

# TAMING AMERICA'S WARRIORS

*Assessing U.S. Military Discipline and  
Responses to Law of War Violations,  
1943–2006*

SCOTT DALE HAMM

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*Scott Dale Hamm, PhD*

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# DEDICATION

To the Marines and soldiers who perform so well day in and day out in conditions that test endurance, patience, and fortitude to guard the American way of life, I offer my thanks. This is especially true of the Marines of Alpha Company, 1st Battalion, 6th Marine Regiment, from 2006 to 2009, with whom I had the good fortune to deploy and witness magnificent feats of both aggressive combat skill and the forbearance needed to operate in challenging environments among civilian populations in Iraq and Afghanistan. You understood the answer to why we fight by rules when the enemy does not always do so.





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# FOREWORD

As long as national governments give high-powered weapons to young warfighters, there will be war crimes. Should anyone doubt that American combatants are capable of battlefield criminality, they need only recall U.S. Marine major Littleton W. T. Waller's 1902 court-martial for his summary execution of 11 civilians on Samar, the Philippines. American war crimes in World War II went beyond the murder of enemy prisoners of war in Sicily by U.S. Army sergeant Horace T. West and captain John T. Compton. More recently, Abu Ghraib, Haditha, and My Lai remain indelible instances of U.S. law of war offenses. Today, the war crime courts-martial of U.S. Navy SEAL Edward R. Gallagher, and Army lieutenant Clint Lorance, among others, are evidence of continued battlefield criminality. Those cases, and more, are recounted by Dr. Scott Hamm.

This is an outstanding book. I have taught the law of armed conflict for 30 years, and I know of no other text that so well covers war crimes that have occurred from World War II until today. As an academic, I appreciate the book's clarity of writing, breadth of coverage, and footnotes that guide the reader to further research. As a retired Marine Corps judge advocate, I know that battlefield commanders are responsible for sometimes difficult law of war decisions. The examples of past cases provided here can be helpful in informing and educating those who make the hard calls on today's battlefields as well as educating students in classroom seminars.

Dr. Hamm, a native of Reading, Pennsylvania, enlisted in the Marine Corps in 1992. Recognizing a path to advancement through off-duty edu-

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cation, he graduated from Campbell University in North Carolina and then earned a master's degree in international relations, as well, through further on-base education. His post-retirement doctorate is from University of Leeds's well-regarded Department of History. Exploiting his academic accomplishments, the Marine Corps frequently assigned him to instructional and supervisory billets at Marine Corps University in Quantico, Virginia.

Dr. Hamm is ideally suited to interpret the sometimes-complex battlefield issues he deciphers. As a recently retired 26-year Marine Corps sergeant major with combat zone experience, he has encountered some of the issues and deficiencies of which he writes. His observations and suggestions for deterring battlefield offenses are supported by his personal involvement as well as his academic expertise.

*Taming America's Warriors* is not a simple recitation of battlefield horrors. It is a valuable roadmap to diminishing the incidence of war crimes through an understanding of the law, as well as recognizing that they can be fostered by lax military oversight and battlefield supervision, as well as failures of training. Dr. Hamm provides a comprehensive and well-written account of American battlefield misconduct; examples of law of war violations from World War II to Iraq, considered as breakdowns of military leadership, too often abetted by weak or failed military law prosecutions. The author does not attempt to reconstruct the mental states of war criminals or discern their motivations. Instead, he provides the varied contexts of battlefield criminality, including the American public's misconceptions of some of those cases, all of which add greater relevance and perspective to the book's lessons.

The author's research is particularly noteworthy for its overall breadth and depth. He mines court-martial records and a wide variety of academic journals and texts, as well as participant reports and interviews, for relevant instructive material. He seamlessly melds them into a clear and readable text. Readers will appreciate his numerous inclusions and interpretations of legal cases pertinent to his account—clearly stated and legally comprehensive, yet free of legalese and easily understood by readers with little legal experience.

Finally, Dr. Hamm isolates the key to reducing war crimes, sagely writing: "Leadership in these instances is crucial, both in modeling proper be-

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havior by authority figures and supporting and reinforcing the ideals and requirements learned in [law of war] training and education.” War crimes will never be entirely eliminated but, as Dr. Hamm recognizes, the involvement of noncommissioned officers and junior officers—the military leaders closest to the “trigger-pullers”—is pivotal in moderating their conduct in situations where moderation is least attainable. Some war crimes—*Nazi Einsatzgruppen* (mobile killing units) in Poland and the Soviet Union, Russian Federation soldiers in Ukraine, Hamas fighters in Gaza—are so repellant, so ghastly, as to defeat rational explanation. Battlefield war crimes, however, are well-suited to Dr. Hamm’s authoritative descriptions and interpretations.

This well-written book by an experienced educator and career Marine is a commendable guide for readers, military or civilian, who are interested in the facts of war crimes, the elements of their origin, and their place in the history of recent armed conflicts.

Lieutenant Colonel Gary D. Solis  
PhD, USMC (Ret)



# PREFACE

This book is the product of research I conducted while pursuing my PhD in military history. I spent more than 26 years in the Marine Corps, and because my later years were spent as a senior enlisted advisor—first sergeant and sergeant major—I had the great fortune to be able to spend time in very different types of units. As a Marine “growing up” in the 1990s, after the United States had lost its main adversary in the Soviet Union, much time was spent trying to figure out what would come next and whether we were ready for it. All Marines spend some time before deploying for combat wondering if they will acquit themselves well and do what they need to for the men and women around them. No one gives a thought to whether they will commit a war crime. That goes against most everyone’s personal ethics and also the institutional ethics of the Marine Corps. It is considered downright un-American. But no matter how realistic and well-designed training is, it cannot replicate all the stressors of combat. It cannot insert the friction of the unknowns, the total effects of leadership—both good and bad—on a unit’s proficiency, or its conduct under the ultimate tests found downrange.

