous deployment time,¹⁷⁷ using the Army as an illustration shows that no matter the length of deployment, civilian defense counsel-related delay has the potential to impact all military units.

Civilian defense counsel delay can impact all cases, including those in which only U.S. servicemembers are involved. Most U.S. Army Soldiers deploy to Iraq and Afghanistan for approximately twelve months.¹⁷⁸ Because of the newly-implemented modularity concept,¹⁷⁹ the deployment schedules of Brigade Combat Teams and other subordinate units within a court-martial convening authority are often staggered.¹⁸⁰ This provides a very small window of opportunity in which a GCMCA can try a court-martial without either extending the deployment of an accused, witnesses, and other parties to the court-martial.¹⁸¹

Aside from the unpleasantness of extending deployments, the ability of a convening authority to extend certain witnesses is not a given. While all active duty servicemembers and all servicemembers properly facing court-martial charges can be extended in theater with the appropriate command-level approval,¹⁸² involuntarily extending U.S. Army Reserve and U.S. Army National Guard Soldiers beyond the time period set forth in their

¹⁷² See, e.g., August Cole, *Afghanistan Contractors Outnumber Troops*, WALL ST. J., Aug. 22, 2009, at A6, available at <http://online.wsj.com/article/SB125089638739950599.html>.

¹⁷³ See Rosenblatt, *supra* note 10, at 16, 21–22 (explaining the challenges of trying courts-martial at small, remote forward operating bases).

¹⁷⁴ See *Private Warriors*, *supra* note 170.

¹⁷⁵ Deployment Experiences, *supra* note 138.

¹⁷⁶ UCMJ art. 38(b)(2) sets forth the statutory right to civilian counsel of choice. UCMJ art. 38(b)(2) (2008). See *supra* note 26–28 and accompanying text.

¹⁷⁷ Standard U.S. Army deployments to Operational Iraqi Freedom have lasted between twelve and fifteen months. See Jeff Schogol, *Gates "Counting-On" 12-Month Deployments for Army This Year*, STARS & STRIPES, Feb. 3, 2008, available at <http://www.stripes.com/article.asp?section=104&article=52169>.

¹⁷⁸ *Id.*

¹⁷⁹ For a synopsis of the modularity concept, see U.S. DEP'T OF ARMY, 2008 ARMY POSTURE STATEMENT add. G, http://www.army.mil/aps/08/addenda_g.html.

¹⁸⁰ Professional Experiences, *supra* note 134.

¹⁸¹ For a discussion of witness production issues in Iraq and Afghanistan, see Rosenblatt, *supra* note 10, at 17.

¹⁸² An involuntary deployment extension is commonly known as a "Boots on Ground (BOG) Extension." Deployment Experiences, *supra* note 137. These involuntary extensions are statutorily permissible and set forth in Army regulation; see UCMJ art. 2(c) (2008); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-4 (16 Nov. 2005).

orders may not be possible.¹⁸³ This wrinkle is especially problematic given the record number of National Guard servicemembers deployed to combat zones in their Title 10 status.¹⁸⁴

The witness availability problem is further complicated when the critical witnesses are local nationals. Local nationals in combat zones often do not have stable jobs or reliable contact information.¹⁸⁵ Many move frequently, often in search of a better security situation, education, or job.¹⁸⁶ If a military justice system is not efficient, local nationals, who may be the critical witnesses in a case or to a particular charge, may not be present or available when a particular hearing is scheduled. Because RCM 703(b)(1) provides an accused with a right to the in-person production of “any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary,”¹⁸⁷ the military justice system must be efficient in order to ensure that all witnesses are present for a particular case or hearing.¹⁸⁸

4. Witness Availability Example

Another hypothetical example will illustrate this dilemma. Assume that you are the division-level Chief of Military Justice for your GCMCA.¹⁸⁹ The accused, First Lieutenant (1LT) George I. Joe, a servicemember, was charged yesterday with two crimes that occurred on his FOB in Eastern Afghanistan. The unit arrived in theater just one month ago for a twelve-month deployment. The first charge is rape of another servicemember by digital penetration.¹⁹⁰ The purported rape victim is a member of the Army National

Guard. The second charge is for the armed robbery of a local national vendor who lives and works on the FOB.¹⁹¹ The alleged rape and armed robbery occurred on different days and are factually unrelated. Both witnesses appear credible, and both were able to identify an unmistakable physical characteristic unique to the accused. There is no other physical evidence to support either charge. First Lieutenant Joe’s company commander and the unit First Sergeant are witnesses to the rape charge in that they saw 1LT Joe exiting out of the purported victim’s trailer immediately after the alleged rape. The Article 32 hearing is scheduled for one week from today. First Lieutenant Joe has already been to TDS, and has been detailed military defense counsel. His military defense counsel has a relatively light caseload and is ready to devote his full time and energy to investigating this case and defending 1LT Joe.

The purported rape victim is scheduled to redeploy three weeks from today, and her 365-day active duty orders carry her on active duty for only two weeks after that. The purported rape victim is generally cooperative, but she is completely unwilling to support any course of action that requires her to stay any additional time in theater, regardless of the impact on the case. The robbery victim is also generally cooperative, but plans to move to a small village in Iran, approximately 100 miles away, in three weeks. He is willing to testify so long as it does not interfere with his pending move. He is not willing to come back to the FOB or to the United States under any circumstances, even if the United States is willing to pay for his travel and reimburse him for his efforts. He is sure that he will get fired from his new job if he were to miss the time required to travel. Furthermore, he lost only \$37, so traveling back to Afghanistan simply is not worth it to him.

As you open your email, you receive an email from Mr. John Doe, who recently emailed the Article 32 Investigating Officer and you with the following message:

I have been retained as 1LT George I. Joe’s civilian defense counsel pursuant to Article 38(b)(2), UCMJ. I am authorized to practice before The Supreme Court of the State of North Carolina, and am in good standing with no pending adverse actions. Pursuant to Article 38(b)(4), UCMJ, and RCM 405(d)(2)(C), 1LT Doe has excused his military defense counsel from this case and no longer desires his services. I am in receipt of the notice of the upcoming Article 32 hearing scheduled for one week from today. I hereby request a delay until a date at least four weeks from today’s date, as I have court dates in numerous courts every single day for the

¹⁸³ There is neither statutory nor regulatory authority to extend reserve servicemember deployments (including National Guard servicemembers) beyond 365 days; see 10 U.S.C. § 12,304 (2006).

¹⁸⁴ See, e.g., Molly Blancett, *Oregon Army National Guard Faces Record Deployment and Record Recruitment Numbers*, KVAL.COM, Feb. 27, 2009, <http://www.kval.com/news/local/40455487.html>.

¹⁸⁵ Deployment Experiences, *supra* note 138.

¹⁸⁶ *Id.*

¹⁸⁷ MCM, *supra* note 29, R.C.M. 703(b)(1).

¹⁸⁸ At first glance, depositions may seem to be a possible solution. According to Rule for Court Martial (RCM) 702, “A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the best interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation or under Article 32 or a court-martial.” *Id.* R.C.M. 702(a). Rule for Court-Martial 702(d)(2), however, gives the accused the complete right to counsel, including the right to representation by civilian defense counsel. *Id.* R.C.M. 702(d)(2). Accordingly, if an accused’s civilian defense counsel is reasonably unavailable, using a deposition to preserve testimony is a viable option only if the accused does not assert his right to the presence of civilian defense counsel.