As I began putting together my application to pursue a doctorate degree, I received the best advice possible from a member of the Marine Corps’ War College faculty. He said to make sure to pick something I was passionate about and will not tire of reading and writing about ad nauseum. Thinking long and hard about what mattered to me and what I could research that might make a wider difference, I thought back to my time

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with Company A (Apache), 1st Battalion, 6th Marines, during deployments to al-Ramadi, Iraq, and the Helmand Province of Afghanistan from 2006 to 2008. Those Marines faced determined enemies who did their best to blend in with the surrounding population. The results of that in an age of the 24-hour news cycle and satellite uplinks from the remotest corners of the Earth were many situations in which the split-second decisions of young Marines meant the difference between a successfully accomplished mission and an international incident. Did we make a few decisions that resulted in tough choices for our commanding officer afterward? Yes, and he made those tough choices, often after long conversations with me and others. But through most of those deployments, during some very hard times, the Marines performed admirably and with the right intentions.

Perhaps one of the hardest questions to satisfactorily answer immediately was why it was so important to follow the rules when the enemy so clearly did not. This was during a debrief after losing one of our own during a patrol to assess damage to a local mosque in order to facilitate repairs paid for by the civil military affairs teams. That question stayed with me, and during subsequent opportunities during my career to teach about ethics in the Marine Corps, it was one that I posed to students often. It is the reason I chose to research and write about changes to how the Marine Corps and U.S. Army train to avoid noncombatant casualties and how disciplining such violations has changed over the years. While researching this, I found there were influences outside the military proper that affected how well the military can mitigate harm to civilians. The military Services—all of them—do a good job trying to maintain the highest standards of conduct and execution of their missions without harm to the innocent. My research process is explained in greater depth in the introduction to this work, but I think it is important to state here that while this book is critical of some actions and decisions, it is intended not merely as a critique but to start hard conversations that will ultimately aid in upholding the high standards of conduct Americans expect from their fighting forces.



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I would like to acknowledge the patience and superb professionalism of my supervisors at the University of Leeds—Professor Simon Hall, Dr. Nir Arielli, and Dr. Sean Fear—who guided my research efforts while I wrote my dissertation, which served as the basis for this book. While we were often spread across the globe, their unfailing commitment to making my arguments coherent and supported are appreciated.

Dr. Gary Solis, a retired Marine, lawyer, and subject matter expert, generously provided me with indispensable information, advice, wisdom, and encouragement throughout my research and writing. His mentorship from one Marine to another and one scholar to another was invaluable and truly represents the Marine Corps motto of *Semper Fidelis*.

Thanks also go to my editor, Stephani L. Miller, and the amazing team at Marine Corps University Press, for helping me present my research in a way I hope will be useful to both leaders and servicemembers. MCUP's continuing efforts to publish on wide-ranging topics that can benefit our servicemembers and help inform the public are truly commendable.

I would finally like to thank my family. From my parents, Clarence and Pat Hamm, I received encouragement to pursue knowledge broadly and follow the path I desired—starting with 26 years in the Marine Corps, as it turned out. Most importantly, my beautiful wife, Becky, thank you for taking our two tornadoes, Helen and Sarah, throughout most weekends for four years to let me pursue this research and to write. We both know I could not have completed this and kept up with them too!



# TAMING AMERICA'S WARRIORS



# INTRODUCTION

War is violent. Violence against noncombatants, whether civilian casualties, the maltreatment or killing of prisoners, or the desecration of the dead, is an unfortunate yet all too common feature of war throughout the history of conflict between opposing forces. Violations of the laws of war have occurred as long as those laws, or the norms that preceded them, have existed.<sup>1</sup> In the recent war between Russia and Ukraine, for instance, the world witnessed Russian soldiers perpetrate several categories of crimes against civilians. The lax reaction by the Russian leaders to the atrocities surprised many uninitiated onlookers in the international community. One of the units, the 64th Motorized Infantry Brigade, was granted the honorific title of Guards for its “mass heroism and valor” by Russian President Vladimir Putin even though accused of committing some of the worst crimes in Bucha (Kyiv Oblast), where more than 350 noncombatant bodies were dis-

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<sup>1</sup> Throughout this book, many different sources were consulted, both military and civilian in origin. Even in textbooks on the law of war, terms like *law of armed conflict* (the preferred language of the Geneva Conventions) and *international humanitarian law* are increasingly used interchangeably, depending on sources consulted. In this volume, when drawing from a particular source to illustrate a case study or its discussion, the author generally uses the wording found in the source material. Additionally, while the term *war crimes* is often used to denote grave breaches, as defined by the Geneva Convention, the *Manual for Courts-Martial* also uses the term for less severe violations of the law of war in its discussion, and that also influences the wording in this work.

covered.<sup>2</sup> This honor was bestowed just weeks after the atrocities in Bucha became publicly known—seemingly a declaration of contempt for the laws of war, a dismissal of the reports of that unit’s actions, or both.

But the atrocities of the Russian military are not even the most recent to be chronicled, with yet newer conflicts since begun. Law of war violations have been committed by almost every state that has entered armed conflict. As Louise Barnett asserts in *Atrocity and American Military Justice in Southeast Asia*, discussing the trial of World War II Japanese general Tomoyuki Yamashita, “From time immemorial most soldiers have seen their role as subduing the enemy, or obeying their country’s orders.”<sup>3</sup> Obedience to orders is an enduring hallmark of disciplined fighting forces. Throughout recent history, however, those who obeyed at the expense of societal mores often found themselves attempting to justify actions their societies would not tolerate. The idea Barnett describes is also in opposition to that which General Douglas MacArthur, reviewing Yamashita’s sentence for war crimes, espoused: that “every soldier, be he friend or foe, is charged with the protection of the weak and unarmed.”<sup>4</sup> Subduer and enforcer, or protector? To which of these roles do the land forces of the United States subscribe today, and why? Is this determined more by doctrine, professional culture, government mandate, or public pressure?

America’s military has its own regrettable history of violations of the laws of war. This book focuses squarely on the United States’ land forces—the Army and Marine Corps—assessing their commitment to fighting within the laws of war and their own advertised set of professional values. The weapons and tactics of the Army and Marine Corps evolved at a rapid pace

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<sup>2</sup> Mychael Schnell, “Putin Honors Brigade Accused of Bucha War Crimes,” *Hill*, 18 April 2022; and “Putin Decorates Army Unit that Ukraine Blames for Bucha Deaths,” *Bloomberg News*, 18 April 2022.

<sup>3</sup> While “subduing the enemy and obeying their country’s orders” may seem to be one and the same, a state’s military is used in various ways, from outright conflict (where they are certainly following orders to subdue the enemy) to operations that are less kinetic on the range of military operations (humanitarian evacuations, peacekeeping operations, or enforcement of blockades). These latter operations may often put soldiers in harm’s way following the orders of their country without much, if any, opportunity to engage an enemy.

<sup>4</sup> Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (Abingdon, UK: Routledge, 2010), 160–61.

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from World War II onward, bringing precision to the act of delivering violence to the enemy.<sup>5</sup> Exiting two decades of war in Afghanistan and Iraq, however, incidents of violence against noncombatants remain a regrettable and persistent feature of war.

International conventions, such as those negotiated at Geneva and the Hague, are a product of the last 125 years.<sup>6</sup> This work examines the progress of the U.S. land forces in terms of its soldiers' compliance and its efforts to hold its soldiers accountable from a baseline during World War II to its recent war in Iraq by first presenting a series of cases containing law of war violations by American forces. These will start with two cases of execution of prisoners during World War II at Biscari, Sicily, and a discussion of the widespread violations in the Pacific theater as a baseline against which to measure. The remaining cases will cover the killing of noncombatants in Vietnam at My Lai and Son Thang; in Iraq at Haditha, Mahmudiyah, and Hamdania; and the torture of prisoners at Abu Ghraib.

For each case, scrutinizing the repercussions to the covered incident for any civilian reactions and military responses demonstrate that several variables influence the degree to which perpetrators of such crimes are held accountable. These variables include: how close to total war the conflict was on the range of military operations; how quickly crimes were reported and what efforts were made to ensure accountability; what legal defenses were considered and used; how often such incidents occurred; and the effectiveness of training and education available. Varying degrees of accountability are noted among the cases, which leads to several important questions. Has the U.S. military done enough to curtail violations? How and to what extent have such efforts changed over time? How have public attitudes or political pressures affected these efforts? Does news of violations matter enough to the public to make a difference and has this

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<sup>5</sup> MajGen Mick Ryan, "An Evolving Twentieth-Century Profession: Technology after World War II," Modern War Institute at West Point, 1 July 2021; and David Whetham, ed., *Ethics, Law and Military Operations* (Basingstoke, UK: Palgrave Macmillan, 2011), 20.

<sup>6</sup> The earliest publication of the Geneva Conventions dates back to 1864, with later conventions in 1906, 1929, 1949, and later amendments added in 1977 and 2005. The Hague Conventions of 1899 and 1907 were additional attempts to codify behavior during war.



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changed over time? All these questions lead to the central inquiry this book addresses: To what extent is continued violence against noncombatants affected by the military or influences outside its control?

The individuals who committed these crimes have free will and bear the largest measure of responsibility for their actions. Through an exploration of the various incidents described in the case studies and, more importantly, the degree of public reactions and military responses to them, however, this book argues that the military also bears some responsibility for the continuing violence, which it shares with both the U.S. public and its elected representatives.

How a public perceives its military and how a government holds its armed forces to a standard of conduct play a part in a force's behavior. At one extreme, as briefly discussed above, is the Russian government's acceptance of the brutality against noncombatants committed by its forces in Ukraine. At the opposite extreme is the Dutch government's resignation en masse in 2002 after the release of the findings from a seven-year investigation that showed that the country's government and military could have done more to prevent the slaughter of more than 8,000 men and boys by Bosnian-Serbian forces in Srebrenica, Bosnia, in 1995.<sup>7</sup> The reactions of Americans to violations of the laws of war varied throughout the period this book covers. The response of the military to those violations consistently displayed an awareness of the incongruity of the violations with its professional values and the potential impact of public disappointment to its prestige, recruitment, and budgets. These varied American public reactions to revelations of crimes, or sometimes lack of reactions, show a susceptibility to unconscious biases and prejudices and are also affected by contemporary events, as they were following 11 September 2001 (9/11). These biases, especially toward non-White ethnicities, will be explored further throughout the book and help account for the public's share of blame mentioned earlier.

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<sup>7</sup> Andrew Osborn and Paul Brown, "Dutch Cabinet Resigns over Srebrinica Massacre," *Guardian*, 16 April 2002. While this example is used to illustrate a government acting in recognition of its failing to uphold its duties to the international community, the author recognizes that based on the timing in relation to upcoming elections the act may have been largely symbolic.

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To determine how efforts to codify and legally constrain war allow us to determine U.S. military progress on preventing war crimes, or the balance of culpability the government and public may share, we must first establish how and why these legal conventions came into being and are used today. Important aspects of this include how the international law developed, how the violations were defined, and how they were enforced.