¹⁸⁹ A chief of military justice typically oversees all prosecutions in a particular jurisdiction. Professional Experiences, *supra* note 134.

¹⁹⁰ See UCMJ art. 120 (2008).

¹⁹¹ *Id.* art. 122.

next three weeks, to include a contested murder trial in the third week. I am available on any date after the last trial date three weeks from today, but will need time to travel into Afghanistan. Attached are certified copies of the court dockets where my presence over the next three weeks is required. I do not anticipate any of those dates becoming available. I was also retained just this morning, and will need sufficient time to prepare for the upcoming Article 32 hearing. I will prepare for it at night after my cases conclude each day. I will provide a list of requested witnesses and evidence as required in the notification memorandum. My client does not consent to any depositions, written or oral. If granted, this delay request may be attributable to the defense for speedy trial purposes.¹⁹²

Given the relative seriousness of the charges and the reasons that the extra time is needed, Mr. Doe's delay requests are not unreasonable and likely should be granted.¹⁹³ The administrative prerequisites of producing a civilian defense counsel will likely take three weeks or more.¹⁹⁴ Furthermore, Mr. Doe's justification for the delay request is properly justified and documented.

In this hypothetical, the current military justice system gives the command no reasonable options with how to properly handle this case. Because Rule for Courts-Martial (RCM) 702(d)(2) gives the accused a right to counsel under RCM 502(d), and Mr. Doe is qualified under RCM 502(d)(3), a deposition cannot be used to secure the testimony of the witnesses who will soon be unavailable.¹⁹⁵ Because there is no subpoena power overseas, the United States would have to coordinate with Iran for the production of the robbery victim.¹⁹⁶

¹⁹² See *id.* art. 38(b)(4) ("If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused."); see MCM, *supra* note 29, R.C.M. 405(d)(2)(C) ("The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose.")

¹⁹³ See MCM, *supra* note 29, R.C.M. 405(d)(2)(C) ("The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to reasonable time to obtain civilian counsel and to have such counsel present for the investigation."); U.S. DEPT OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER para. 2-1(d) (16 Sept. 1990) ("Any reasonable request for delay by the accused should be granted.")

¹⁹⁴ See *supra* Part IV.

¹⁹⁵ See MCM, *supra* note 29, R.C.M. 502.

¹⁹⁶ See *id.* R.C.M. 703(e)(2)(A) discussion (2008) ("A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign

As a result, unless the government is able to make the necessary coordination with Iran, 1LT Joe's hiring of a civilian attorney will preclude a court-martial for the robbery charge. Additionally, the justified delay attributable to the hiring of civilian defense counsel will prevent the government from trying the rape case in theater, even though such would likely have been possible if the accused proceeded with only military defense counsel.¹⁹⁷ Although the rape case could be tried in the United States, taking the commander and first sergeant, who are critical witnesses in the case, away from their unit to travel to the United States to testify in person would likely degrade the unit's operational readiness.¹⁹⁸

VI. Options to Address These Potential Conflicts

A. Status Quo: No Change

As is the case with any problem, it is wise to first analyze the benefits and drawbacks of not fixing the problem at all. Change is not beneficial if its results are worse than the initial problem, as the presence of civilian defense counsel benefits both the servicemember and command in several ways.¹⁹⁹

The substantial drawbacks of the current system, however, are illustrated in the examples above.²⁰⁰ An accused can now use the right to civilian defense counsel of choice offensively rather than defensively. In certain cases, the unavoidable delays caused by civilian defense counsel scheduling conflicts and production delays can undermine an entire court-martial case.²⁰¹ At a minimum, the mere requirements involved with producing civilian defense counsel could give an accused an increased negotiating stature.

Such drawbacks are unintended consequences of Article 38(b)(2),²⁰² and serve to undermine the military justice system's ability to assist the command in protecting the United States. Accordingly, it is necessary to analyze

nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.")

¹⁹⁷ For example, the convening authority could have ordered depositions for witnesses who would likely be unavailable. See *id.* R.C.M. 702.

¹⁹⁸ All parties at a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (2008). Rule for Courts-Martial 703(a) implements Article 46. See MCM *supra* note 29, R.C.M. 703(a). Rule for Court-Martial 703(b) disallows testimony "via remote means," such as video teleconference, over defense objection. See *id.* R.C.M. 703(b).

¹⁹⁹ See *supra* Part III.C.

²⁰⁰ See *supra* Parts V.B.1 & V.B.2.

²⁰¹ See *supra* Part V.B.2.

²⁰² See *supra* Part II.B.2.

proposed changes.²⁰³ Because these changes would serve as the ammunition to attack these civilian defense counsel-related problems, we must critically examine all of their intended and unintended effects.

B. Westmoreland and Prugh Plan

Westmoreland and Prugh proposed the enactment of “a special codal provision which would take effect only in time of war or military exigency” as a way of “dealing with the inadequacies of the Code in its wartime or military stress operation.”²⁰⁴ Westmoreland and Prugh proposed UCMJ changes that would be enacted “[i]n a time of war or other military exigency,” including declared wars and almost any Presidential commitment of troops.²⁰⁵

The proposed statutory changes involving a servicemember’s right to civilian counsel begin at Article 32(b), UCMJ.²⁰⁶ Their proposal reads:

§ 832(b) is amended to provide that the investigating officer, by making an appropriate finding on the record, may rule that due to the war or military exigency appearance by civilian counsel under the circumstances is unreasonable and would interfere with the due administration of justice. The accused may, however, be accorded civilian counsel if one is available from the locality in which the investigation is being held.²⁰⁷

They also propose modifying Article 38(b),²⁰⁸ UCMJ, to read, “§ 838(b) is amended to conform to § 832(b) as to civilian counsel of general and special courts-martial.”²⁰⁹

Interestingly, this proposed change would give an Article 32 investigating officer, not a commander or convening authority, the power and responsibility to make the determination whether or not the military exigency precludes the government’s requirement to produce civilian defense counsel.²¹⁰ The proposal is silent as to if or how the

Article 32 investigating officer’s determination would be reviewed.

The main benefit to this system is the increased efficiency with which the military justice system would operate. The second benefit is that a servicemember could possibly retain the right to civilian defense counsel so long as the government doesn’t have the production burden. The second sentence of their proposal gives the Article 32 officer the ability to grant a servicemember the right to civilian counsel “if one is available from the locality in which the investigation is being held.”²¹¹ Accordingly, if a civilian defense counsel was able to make it to the deployed location without the assistance of the U.S. government, the Article 32 officer would have a way to allow his or her presence.

Despite a likely increase in efficiency, this paradigm has fundamental legal, practical, and logical flaws that make it inadvisable. First and foremost, the proposal is overbroad and lacks clarity. In spite of Westmoreland and Prugh’s caveat that their proposed statute is a “layout,” and “is not as specific as the ultimate legislation might be,”²¹² the complete lack of implementing guidance makes the proposal hard to evaluate.²¹³ Take the proposed change to Article 38(b);²¹⁴ the plain reading indicates that the Article 32 investigating officer’s determination, if appropriate, would be binding on the remainder of the proceeding.²¹⁵ Such would be nonsensical, as the operational environment could change between the pretrial investigation and the time of trial, making the presence of civilian defense counsel, where previously unreasonable, reasonable and prudent.²¹⁶

Second, vesting the power in each individual Article 32 investigating officer, rather than a commander or convening authority, could lead to illogical inconsistent rulings. Assume two servicemembers from different companies in the same battalion commit aggravated assaults on the same day by pointing their loaded rifles at their first sergeants. Both accused are charged on the same day, and both have Article 32 hearings scheduled one week from today. Two separate Article 32 investigating officers are appointed. The accused hire the same civilian defense counsel. Under the Westmoreland and Prugh plan, the Article 32 investigating officers could easily come to different conclusions about the reasonableness of producing civilian defense counsel. Even

²⁰³ A chart comparing the details of each proposal is located at Appendix A.