Paintings on the inside of caves from 10,000 years ago during the Neolithic Period (New Stone Age) depict what appears to be humans fighting using bows.<sup>8</sup> Since then, there are few documented periods devoid of evidence of conflict. Through time, some cultures sought to reduce war's effects on the civilian population and formalize rules for the treatment of the injured or captured.<sup>9</sup> The formulation of these rules represented an attempt to enforce the observation of basic humanitarian principles, govern the discipline of armies afield, and regulate how hostilities were conducted. Contemplation of how to do this began thousands of years ago, with Egyptian agreements with adversaries on the treatment of prisoners. Efforts increased as the technology associated with warfare evolved.<sup>10</sup> Additionally, over time, observed principles and rules acquired a status of customary law and indeed informed and shaped most laws of war, and the rules or codes many militaries function under today. To become a customary law, these principles require consistent and recurring action, or lack of action, by states, coupled with a general recognition by states that these actions, or the absence of them, are required or permitted under international law.<sup>11</sup>

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<sup>8</sup> John Keegan, *A History of Warfare* (New York: Vintage Books, 1993), 119.

<sup>9</sup> Roman and Greek evolution in laws of war, specifically from the idea of conquered peoples as the property of conquerors, to a more refined sense of rights to be upheld during conflict can be found in Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols. (London: Macmillan, 1911). Further refinement of these ideas during the medieval period are discussed at length in Maurice Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965).

<sup>10</sup> Robert Stacey, "The Age of Chivalry," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George Andreopoulos, and Mark R. Shuman (New Haven, CT: Yale University Press, 1994), 27.

<sup>11</sup> Adam Roberts and Richard Guelff, *Documents of the Laws of War*, 3d ed. (Oxford, NY: Oxford University Press, 2000), 7–9.

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While the treaties and conventions that seek to regulate hostilities today evolved from much earlier attempts, during that evolution contemporary societal beliefs were often incorporated. Mark Mazower wrote that as the leading powers began to formalize the laws of war at the end of the nineteenth century, they did so with an implicit bias toward minimizing violence between “civilized” states. They neither expected reciprocity of civilized behavior nor taught the need to follow those laws during conflict against the “uncivilized.”<sup>12</sup>

While international treaties have no real power to punish violations or enforce their agreements, the Geneva Conventions in 1949 were among the first multinational treaties requiring signatories to sponsor and enforce domestic laws by criminalizing certain violations.<sup>13</sup> Additionally, that 1949 convention also debuted the concept of grave breaches, with the requirement for signatories to seek out and prosecute the individuals who commit them.<sup>14</sup> This was important, as even in countries such as the United States, where standing orders in the military prohibited certain acts, there was no previous specific mechanism requiring punishment for law of war violations. This was true as far back in American military jurisprudence as the Lieber Code (1863), and through the Law of Land Warfare (1943) and its successors for the U.S. armed forces.<sup>15</sup> Also, outside U.S. law, although the 1907 Hague Regulation IV imposed fines on the states of soldiers who

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<sup>12</sup> Mark Mazower, “An International Civilization?: Empire, Internationalism and the Crisis of the Mid-Twentieth Century,” *International Affairs* 82, no. 3 (2006): 557, <https://doi.org/10.1111/j.1468-2346.2006.00551.x>.

<sup>13</sup> Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 15, 85.

<sup>14</sup> Grave breaches under the 1949 Geneva Convention include: willful killing, torture and inhumane experiments, willful causing of great suffering or serious injury, extensive destruction of property not justified by military necessity, and compelling a prisoner of war to serve in a hostile power’s forces or depriving them or other protected persons of the rights of fair and regular trials, and taking of hostages or unlawfully deporting, transferring, or confining a protected person under the convention.

<sup>15</sup> The Lieber Code was issued as in 1863 to guide the actions of Union soldiers during the Civil War, updating the existing Articles of War (applicable to the land forces) from 1806. The Law of Land Warfare was published during World War II and would continue in force until the introduction of the Uniform Code of Military Justice (UCMJ), which replaced the land forces’ Articles of War, and the maritime forces’ Articles for Government of the United States Navy, known colloquially as the *Rocks and Shoals*, in 1951.

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violated the law of war, it left it to the states as to how, or if, the individual violator was punished.

Even today, while the International Criminal Court (ICC) was established at the Hague in 2002, with an intended jurisdiction over crimes of genocide, crimes against humanity, war crimes, and the crime of aggression, the United States was one of 40 of the original 123 signers to never ratify the statute with domestic legislation. Other world powers, like Russia and China, similarly never ratified or failed to sign the statute entirely.<sup>16</sup> While U.S. policymakers initially supported the concept and took part in the statute's negotiations, the possibility of politicized prosecutions of servicemembers and officials by the ICC's prosecutors, who would have few, if any, limits in the end prevented ratification. It also prompted lawmakers to pass the American Service-Members' Protection Act, which among other things, gave the president the authority to use any means necessary to free servicemembers or officials detained or imprisoned on behalf of the ICC.<sup>17</sup>

To specifically evaluate the military's efforts to conform to the law of war and punish those responsible for violations thereof, it is necessary to understand through which mechanism the U.S. military is held accountable for these violations. The 1949 Geneva Convention required signatories to adopt domestic laws to punish violations. Although the Uniform Code of Military Justice (UCMJ) was devised in 1950 and came into effect with the *Manual for Courts-Martial* in May 1951, and fulfills this requirement, it was not specifically designed to do so. Rather, its catalyst was the post-World War II criticism and perceived shortcomings of maintaining two separate justice systems for the Army and Navy. It was further revised in 1968 to remove the influence of unit commanders—which also introduced the concept of undue command influence into the military justice lexicon.<sup>18</sup> The unique legal aspects of the UCMJ, both positive and nega-

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<sup>16</sup> Claire Klobucista and Mariel Ferragamo, "The Role of the International Criminal Court," Council on Foreign Relations, 24 August 2023.

<sup>17</sup> American Servicemembers' Protection Act of 2001, S. 1610, 107th Cong. (2001).

<sup>18</sup> Barnett, *Atrocity and American Military Justice*, 211. Undue command influence (UCI) will appear in several case studies in this work and is an impediment to the military justice system. While undetected UCI may work against defendants, more attorneys seek to raise concerns of UCI as diversions during proceedings to attempt to influence panels (juries) during courts-martial.

tive, and discussed at some length below, will impact the prosecution of every case study from Vietnam to present. This exclusively military legal system was seen by the U.S. government as sufficient to fulfill the Geneva Convention requirements until My Lai, during the Vietnam War. It would be decades after the 1949 requirement before the government finally enacted legislation to supplement U.S. domestic law to address law of war violations.<sup>19</sup> Also, it is important to remember that the UCMJ is revised periodically, and although many of the most recent revisions provide promise for better future handling of these cases, it is too early to tell what the true impact will be.

The first two sentences of the *Manual for Courts-Martial*, where the UCMJ is contained, discusses the source of military jurisdiction and states, “The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.”<sup>20</sup> The *Manual for Courts-Martial* later restricts the ability to try subject personnel for war crimes to general courts-martial, citing 10 U.S. Code section 818’s Article 18, and allows for personnel found guilty while tried under the law of war to be awarded any punishment not prohibited by the law of war.<sup>21</sup> One reason both the military and the government share responsibility for the past continued violence against noncombatants is the difficulty for either researchers or the military to derive a definitive number of prosecutions for violations of the laws of war by the U.S. military. This is something be-

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<sup>19</sup> These domestic laws include the 1996 War Crimes Act and the 2005 Military Extraterritorial Jurisdiction Act (MEJA).

<sup>20</sup> *Manual for Courts-Martial* (Washington, DC: Joint Service Committee on Military Justice, U.S. Department of Defense, 2019), I-1. Specific jurisdictional concerns are discussed in the Rules of Courts-Martial 201 and 202.

<sup>21</sup> *Manual for Courts-Martial*, A2-7, II-149. Courts-martial are classified by who convenes the proceeding. The lowest level, in terms of both rank of the convening officer and the punishment it can award a member found guilty, is a summary court-martial, which may be convened by a battalion commander (O-4, major and above). The next most severe is a special court-martial, where a finding of guilt may carry with it an equivalent stigma of a felony conviction in a civil court and is convened normally by a commander at the regimental level or higher (normally O-6, colonel). The most severe form, reserved normally for cases involving capital crimes or numerous serious violations, is a general court-martial and convened by a general officer (O-7-10, brigadier general to general). Articles 22-24 of the UCMJ dictate convening authority. *Manual for Courts-Martial*, A2-8.

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ing remedied by recent efforts, which is discussed in more depth later.<sup>22</sup> Increasing the difficulty of tracking violations is that under the UCMJ, by which U.S. servicemembers are tried, there are many punitive articles that cover the crimes constituting grave breaches, such as murder, rape, and others. It is allowable, and routine practice, to levy charges for the article within the UCMJ without specifying the crime as a war crime.<sup>23</sup> Although the military seldom differentiates between law of war violations and other UCMJ violations, the government has yet to address the issue during numerous revisions of the military's law since its inception.

Despite the UCMJ meeting the requirement for a domestic law to try law of war violations, it has proven less than efficient for that purpose since it was enacted. There are several reasons for its lack of effectiveness. These include the fact that, by their nature, war crimes are often perpetrated in a highly dangerous and fluid environment; military prosecution teams often lack meaningful trial experience in complex cases; and military law includes additional obstacles to otherwise successful prosecutions. Despite the many obstacles to prosecuting law of war violations under the UCMJ, many other countries also use similar systems. The U.S. Department of Defense (DOD) promulgates a Law of War Program that is constituted of several lines of effort including disseminating and training the law of war to its members, employing qualified legal advisors, oversight and assessment on investigations, and more.<sup>24</sup> The manual is nearly 1,200 pages long, and training on the law of war begins during entry-level training and is mandated annually and before deployments, yet there remain occasional violations, particularly early in conflicts when more leadership attention is paid to planning and conducting initial operations.

This book examines case studies of violations of the law of war committed in various conflicts and situations from the past 80 years. To nar-

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<sup>22</sup> The new DOD policy on civilian harm mitigation and response will explicitly require processes and protections for civilians greater than those required by the Geneva and Hague Conventions. Dan Maurer, "The U.S. DOD's New Civilian Harm Mitigation and Response Policy and 'Harm Resulting from' Military Operations," *Articles of War*, Libeer Institute West Point, 5 January 2024.

<sup>23</sup> Gary D. Solis, "There Are No Accurate War Crime Numbers" (unpublished paper, 2019).

<sup>24</sup> *Department of Defense Directive 2311.01, DOD Law of War Program* (Washington, DC: Department of Defense, 2 July 2020).

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row the number of case studies to a manageable scope, those that were selected were crimes committed by members of the U.S. Services whose focus is land warfare, specifically the Army and Marine Corps; cases where there was an ability to quantify or identify with certainty the victims; and for which there were available information or records concerning the incidents, the investigations, prosecutions—where applicable—and public reaction. It is for this reason that some potential cases, such as the Tiger Force in Vietnam, other cases of civilian deaths from Iraq or Afghanistan, or that of the Bagram prisoner torture and abuse were not selected.

This said, this work begins with the two incidents from the invasion of Sicily at Biscari during July 1943 in the European theater of the World War II. An enlisted man murdered more than 30 prisoners he was moving to a rear area, and an officer ordered the killing of 30-plus more enemy prisoners later the same day. From the Pacific theater, an examination is made of the many types of violations—and lack of accountability—perpetrated in the fight against the Japanese. These cases and their aftermaths serve to set a baseline from which to assess progress through the book's remaining chapters. The remaining cases mentioned earlier allow enable analysis of the variables listed above and assessment of where lessons learned did or did not affect the preparation for conflict, the aftermath of the law of war violations, or the investigation and prosecution of the guilty. Together, these examples demonstrate that while the military made many efforts to ensure its soldiers fight and comply with the law of war, there are occasional, specific shortcomings in their execution and influences from without that all bear a share of responsibility for the continuing violence against noncombatants. The focus of this work is the progress during the period from the Vietnam War to the present compared against the baseline in World War II. World War II was chosen for the total nature of war during the conflict. While there were cases of violations of the law of war between that war and Vietnam, such as during the Korean War—most notably at No Gun Ri—they preceded the time frame focused on by this book.