²⁰⁴ Westmoreland & Prugh, *supra* note 65, at 88.

²⁰⁵ *Id.*

²⁰⁶ Article 32 provides a servicemember the right to a “thorough and impartial investigation” prior to any case being referred to a general court-martial. UCMJ art. 32(a) (2008).

²⁰⁷ Westmoreland & Prugh, *supra* note 65, at 88–89.

²⁰⁸ UCMJ art. 38(b) sets forth an accused’s right to civilian defense counsel. UCMJ art. 38(b). *See* authorities cited *supra* notes 26 & 192.

²⁰⁹ Westmoreland & Prugh, *supra* note 65, at 88–89.

²¹⁰ *See id.*

²¹¹ *Id.* at 89.

²¹² *Id.* at 88.

²¹³ Westmoreland and Prugh assert that nothing in their proposed statute “is intended to alter in any way the substantive rights of an accused.” *Id.* Their proposal, however, does exactly that by essentially eliminating the right.

²¹⁴ *See supra* note 209 and accompanying text.

²¹⁵ *Id.*

²¹⁶ For example, the security situation in Baghdad improved markedly during the Summer 2008. *See, e.g.,* Bernhard Zand, *Optimism Grows in Iraq as Daily Life Improves*, SPIEGEL ONLINE INT’L, July 2, 2008, <http://www.spiegel.de/international/world/0,1518,563471,00.html>.

if the differences were legally permissible, these differing conclusions could discredit the validity of the military justice system in the eyes of both servicemembers and civilians.

Third, Article 32 investigating officers (IO) may not be qualified to make an educated determination based on the operational criteria set forth in the proposed statute. Nothing in the UCMJ or RCM requires an Article 32 IO to have any operational experience, training, or knowledge.²¹⁷ An Article 32 IO's role is to assist the commander rather than to make binding decisions.²¹⁸ Furthermore, the Article 32 IO's legal advisor will likely be a company grade JA with very little operational training and background. Decisions involving operational considerations are best made by commanders and convening authorities, as they best understand the operational situation. An uninformed decision to disallow civilian defense counsel could undermine the actual fairness of the trial itself, as well as the perception that the system is fair to the accused. Conversely, an uninformed decision to allow civilian defense counsel could harm the commander's ability to accomplish her mission.

Although Westmoreland and Prugh ably identify the theoretical and practical problems that an unchecked right to civilian defense counsel in a deployed environment could cause,²¹⁹ their overbroad proposal does not adequately solve the problem. In instances where an established individual right is curtailed in favor of the broader policy goal of a more efficient and effective military justice system, only the convening authority, who is the most qualified to assess the operational situation, should be given the power to abrogate that right.

In kinetic operations, commanders and trained leaders are charged with determining whether there is a military necessity to strike a particular target.²²⁰ It would be unwise to give an untrained officer the power to determine whether or not it is proper to strike a particular target. The same principle should be applied when deciding who should have the power to abrogate a deployed servicemember's right to civilian defense counsel. The convening authority is the properly trained and responsible official. An Article 32 officer is like a staff officer in that he or she should remain an advisor, not a decision maker. An untrained and uninformed Article 32 officer would not have the proper perspective to determine whether the necessity exists to eliminate this critical individual right.

²¹⁷ See MCM *supra* note 29, R.C.M. 405(d)(1) discussion (2008).

²¹⁸ See UCMJ art. 32(b); MCM, *supra* note 29, R.C.M. 405(d)(1).

²¹⁹ See *supra* Part V.A.

²²⁰ The law of war principle of military necessity "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3a (July 1956) [hereinafter FM 27-10].

C. Service Secretary Plan

The WALT set forth two separate proposals to limit a servicemember's right to civilian defense counsel. These proposals were designed to balance "the need to recognize the legitimate military considerations with the desire to impinge on accuseds' rights only when clearly necessary."²²¹ The first proposal was to "preclude civilian representation in specifically defined hostile fire areas."²²² Because WALT conducted a survey that proposed vesting the service secretaries with the power to preclude civilian representation in specific areas,²²³ this plan is hereinafter the "Service Secretary Plan."

The WALT survey asked a simple question which received overwhelming support from the active and retired senior military leaders who responded. The question read, "Should the service secretaries or some other authority be allowed to suspend the right to civilian counsel in areas of hostility?"²²⁴ The respondents, consisting of active and retired general officers from all branches, JAs, commanders, and staff officers, supported this proposition more than any of the thirty-six other questions that dealt with all aspects of the military justice system.²²⁵

Despite the overwhelming support for this proposal, WALT did not recommend it, and The Judge Advocate General did not approve it.²²⁶ The WALT correctly identified the potential overbroad application of such a provision. Despite the operational or efficiency problems that producing civilian counsel may cause, "if absolute geographical limitations concerning retention of counsel are established, the accused might be denied representation by counsel who is readily available."²²⁷

Changes to the military command structure subsequent to WALT have also created a logical flaw to this concept of vesting any deployment-related power with the respective service secretaries. Under the Goldwater-Nichols Defense Reorganization Act of 1986, the service secretaries were explicitly excluded from the chain of command of deployed servicemembers.²²⁸ Deployed servicemembers are now "subject to the authority, direction, and control of the Secretary of Defense and subject to the authority of

²²¹ Gates & Casida, *supra* note 158, at 156.

²²² *Id.*

²²³ *Id.* app. A, at 139.

²²⁴ *Id.*

²²⁵ Out of 259 respondents, 240 supported this proposal, while only nineteen objected. *Id.*

²²⁶ *Id.* at 155-57.

²²⁷ *Id.* at 156.

²²⁸ See Goldwater-Nichols Defense Reorganization Act of 1986, 10 U.S.C. § 165 (2006).

commanders of combatant commands.”²²⁹ Accordingly, if this proposal were implemented, a more logical choice for who may abrogate the right would be the respective combatant commanders.²³⁰

Two additional problems make this plan overbroad. First, the security situation in a particular geographical area can change dramatically in a short time period. For example, the security situation in Baghdad, Iraq improved dramatically between April 2008 and September 2008.²³¹ An accurate, geography-based preclusion rule would require almost daily analysis at the highest command levels, which is neither practical nor feasible.

Second, geography-based restrictions could tempt the government to abuse the system in a misguided effort to secure quicker case resolution. This abuse could occur in a variety of ways. For example, a convening authority might improperly factor the area in which civilian attorneys are precluded in his analysis when exercising his RCM 504(e) venue selection authority.²³² Such a rule would also tempt some commanders facing impending deployment to an area in which civilian counsel are not permitted to not promptly dispose of certain cases. In contrast, commanders would be tempted to extend the deployments of accused servicemembers and witnesses in cases arising contemporaneously with redeployment, even if the case could easily and properly be tried in the United States.