The case studies form a relatively *longue durée* overview examining the question from a comparative vantage point that allows themes and trends emerging concurrently with the military's development to become evident, rather than spotlight characteristics of the episodes individually.



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From this decades-long perspective, recurring patterns pertaining to the variables at the heart of the central question and themes regarding the influences at play become apparent.

There is much scholarship covering not only the U.S. military development post-World War II, war crimes by and against U.S. personnel, the military legal system, and other germane topics, but also on the conflicts and specific episodes themselves. It was through combining the information in many works examining different aspects of the topic that a clearer picture of the continual effects exerted by outside influences on these violations developed.

Judging by the case studies from the earliest conflicts, the historiographies are well developed and access to official data and records is fairly open, with many digital databases now available. In more recent cases, there is a shallower pool of information available for a number of reasons. These include the episode's recency or security classifications assigned to investigations and other correspondence that necessitates working with heavily redacted materials. The latter case studies provided opportunities to conduct oral history interviews with individuals with firsthand relevant experiences. These oral histories provide context and unpublished original information for some of the case studies and also were useful in validating the public sentiment gleaned from contemporary news sources.

An advantage to the use of these histories is to include the perspectives and firsthand accounts of people who were present, but which heretofore have never been recorded. This could be due to lack of research or knowledge of the subjects' involvement—sometimes due to the chain of command's omission of information—or due to lack of interest caused by an assumption that their rank or billet at the time of the episode did not provide them sufficient knowledge or context of the event. Some of the challenges with using oral history are ensuring the objectivity of the information received, especially when considering some of the interviewees are still on active duty, and the fact that using them to fill gaps in the record means there is little to no corroboration available at times. To mitigate the first of these challenges, the author endeavored to interview several people where possible to determine whether the accounts corroborated each other, and for the second, tried to use indicators within the official

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records to confirm pieces of information obtained during the interview to gauge the subject veracity. Another challenge specific to the type of case studies used was that in one particular instance, the interviewee was still on active duty and worried about their reputation or possible career implications to discussing their own and others' actions during the incident. At their request, their identity has been anonymized and the information used in a way that did not serve to identify them. Additionally, since one of the aims of the case studies is to understand public reaction and its influence on military response to violations, news media sources, many times in the form of newspaper coverage, is prominently used throughout the book as well.

When examining the various cases, it becomes clear that the military had a vested interest in preventing law of war violations but on several occasions failed to do so for a number of reasons. One reason is a legal system not designed specifically to address these types of crimes and possessing limitations owed to multiple levels of internal and external review where outside pressures may influence accountability. While not apparent at the beginning of the research, this became an important factor preventing deterrence against continuing violence due to sentence reduction, mitigation, or elimination. The system of training and education about the law of war has improved during the period studied, although the overwhelming concern for personal safety during chaotic incidents and the presence of outside pressure to mitigate punishments for perpetrators can both work against education during and after the episodes studied. Finally, those charged with responsibility for the function of national defense, including internal discipline of the forces—its leaders—are often rightfully concerned initially with prosecution of the operations and campaigns. Later, after an incident occurs, they can be subject to the temptation to protect the institution they have made their careers serving by less than aggressively initiating investigations and prosecutions for these crimes. As we will see, from the case studies within this work, better planning of operations, closer supervision of junior soldiers in situations that are obvious for the potential of law of war violations, and a firmer resolve to hold accountable senior members who fail to enforce the standards are at least partial remedies to the continued violence against noncombatants.

# **PART ONE**

**WORLD WAR II**  
**Setting a Baseline for Comparison**



## INTRODUCTION

When Americans think about World War II today, invariably some images invoked—such as the iconic flag raising over Iwo Jima—transcend generations, but some are dependent on the age of the individual. Those born in the past 20 years might picture Tom Hanks in *Saving Private Ryan* rushing to evacuate a paratrooper, the last son of a family, after his brothers are killed in other actions. For others, the scenes of Bastogne or Guadalcanal portrayed by relatively unknown actors in the epic series *Band of Brothers* or *The Pacific* may resonate. The generation born 30 years before them grew up cheering the heroes in reruns of John Wayne, Burt Lancaster, or Robert Mitchum movies, but also had *Schindler's List* with which to soberly reflect on the human costs and causes of the war. Those born in the preceding decades were likely much more familiar with grainy footage of Adolf Hitler exhorting his army, bodies awash in the surf of Normandy or the Pacific islands, or film footage of concentration camps being liberated. They sat with their grandfathers, fathers, and uncles and heard stories about the war—its costs and the triumphs. Some perused dime-store pulp magazines that glorified war and possibly set the stage for future disenchantment with their service, or worse. Handed down through these succeeding generations were stories and myths.

In his own words, Studs Terkel said the title of his book, *The Good War*, was purely ironic, noting the horrors of all wars. But the collective feeling that World War II in particular was a war worth fighting was a strong sentiment and over time grew stronger, shading memories and ingraining a

reverence for the men and women who fought the war, no matter the content of their own suppressed feelings or recollections.<sup>1</sup>

As the myth of the Good War became stronger, prewar tensions in America, such as those from isolationists who opposed the United States' involvement even after Pearl Harbor, were largely a forgotten aspect of public sentiment.<sup>2</sup> Also largely unexamined were the violations of the law of war committed by U.S. forces. Although whether or not World War II was good can be argued, the importance, and necessity, of the conflict to the military and society—to the world—is beyond debate. The war effort touched everyone, from shortages of life's essentials to war bond drives and victory gardens. The sheer breadth of its scope, with its separate theaters spawning different schools of thought within the U.S. military about the right answers to tactical and operational problems, drove innovation in the continuing development of combined arms. Together, these shaped the United States' preference of what Russell Weigley later defined as the "American Way of War."