Using an operational law analogy, this plan is indiscriminate and disproportionate.²³³ Fire-bombing or carpet-bombing a city violates the law of war because it is indiscriminate.²³⁴ Abrogating a servicemember’s right to

civilian defense counsel in a particular area is like the carpet-bombing of that right in that particular area. Even if there is a valid military purpose for abrogating the right, doing so in this manner is arguably disproportionate to the resulting gain to the government.²³⁵

Despite this plan’s simplicity and appeal, it would have negative unintended consequences that could be worse than the problem that the current system creates. As a result, the Service Secretary Plan is too overbroad and should not be implemented.

D. The WALT Plan

The WALT Plan proposed and recommended a second plan that is case-specific and more appropriate for today’s environment. The WALT correctly recognized that the biggest hurdles to civilian defense counsel representation in a combat zone are the inherent delays involved with producing them into theater.²³⁶ This second WALT proposal, hereinafter the “WALT Plan,” is designed to protect the right to civilian defense counsel as much as possible while still providing the command and military justice system a method to prevent delays.²³⁷

The WALT Plan proposes a loose timeline that would require an accused to request civilian defense counsel “early in the case.”²³⁸ This request would be made to the convening authority. The convening authority must then decide “whether, under the attendant conditions, it would be possible for the civilian defense counsel to appear, whether processing the request or the subsequent appearance of counsel would delay trial, and if so, whether other factors would preclude on [sic] otherwise reasonable delay.” An accused could appeal a convening authority’s decision to deny civilian defense counsel to the military judge, who must apply a “clear abuse of discretion” standard of review. If an accused fails to make a pretrial request, presumably prior to referral, the military judge could either determine that the request is “untimely,” or “if appropriate, consider the merits of the request himself.” Regardless of a decision to deny civilian defense counsel, a civilian counsel would not be excluded if he was “present at the trial and ready to proceed.”²³⁹

This plan has numerous strengths. First, it is case-specific. The unique factors of each case control the

²²⁹ *Id.*

²³⁰ See Bonney, *supra* note 83, at 85–86 (“We should allow either the President, acting as the Commander in Chief, or his designated senior Theatre Commander, to make a firm decision governing the entrance of civilian counsel entering the combat zone to represent an accused.”). Similar to the Service Secretary Plan, Bonney supported theater-wide exclusion of civilian defense counsel. See *id.* at abstract. Because Bonney’s proposal is nearly identical to the Service Secretary Plan except for the approval authority, it is not separately addressed.

²³¹ See *supra* note 216 and accompanying text.

²³² See MCM, *supra* note 29, R.C.M. 504(e).

²³³ The law of war principle of discrimination states, “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol 1) art. 48, June 8, 1977, 3 U.N.T.S. 1125. The law of war principle of proportionality states that “[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” *Id.* art. 51(5)(b).

²³⁴ See *id.* art. 51(5)(b) (stating that indiscriminate attacks include “those which employ a method or means of combat which cannot be directed at a specific military objective”).

²³⁵ The collateral damage would be the harm to the specific case and to the military justice system as a whole. For concise discussion on proportionality, see *id.*; FM 27-10, *supra* note 220, para. 41.

²³⁶ See *supra* Part IV.

²³⁷ See Gates & Casida, *supra* note 158, at 155–57.

²³⁸ *Id.* at 156.

²³⁹ *Id.*

decision as opposed to overbroad, geographically-based limitations. Second, if the initial request is made to the convening authority, the person most in tune with the operational situation and whom the military justice system is designed to support will be making the decision on the appropriateness of civilian defense counsel. Third, this plan has a proposed system of review to protect against an improper or arbitrary denial of civilian defense counsel. Fourth, this plan never completely closes the door on civilian defense counsel representation. An accused could produce civilian defense counsel, which would nullify any previous denial. It also appears that a civilian defense counsel would be allowed to participate if he or she arrived partway through a hearing, which would avoid the unjustifiable situation of denying civilian defense counsel representation when the civilian defense counsel is present and willing to proceed.

This plan also has several drawbacks and unanswered questions. Above all, the system of initial review, which allows a military judge to review a convening authority's decision, has a practical flaw, as the unclear standards of review would create an unintended forum choice for the accused. Whereas the plan states that the military judge would review the convening authority's decision "only for clear abuse of discretion," it also gives the military judge the power to be the first to "consider the merits" of untimely, yet "appropriate," requests for civilian defense counsel.²⁴⁰

Consequently, if an accused has good reason to believe that the convening authority will deny the request for civilian defense counsel, several practical reasons indicate that the accused would almost always be better served to submit an untimely request directly to the military judge. First, the military judge would not be bound by the "clear abuse of discretion" review standard.²⁴¹ Second, since the military judge's decision would likely be reviewable under Article 66, UCMJ, the military judge may be more likely to err on the side of the accused to prevent appellate scrutiny.²⁴² Third, the convening authority may still have to testify, at either government or defense request, to explain

²⁴⁰ *Id.*

²⁴¹ The WALT plan does not discuss appellate review under Article 66, UCMJ. See UCMJ art. 66 (2008). Assuming that the standard of review would be the same regardless of who denied civilian counsel, making a request for civilian counsel directly to the military judge could benefit the accused in that the appellate court, rather than the military judge, would be performing the first review of the decision. Furthermore, unless a military judge based his or her decision on specific representations from the convening authority, the appellate court might be less willing to give deference to a military judge's opinions of the operational situation.

²⁴² For example, a military judge is highly unlikely to not consider the request simply because it was "untimely." Professional Experiences, *supra* note 134. Article 66 sets forth the basic rules for appellate court review. See UCMJ art. 66 (2008). Even assuming that the government could seek an interlocutory appeal, such an appeal would usually be unwise, as the time it would take secure the appellate decision would cut against the exact reason why civilian counsel was denied in the first place. See *id.* art. 62 for the rules regarding government interlocutory appeals.

why the operational situation does or does not allow for the presence of civilian defense counsel.²⁴³ Regardless, since operational considerations are typically classified, inserting judicial proceedings in this process could create a classified case. Accordingly, this plan, which is designed to take away the defense's current Article 38 "sword," could unintentionally give the accused the "machete" of an automatic classified case.

The second potential flaw is more theoretical. Because both the military judge and convening authority are charged with upholding the purposes of military justice,²⁴⁴ giving an independent military judge, rather than the convening authority, the power to limit an accused's right to civilian defense counsel is understandable. Nonetheless, the military judge will not have the operational training and experience of a convening authority. Commanders base most operational decisions on training, experience, and gut instinct.²⁴⁵ Because the WALT standard includes the critical variable of "attendant conditions,"²⁴⁶ which are not defined, but presumably include operational considerations, the military judge is not as qualified as a convening authority to perform such an analysis.

Trained commanders responsible for using the military justice system can make the most informed decision as to whether a military necessity exists to eliminate the right.²⁴⁷ Using an operational analogy, the WALT Plan is similar to giving a trial counsel, rather than the commander, authority to be the final arbiter on whether a particular artillery strike is necessary. Giving a JA such authority is not impermissible, but most would agree that a JA's training and purpose do not warrant such a role.

E. A New Proposal: Precision-Targeted Abrogation

1. *Reasons for a New Proposal*

A new proposal is necessary because the aforementioned proposals fail to adequately address the problems they attempt to solve. The proposed solutions would create additional problems because they may unnecessarily or indiscriminately eliminate a valuable individual right. A new proposal, entitled "Precision-Targeted Abrogation," seeks to surgically target a deployed servicemember's right to civilian defense counsel only when

²⁴³ See MCM, *supra* note 29, R.C.M. 703(b)(1) ("Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.")

²⁴⁴ See *supra* note 67 and accompanying text.

²⁴⁵ See U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE paras. 6-9 & 6-10 (12 Oct. 2006).

²⁴⁶ See *supra* note 240 and accompanying text.

²⁴⁷ See *supra* note 220 and accompanying text.

no viable alternative is present.²⁴⁸ Precision-Targeted Abrogation attempts to limit incidental damage to the military justice system by effectively balancing a servicemember's right to civilian defense counsel with the military justice system's interests in being efficient, accurate, and fair.

2. Under What Circumstances the Right Should Be Abrogated

Eliminating an accused's rights under Article 38(b)(2), would be allowed only on a case-by-case basis for non-capital cases where the misconduct occurred in a deployed area.²⁴⁹ Abrogation would require a specific, written finding that there is clear and convincing evidence that either: (1) an Article 32 investigation or court-martial proceeding could properly occur during an operational deployment, but would likely never occur during that operational deployment, solely because of the delay an accused's assertion of his or her Article 38(b)(2) rights would cause; or (2) complying with an accused's Article 38(b)(2) rights creates a reasonably foreseeable risk of death or grievous bodily harm to any person.

3. Who May Abrogate the Right?

Similar to the WALT Plan, Precision-Targeted Abrogation would vest the abrogation authority in a court-martial convening authority.²⁵⁰ Under Precision-Targeted Abrogation, the authority would be withheld to a GCMCA within the chain of command of an accused deployed in support of a declared war or contingency operation.²⁵¹

²⁴⁸ Draft statutory language for Precision-Targeted Abrogation is located at Appendix B. A flow chart diagramming the process is located at Appendix C.

²⁴⁹ Because of the severe and final nature of the death penalty, capital cases involve numerous additional due process steps and individual protections. See, e.g., MCM *supra* note 29, R.C.M. 501(a) (requiring panels of at least twelve members for capital cases); *id.* R.C.M. 1004 (describing sentencing rules in capital cases); *id.* R.C.M. 1204(c)(2) (describing specific post-trial processing procedures for capital cases). For a good summary of the relevant statutory and case law related to capital cases, see *id.* R.C.M. 1004 analysis, at A21-74 through A21-79.

²⁵⁰ For a discussion of the WALT Plan, see *supra* Part VI.D. Precision-Targeted Abrogation proposes withholding the power to abrogate an accused's right to civilian counsel to a general court-martial convening authority. See *infra* Part VI.E.2.

²⁵¹ The WALT Plan does not propose withholding authority to the general court-martial convening authority (GCMCA). See Gates & Casida, *supra* note 158, at 155-57 (1984). Although the first general officer in a servicemember's chain of command is typically the GCMCA that handles a particular case, Article 22 lists numerous other superior commanders who may convene a general court-martial. See UCMJ art. 22 (2008). Under Precision-Targeted Abrogation, those superior GCMCAs would have abrogation authority, even though not deployed in support of a declared war or contingency operation. A contingency operation is generally one that is "designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions,

There are two main reasons why this power should rest with a GCMCA and not a subordinate commander or official. First, a GCMCA is the only officer truly qualified and positioned to accurately evaluate the operational situation within his entire command, as well as how the introduction of civilian defense counsel could impact his ability to carry out his mission. If the decision to abrogate a servicemember's right to civilian defense counsel is based on operational concerns, a military judge or other officer who does not have operational control of the unit or the responsibility to ensure mission accomplishment should not be given the power to potentially undermine the mission by requiring production.

Second, if the abrogation is based on an inability to prosecute the case because of unavoidable delay caused when an accused exercises his or her Article 38(b)(2) rights, only the GCMCA can properly evaluate how a delay might impact the ability to process a case. The GCMCA is ultimately responsible to ensure fairness throughout the entire process.²⁵²

One may argue that a military judge or subordinate convening authority could make the decision to abrogate the servicemember's right to counsel. While both options would be legally permissible, neither is advisable. For one, a military judge has no control over a case until it is referred to a special or general court-martial.²⁵³ Because an accused has a right to civilian defense counsel representation at an Article 32 hearing, delays caused by civilian defense counsel production may have consequences that could unfairly prevent the case from ever being referred.²⁵⁴ Second, such a critical decision impacting individual rights should be withheld from field-grade commanders. General officers are typically more experienced with the military justice system than subordinate commanders. They also have an experienced field-grade JA on their staffs, which is not always the case at lower-level units.²⁵⁵

4. GCMCA-Level Procedural and Due Process Requirements

Unlike the WALT Plan, which calls for an accused to "make a timely and detailed request for civilian counsel to

operations, or hostilities against an enemy of the United States or against an opposing military force." 10 U.S.C. § 101(a)(13)(A) (2006).

²⁵² For example, a GCMCA or the staff judge advocate must review allegations of legal error set forth in post-trial submissions, which occurs after a military judge has lost authority over a case by authenticating the record of trial. See MCM, *supra* note 29, R.C.M. 1106(d)(4).

²⁵³ See MCM *supra* note 29, R.C.M. 406 & 503.

²⁵⁴ See *supra* Part V.B.

²⁵⁵ See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-1(d)(11) (30 Sept. 1996).

the convening authority,”²⁵⁶ an accused has no burden to preserve his Article 38(b)(2) rights under Precision-Targeted Abrogation. The default under Precision-Targeted Abrogation is that a servicemember’s Article 38(b)(2) rights remain intact. Furthermore, prior to a servicemember’s Article 38(b)(2) rights, a GCMCA must follow specific procedural steps designed to provide a servicemember the due process necessary to ensure that the GCMCA’s decision is as fully informed as possible.²⁵⁷

When a GCMCA determines that abrogation is necessary, he or she must first notify the accused and military judge (if applicable) in writing of her intent to abrogate the accused’s right to civilian defense counsel under Article 38(b)(2), UCMJ.²⁵⁸ The abrogation notice to the accused must contain: (1) the detailed reasons that justify abrogation; and (2) the time period for which the abrogation applies.²⁵⁹ The GCMCA must ensure that the accused is detailed a military defense counsel. The accused and defense counsel shall be permitted to immediately review any documentation supporting the abrogation decision.²⁶⁰ An abrogation notice would serve as an automatic stay of any scheduled hearing or proceedings. The delay would be excluded from speedy trial calculations.²⁶¹

The accused would be provided 48 hours from receipt of the notice of abrogation, or detailing of military defense counsel, whichever is later, to submit privileged written matters to the GCMCA in response to the abrogation notice.²⁶² The accused would also be provided with the right to a face-to-face meeting with the GCMCA and servicing SJA, in person or via video teleconference, within forty-eight hours of the abrogation notice. The accused’s detailed counsel may attend the meeting and present evidence or argument.

²⁵⁶ Gates & Casida, *supra* note 158, at 156.

²⁵⁷ See Appendix C for a flow-chart diagram of the process.

²⁵⁸ Such a notice would be entitled “Notice of Intent to Abrogate Rights Under Article 38(b)(2), UCMJ,” otherwise known as the “Abrogation Notice.”

²⁵⁹ Abrogating a right for an indefinite time period would be permissible, but subject to periodic review. *See infra* Part VI.E.5.