Although it was a conflict that is widely accepted today as having been necessary, World War II, like any war, had its violations and war crimes—including those committed by U.S. forces in numbers that popular memory often fails to appreciate. Because of the juxtaposition between the horrors brought by the total nature of that war and its romantic place in popular memory and myth, it is instructive to draw several case studies from World

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<sup>1</sup> During the past three decades, more and more memoirs of the service of World War II veterans have been published and are accessible to the general public. A major theme in many is the veteran's reluctance to previously share experiences with family members, sometimes out of humility, sometimes out of an effort to insulate them from the horrors the veteran endured, and sometimes out of shame for some of the darker turns or just the ever-presence of fear that did not square with the image of the returning victorious soldier of the day. More well-known examples are Eugene B. Sledge's *With the Old Breed: At Pelelieu and Okinawa* (New York: Random House, 1982), discussing the barbaric conditions—and actions—he witnessed; and James Bradley's *Flags of Our Fathers* (New York: Random House, 2000), which tells of his father's reticence of discussing his own experiences from that war. Lesser known but equally powerful works include LtCol Kerry Lane's *Marine Pioneers: The Unsung Heroes of World War II* (Atglen, PA: Schiffer Publishing, 1997), and *If You Survive* (New York: Ballantine Books, 1987) by George Wilson.

<sup>2</sup> Eileen Prose, *Good Day!* interview of Studs Terkel, YouTube video, 10:30, 18 April 2017.

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War II to serve as a starting point with which to measure the U.S. military's efforts and progress toward eliminating those violations during the span of the subsequent five decades that are the focus of this book. When examining these and later cases for the contributing factors that caused the incidents and how they were handled, the race of the enemy or noncombatant victims of the crime will emerge as important. The responses of the military leadership to the violations often anticipated the reactions of the public, and many times these reactions reflected the public's prevailing attitudes, creating double standards for military actions based on the skin color of the victim. The responses of the fighting men to the events reflect a tension between the realities of the ferocious combat environment, prevailing societal attitudes, the training in law of war, and personal morals of the individual soldier. This explains the quick reporting in cases like those, discussed below, describing war crimes committed during the invasion of Sicily at Biscari. It also accounts for viscerally negative reactions to trophy taking recounted in memoirs from that war, and the disparity between the combat theaters in the pursuit of justice. As we shall see, fighting was treacherous on all fronts, but a special level of enmity seemed to have been displayed for the enemy in the Pacific.

World War II was not the first time the United States fought a determined enemy in the Pacific. The Philippine-American War from 1899–1902 witnessed the United States fighting to exert its control over the Philippines following victory during the Spanish-American War. In the Philippines, U.S. troops faced an enemy every bit as determined as the Japanese, even if their methods more closely resembled the Vietnamese enemy from that later conflict.<sup>3</sup> In fact, the derogatory term *gook*, while acknowledged by most dictionary makers to be an American contrivance, has several purported etymological origins. One of the earliest these was as a derivative of the term *goo-goo* referring to a Filipino in the Spanish-American War, although some thought it could also have been a mocking imitation of Fili-

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<sup>3</sup> Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (New York: Routledge, 2010), 2, 5–7.



pino speech.<sup>4</sup> In any case, the term would become common to Marines for natives anywhere, and it was used again in Nicaragua during the Banana Wars of the early twentieth century. By the time of the conflict in Vietnam, it was predominantly applied to Asian cultures. While several authors, including Louise Barnett and Paul Kramer, point out that there are specific parallels between the “savage war” in the Philippines and the Vietnam War due to the insurgency aspect, the way the media portrayed—and how society understood—the enemy in World War II meant it, like Vietnam, was in many ways a variation on prejudices dating back to the Philippine-American War.<sup>5</sup>

In her book, *Atrocity and American Military Justice in Southeast Asia*, Louise Barnett aptly demonstrated the zeitgeist of the era with a quote from U.S. Army private John D. LaWall’s memoir about his service during the conflict in the Philippines noting that most of its participants saw that war as a clash between “discipline and lack of it, between civilization and semi-barbarism, between law and order and the brigandage.”<sup>6</sup> This sort of denigration of other cultures as less than civilized and unworthy of consideration or basic rights and protections was rampant and on full display during the Philippine-American War.<sup>7</sup> It was again demonstrated in the World War II Pacific campaigns and was just barely concealed by the time of the Vietnam War. Later conflicts would indeed demonstrate that, even if the flagrant display of this attitude was relegated to history, the attitudes toward other cultures would continue to the present, as demonstrated in the cases from the Iraq War.<sup>8</sup> Like LaWall, many veterans of World War II

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<sup>4</sup> David Roediger, “Gook: The Short History of an Americanism,” *Monthly Review* 43, no. 10 (1992): 50–54; and Paul Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines* (Chapel Hill: University of North Carolina Press, 2006), 125.

<sup>5</sup> Barnett, *Atrocity and American Military Justice in Southeast Asia*, 5–7, 175–79; and Paul A. Kramer, “Race-Making and Colonial Violence in the U.S. Empire: The Philippine-American War as Race War,” *Diplomatic History*, no. 2 (2006): 173–76, <https://doi.org/10.1111/j.1467-7709.2006.00546.x>.