²⁶⁰ If the documentation is classified, the command should grant temporary security clearances when possible. If the GCMCA determines that showing the accused or detailed defense counsel the documentation would present a security threat, the accused or detailed defense counsel will not be permitted to inspect the documentation. Any decision to deny inspection is reviewable during the initial review process. *See infra* Part VI.E.5.

²⁶¹ Absent excused delay, the government must arraign an accused within 120 days from referral of charges or imposition of pretrial confinement. *See MCM supra* note 29, R.C.M. 707.

²⁶² These written matters would be privileged under MRE 410, as an accused may wish to present incriminating or embarrassing information in order to prevent the GCMCA from ordering abrogation. *See id.* MIL R. EVID. 410 for a list of privileged pretrial discussions and statements.

After considering any matters that the accused submits, the GCMCA would again weigh the operational situation and case status. If the GCMCA believes that abrogation is necessary, the GCMCA must immediately notify the accused, detailed defense counsel, military judge (if applicable), and first O-10 in the chain of command in the form of an abrogation order. This order must set forth the specific law on which the abrogation is based and the facts and evidence that support the abrogation.²⁶³ It must also specifically address any evidence and matters that the accused submits.

Such procedures would be burdensome, yet appropriate. First, the procedures would give an accused procedural due process to ensure that the GCMCA and reviewing officials have all available evidence, to include the accused’s point of view. An accused would have the right to submit privileged matters in writing and in person. This could give the case a “face” rather than just a name, which could benefit the accused.²⁶⁴ Second, the procedures help to mitigate any argument that servicemembers rights are summarily disregarded in a deployed environment. Third, the procedures assist in preventing fraud, corruption, and bad faith in the process by requiring detailed justifications for all decisions. Lastly, the procedures preserve the record for additional review.

5. System of Initial Review

To prevent abuse and ensure fairness, any abrogation of a well-established right should include an immediate and substantial initial review. Under Precision-Targeted Abrogation, this review would be performed by the first officer in the pay grade of O-10 in the accused’s chain of command, who would be known as the reviewing official (RO). If the GCMCA is an O-10, the RO would be the next senior official in the chain of command.²⁶⁵

The RO must personally review the abrogation order as expeditiously as possible. The RO may seek advice and assistance from his staff, but the responsibility to review the abrogation order is not delegable. The RO must review the decision on a *de novo* basis, granting absolutely no deference to the subordinate commander’s decision. Although the review may be based solely on the evidence

²⁶³ If the rationale is based on classified evidence, the GCMCA should seek to either: (1) declassify it; (2) ensure that the defense counsel and accused possess the requisite security clearances; or (3) submit an unredacted version to the reviewing official and a redacted version to the accused and detailed defense counsel.

²⁶⁴ Many GCMCAs never see an accused’s face, either in person or in a photograph. Professional Experiences, *supra* note 134.

²⁶⁵ There would be no review mechanism in the extremely rare event that the President of the United States convened the court-martial. Article 22(a)(1) gives the President the power to convene courts-martial. UCMJ art. 22(a)(1) (2008).

contained in the file, the RO is encouraged to conduct additional investigation as necessary. The accused has no right to present additional evidence to the RO, but the RO may consider anything an accused submits.

The RO must notify the accused, detailed defense counsel, servicing GCMCA, and military judge (if applicable) of his or her decision within 120 hours of the GCMCA signing the abrogation order. A failure to uphold the abrogation within 5 days will automatically vacate the abrogation order.

Requiring a personal, de novo review by an O-10 or above ensures proper application of the system in two main ways. First, it requires a more experienced commander who possesses the requisite tactical training, operational knowledge, and national policy visibility to agree with the GCMCA's assessment. Second, it forces the GCMCA who orders abrogation to properly justify and believe in the propriety of the decision, as he will not want to look poor by presenting a weak case to a supervising commander.

6. *Periodic Review, Appellate Review, and Other Considerations*

Both the servicing GCMCA and reviewing official must independently review the propriety of each abrogation order at least once every fourteen days. Each must forward his or her opinion to the accused, detailed defense counsel, and military judge (if applicable). A failure to conduct this periodic review serves to immediately terminate the abrogation order. Article 38(b)(2) rights should be immediately restored whenever either the abrogation standard is not met or servicing GCMCA or RO believes such is warranted.

The decision to abrogate would not be reviewable by the military judge. Furthermore, appellate courts could overturn a case based on improper abrogation only in cases where credible evidence exists of: (1) any form of unlawful command influence, or (2) both the GCMCA and reviewing official violated Article 98, UCMJ, Knowingly and Intentionally Failing to Enforce or Comply With Provisions of the Code.²⁶⁶ Because abrogating a servicemember's right is appropriate only when a commander makes an educated and informed factual decision about mission or case completion, traditional judicial review is unnecessary and inappropriate. In other words, abrogation is completely based on a factual, rather than legal, determination. Since senior commanders are the officers with the proper training

²⁶⁶ The elements of UCMJ art. 98 (2008) are found at MCM, *supra* note 29, pt. IV, ¶ 22b(2). This offense is "designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before during, and after trial." *Id.* ¶ 22c(2). Limiting review to these instances will help prevent abuses of the system, as well as correct any that do occur, while also preventing appellate judges from second-guessing the operational-based decisions of the GCMCA and RO.

and best access to critical information, injecting military judges into the decision process is unnecessary and unwise.

7. *Drawbacks*

This Precision-Targeted Abrogation plan contains two drawbacks that are immediately apparent. First, if an abrogation decision is based on classified information, and the accused or defense counsel are not permitted to view the information due to an insufficient security clearance or a security risk, the abrogation decision would be made on evidence to which the accused would be unable to respond. Even if such seems to smack in the face of traditional due process notions, one must remember that the Article 38(b)(2) right to civilian defense counsel of choice is facially statutory, not constitutional.²⁶⁷ The abrogation decision would have nothing to do with the merits of the actual case. So long as the accused is properly represented by detailed military defense counsel, his or her constitutional right to a fair trial is protected.²⁶⁸ Even assuming that the right to civilian defense counsel of choice is constitutional, abrogation must simply not be wrongful.²⁶⁹ The procedures used to abrogate Article 38(b)(2) rights do not have to conform to constitutionally-based discovery rules applicable to the merits of a particular case.²⁷⁰ The proposed due process rights and review procedures provide sufficient protection to the accused.

Second, the standard that permits a GCMCA to abrogate Article 38(b)(2) rights based on "a reasonably foreseeable risk of death or grievous bodily harm to any person" may be overbroad and lead to unintended consequences. It is inarguable that presence in a combat zone or deployed setting has some degree of inherent risk as death or grievous bodily harm is always somewhat foreseeable. Thus, it is possible that a GCMCA and RO could abuse this standard if their threshold for what is a "reasonably foreseeable risk" was low.

Abuse of the system, however, would be unlikely. GCMCAs and ROs, by the very nature of their duties and qualifications, which involve sending servicemembers into dangerous situations on a daily basis, have a solid understanding of what constitutes a "reasonably foreseeable risk." Additionally, the initial review procedures guard against one commander improperly setting the bar too low for what is a reasonable risk. Regardless, because commanders are responsible for the safety of civilian counsel in theater, their judgment on this issue should be final.

²⁶⁷ See *supra* Part II.B.

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ For a list of the constitutionally-based court-martial discovery rules, see MCM *supra* note 29, R.C.M. 701 & 703.

These two wrinkles are not the only potential drawbacks to Precision-Targeted Abrogation. Others undoubtedly exist, and should be discussed as they are identified.

8. Application: Specific Examples

The best way to demonstrate the value of Precision-Targeted Abrogation is to re-examine the two prior examples from Part V.B. Both examples demonstrate how Precision-Targeted Abrogation would work.

a. Operational Dangers Example

Using the first example from above,²⁷¹ assume a servicemember at a remote FOB in Afghanistan charged with larceny of a fellow servicemember's iPod. The accused, through email, retains civilian defense counsel. The convening authority does not want to produce the civilian defense counsel because of legitimate operational concerns.

Using Precision-Targeted Abrogation, so long all procedures were properly followed, a special or general court-martial could occur. All of the evidence is located at the FOB. The defense counsel and military judge could make it to the FOB. The risk to the unit is not increased by the presence of civilian defense counsel. Under the current system, the commander would have to either sacrifice operational and physical security to try the case, or simply not try the case at all.

b. Witness Unavailability Example

In the second example from above,²⁷² the accused, 1LT George I. Joe, was charged with rape of another servicemember by digital penetration and armed robbery of a local national vendor. First Lieutenant Joe's company commander and the unit First Sergeant are witnesses to the rape charge. The alleged rape victim and robbery victim will soon be unavailable to testify in any proceeding in theater.

Using Precision-Targeted Abrogation, the GCMCA would have the flexibility to eliminate the right to counsel to the exact degree required.²⁷³ For example, the GCMCA could preserve testimony and still produce a civilian defense

counsel for trial. This could be accomplished in one of two ways. First, if the GCMCA believed that a deposition was proper, she could order a deposition and simultaneously abrogate 1LT Joe's right to civilian defense counsel to that deposition,²⁷⁴ allowing the right to civilian defense counsel to reattach for subsequent proceedings. Second, a GCMCA could abrogate an accused's right to civilian defense counsel through only the Article 32(b) investigation, potentially preserving testimony for potential admission under RCM 804(b)(1).²⁷⁵ In either situation, the military defense counsel could contact civilian defense counsel to coordinate strategy.

While preserving testimony via a limited deposition abrogation would be an attractive option in many cases where the abrogation is based on anticipated witness unavailability, the GCMCA should not be limited to it. First, the GCMCA is not required to order a deposition.²⁷⁶ Second, the GCMCA may choose to promote efficiency by preserving testimony at the Article 32 hearing rather than by deposition. First Lieutenant Joe remains protected from losing witness testimony even if the convening authority doesn't order a deposition, as the military judge may order a deposition upon 1LT Joe's request after referral.²⁷⁷ Such a request would also provide an opportunity to litigate potential evidence admissibility issues.

The GCMCA would have a choice as to how to preserve the testimony of the soon-to-be unavailable witnesses, as well as any witnesses the accused requests. Additionally, the Article 32 investigation could be completed as scheduled, and the case could be referred shortly thereafter. The GCMCA must then re-evaluate the case, and in most cases, revoke the abrogation. Regardless of the path that the GCMCA chooses, following the specific procedures found in Precision-Targeted Abrogation will ensure that the accused's rights are sufficiently protected.

VII. Conclusion

A recent modification to the RCM demonstrates that reducing an accused's right to civilian defense counsel may help strike the proper balance between individual rights and the need for efficiency and effectiveness. Rule for Court-Martial 305(m), which is new to the 2008 edition of Manual for Courts-Martial, gives the Secretary of Defense the authority to "suspend the application" of various individual procedural protections afforded to a pretrial confinee when

²⁷¹ For the detailed facts of this example, see *supra* Part V.B.2.

²⁷² For the detailed facts of this example, see *supra* Part V.B.4.

²⁷³ This example assumes that the government is not pursuing a capital referral for the rape charge. Although death is the maximum punishment listed for rape under UCMJ art. 120 (2008), the Supreme Court has held that imposing the death penalty for raping an adult is cruel and unusual punishment under the Eighth Amendment. See *MCM, supra* note 29, pt. IV, ¶ 45f(1); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

²⁷⁴ See UCMJ art. 49; *MCM supra* note 29, R.C.M. 702(a) ("A deposition may be ordered whenever, after referral of charges, due to exceptional circumstances of the case it is in the best interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.").

²⁷⁵ See *id.* R.C.M. 804(b)(1).

²⁷⁶ See authorities cited *supra* note 274.

²⁷⁷ See *MCM supra* note 29, R.C.M. 702(b).

“operational requirements . . . would make application of such provisions impracticable.”²⁷⁸ One of those protections is “[t]he right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel.”²⁷⁹

The RCM 305(m) abrogation of right to counsel is appropriate for that limited setting, but should not be used as a model in the vastly more important realm of pretrial investigations and hearings. As was the case with the Service Secretary Plan,²⁸⁰ the RCM 305(m) model would be indiscriminate and overbroad if applied in other arenas.

Similar to the security and safety of civilians living in an area of conflict, a deployed servicemember’s right to civilian defense counsel is valuable and should be preserved when possible. Unfortunately, preserving those valuable things at all costs and in all situations can bring about even greater undesirable consequences. Always preserving civilian security and safety during a conflict could lead to an indefinite extension of the conflict. Always preserving a

deployed servicemember’s right to civilian defense counsel could do the same, as it could cause the command to lose the ability to use the military justice system to maintain good order and discipline.

A GCMCA’s ability to precisely target a problem should not be limited to objectives that the enemy controls. Just as he or she is able to use a laser-guided rocket to destroy a building and minimize collateral damage, he or she should be able to use Precision-Targeted Abrogation as a weapon against a deployed servicemember’s use of his or her right to civilian defense counsel.

Major General Moorman accurately stated, “Change for its own sake can never be a sound basis for altering the military justice system; it must be tied to actual needs that genuinely enhance military justice operations under all circumstances and environments in which it is practiced.”²⁸¹ Precision-Targeted Abrogation addresses one such need in a way that would enhance the military justice system.

²⁷⁸ *Id.* R.C.M. 305(m).

²⁷⁹ *Id.* R.C.M. 305(e)(3).

²⁸⁰ *See supra* notes 233–35 and accompanying text.

²⁸¹ Moorman, *supra* note 2, at 186.

Appendix A

Chart: Comparison of Abrogation Proposals

Abrogation System	Who Has Power to Abrogate	Abrogation Time Frame	Initial Review Authority	Who must request review	Standard of Initial Review	Deadline for Initial Review
Westmoreland and Prugh Plan	Art. 32 IO during "Time of War or Military Exigency"	Prior to Article 32 hearing	None (not addressed in proposal)	N/A	N/A	N/A
Service Secretary Plan	Service Secretary in "Areas of Hostility"	Any Time During Hostilities	None (silent regarding cases ongoing upon abrogation)	N/A	N/A	N/A
WALT Plan	Convening Authority or Military Judge (accused must request civilian counsel)	Timely (not further defined)	Military Judge	Accused	Clear Abuse of Discretion	Not specified
Precision - Targeted Abrogation	General Court-Martial Convening Authority of accused in a declared war or contingency operation	Any time prior to production of civilian counsel	First O-10 in Chain of Command (or next higher GCMCA if O-10 convenes C-M)	Automatic Review	De Novo	Within 5 days or prior to any proceeding, whichever is earlier

Appendix B

Draft Statutory Language for Article 38, UCMJ (Precision-Targeted Abrogation)

§ 838. Art. 38. Duties of Trial Counsel and Defense Counsel.

(b)(8) In a case in which the alleged violation of the punitive articles occurred outside of the United States and the accused is assigned to a unit deployed in support of a contingency operation or declared war, any general court-martial convening authority in the accused's chain of command may abrogate a servicemember's rights under paragraph (b)(2) contingent upon compliance with the procedures set forth in this paragraph.

- (A)** The general court-martial convening authority must first communicate in writing the intent to abrogate the accused's rights under paragraph (b)(2) to the accused, defense counsel for the accused, military judge (if applicable), and the first officer in the pay grade of O-10 or above in the accused's chain of command. If the general court-martial convening authority seeking abrogation of an accused's rights under paragraph (b)(2) is at the pay grade of O-10, the notice will be transmitted to the next senior member of the chain of command. The President of the United States must submit the written finding to only the accused, defense counsel for the accused, any co-accused (if applicable), and defense counsel for a co-accused (if applicable), and the military judge (if applicable).
- (B)** The notice of intent to abrogate an accused's rights under paragraph (b)(2) must contain the following:
- (i)** A specific finding by the general court-martial convening authority initiating abrogation that there is clear and convincing evidence that either:
 - (1)** An investigation pursuant to article 32(b) or a court-martial proceeding could properly occur during a deployment in support of a contingency operation or declared war, but would likely never occur during that deployment, solely because of the delay that an accused's assertion of his or her rights under paragraph (b)(2) would cause; or
 - (2)** complying with an accused's rights under paragraph (b)(2) creates a reasonably foreseeable risk of death or grievous bodily harm to any person.
 - (ii)** The time period for which the abrogation of rights under paragraph (b)(2) would apply. The abrogation may be for a specified or indefinite time period, but only for a time period justified under paragraph (b)(8)(B)(i).
 - (iii)** A copy of all documentation that supports the determination under paragraph (b)(8)(B)(i), or the location where the documentation may be reviewed. If the decision is based on classified evidence, all parties must be so notified. The general court-martial convening authority should take all reasonable steps to permit the accused and defense counsel to review classified evidence. Any decision to deny inspection is reviewable under the review process set forth in paragraph (b)(8)(G).
 - (iv)** Notice of the accused's right to submit matters and evidence to the general court-martial convening authority within forty-eight hours of notification or assignment or waiver of military defense counsel, whichever is later. For evidentiary admissibility purposes, all materials submitted would be considered statements made in the course of plea discussions.
 - (v)** Notice of the accused's right to a personal meeting with the general court-martial convening authority and the general court-martial convening authority's principal legal advisor within forty-eight hours of notification or assignment or waiver of military defense counsel, whichever is later. All materials submitted would not be admissible against the accused at a later investigation pursuant to article 32(b) or at a court-martial proceeding. For evidentiary admissibility purposes, all materials submitted would be considered statements made in the course of plea discussions.
- (C)** The general court-martial convening authority may abrogate a servicemember's rights pursuant to paragraph (b)(2) only after:

- (i) Following all procedures set forth in paragraph (b)(8)(B);
 - (ii) Considering all matters that the accused submits; and
 - (iii) Determining, after a reassessment of all available evidence, that the finding set forth in paragraph (b)(8)(B)(i) remains valid.
- (D) If the general court-martial convening authority orders abrogation, a written abrogation order must be served upon the accused, defense counsel for the accused, military judge (if applicable), and the first officer at the pay grade of O-10 or above in the chain of command who outranks the general court-martial convening authority. The order must:
- (i) State the specific finding by the general court-martial convening authority initiating abrogation that there is clear and convincing evidence that either:
 - (1) An investigation pursuant to article 32(b) or a court-martial proceeding could properly occur during a deployment in support of a contingency operation or declared war, but would likely never occur during that deployment, solely because of the delay that an accused's assertion of his or her rights under paragraph (b)(2) would cause; or
 - (2) complying with an accused's rights under paragraph (b)(2) creates a reasonably foreseeable risk of death or grievous bodily harm to any person.
 - (ii) A copy of all documentation that supports the determination under paragraph (b)(8)(D)(i), or the location where the documentation may be reviewed. If the decision is based on classified evidence, all parties must be so notified. The general court-martial convening authority should take all reasonable steps to permit the accused and defense counsel to review classified evidence. Any decision to deny inspection is reviewable under the review process set forth in paragraph (b)(8)(G).
 - (iii) Specifically address all matters submitted by the accused; and
 - (iv) State the time period of the abrogation.
- (E) If the accused is not represented by counsel upon receiving the notice requirement of paragraph (b)(8)(B), the general court-martial convening authority must ensure that the accused's rights under paragraph (b)(3) are immediately satisfied.
- (F) An investigation pursuant to article 32(b) or any court-martial proceeding must be delayed upon the initiation of action under paragraph (b)(8) until the initial review under paragraph (b)(8)(G) is complete. Timely actions under paragraph (b)(8) shall be considered as immediate steps to trial for speedy trial purposes.
- (G) Upon the issuance of an abrogation order, the first officer in the pay grade of O-10 in the accused's chain of command who outranks the general court-martial convening authority who ordered abrogation will perform an initial review of the decision to abrogate the accused's rights pursuant to paragraph (b)(2). If the general court-martial convening authority seeking abrogation of an accused's rights under paragraph (b)(2) is at the pay grade of O-10, the next senior member of the chain of command will perform the review. Any decision by President of the United States pursuant to paragraph (b)(8) is not reviewable.
- (i) The official performing the initial review (reviewing official) must personally review the case. This authority and responsibility is not delegable.
 - (ii) The reviewing official must not give any deference to the subordinate commander's abrogation decision or rationale. This initial review shall be a complete reexamination and reevaluation of the available evidence.

- (iii) Although this review may be based solely on the matters forwarded by the subordinate commander, the reviewing official may order additional investigation.
- (iv) The accused has no right to submit additional evidence to the reviewing official. Any evidence submitted, however, may be considered at the discretion of the reviewing official.
- (v) The reviewing official must issue his or her decision within 120 hours from the signing of the abrogation order. Failure to issue a decision within 120 hours will automatically terminate the abrogation order.
- (H) The general court-martial convening authority ordering abrogation and the reviewing official must independently review each abrogation order at least once every fourteen days. Each must issue a written opinion to the accused, defense counsel for the accused, and military judge (if applicable) stating whether continued abrogation is still warranted. The general court-martial convening authority ordering abrogation or the reviewing official shall terminate the abrogation immediately if he or she believes that the abrogation is no longer warranted. A failure to issue a written opinion pursuant to this paragraph will automatically terminate the abrogation order.
- (I) The decision to abrogate an accused's rights pursuant to paragraph (b)(2) is not reviewable by the military judge.
- (J) Article 66 reviews of decisions made pursuant to paragraph (b)(8) are proper only in cases where credible evidence exists of:

 - (i) Any form of unlawful command influence; or
 - (ii) Both the general court-martial convening authority ordering abrogation and the reviewing official violated article 98 by knowingly and intentionally failing to enforce or comply with provisions of this code.
- (K) If a servicemember's rights under paragraph (b)(2) are abrogated by operation of this paragraph, the sentence adjudged may not include death.

Appendix C

Flow Chart of the Precision-Targeted Abrogation Process