<sup>6</sup> Barnett, *Atrocity and American Military Justice in Southeast Asia*, 22; and J. D. LaWall, “Diary,” Spanish-American War Survey, U.S. Volunteer Infantry 27th Regiment, U.S. Army Center of Military History, Carlisle Barracks, PA, 102.

<sup>7</sup> *Affairs in the Philippine Islands: Hearings Before the Committee on the Philippines of the United States Senate*, 57th Cong. (10 April 1902), 2932, hereafter *Affairs in the Philippine Islands*, 322, 377.

<sup>8</sup> Barnett, *Atrocity and American Military Justice in Southeast Asia*, 237.

and Vietnam later admitted a grudging respect for their determined enemies. But the early contempt, based on training, popular portrayal in the media, and social biases resulted in a disregard not only for the enemy but for the society from whence they came—and this contempt has a share of blame in the violations which followed.

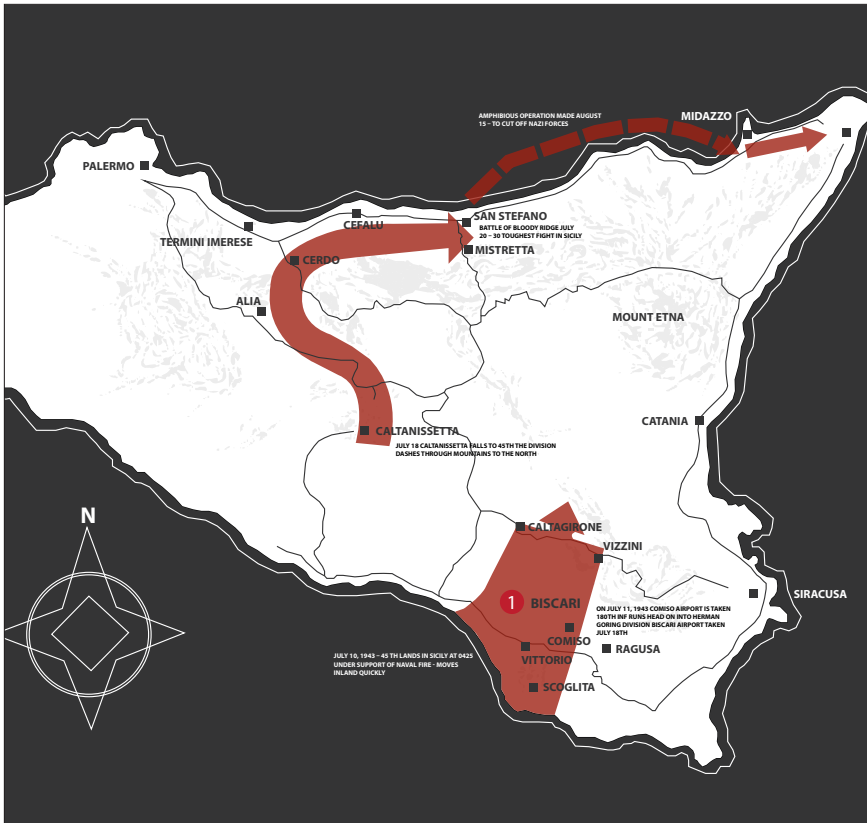
While these societal attitudes, reflected in the perceptions of the soldiers, have a role in the commission of violations, some authors, including Sibylle Scheipers, point out that the laws of war themselves also have a role due to their inherent unfairness, written as they were to influence state-sponsored armies and giving little direction toward the proper treatment of irregular forces.<sup>9</sup> This ambiguous handling of what treatments should be accorded irregular fighters had second- and third-order effects on the populations such fighters lived and hid among. Although the forces killed in the first case study at Biscari were from declared-enemy states of Italy and Germany, the fact some were found in civilian clothes and therefore fighting in an irregular manner lent a degree of complexity to the defense presented by one of the perpetrators.

This chapter sets a baseline to compare future changes aimed at reducing law of war violations, including improvements in training and education of the law of war, how war crimes were investigated and prosecuted, and policy and manpower changes to support all of those efforts. Themes that recur throughout the cases comprising this book include the effects of the strong bond between society and its military, the impact on prosecuting and punishing perpetrators and time elapsed between the violation and initiation of investigations, the degree to which military actions were taken in anticipation of the public reaction, and the very significant influence larger American society's racial biases play in the potential for violations, as well as the consequences to the perpetrators thereafter. This part will address the above by first exploring the Biscari Massacre, actually two separate incidents during the opening days of the campaign in Sicily, to begin illustrating the themes and to provide a starting point for comparison of later cases. Next, it will contrast the actions aimed at accountability taken in the European theater with the conspicuous inaction in the Pacific.

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<sup>9</sup> Sibylle Scheipers, "Is the Law of Armed Conflict Outdated?," *Parameters* 43, no. 4 (2013): 45–46.

## Part One: World War II



Library of Congress Geography and Map Division, Washington, DC, adapted by MCUP

Campaigns of the U.S. Army 45th Infantry Division, map of Sicily, 1945. This map illustrates U.S. troop movements and battle sites on the western front of World War II during July 1943.

ic theater, where countless acts of trophy-taking and violence were perpetrated against personnel rendered hors de combat. There, those crimes produced little to no accountability, demonstrating the influence of societal attitudes on race, as well as illustrating the themes mentioned above.

# CHAPTER 1

## European Theater

On the morning of 10 July 1943, the Allies landed on Sicily and began their invasion of Europe. This landing, part of the Anglo-American effort called Operation Husky, followed the Allied campaign in North Africa and was aided by a major series of deception operations to convince the Axis powers the invasion was aimed for Sardinia.<sup>1</sup> The invasion was a success and eventually resulted in the capture of many Italian soldiers and the expulsion of most German forces to the Italian mainland. It was just days after the initial landings, on 14 July, that two separate incidents, which collectively came to be called the Biscari Massacre, occurred.<sup>2</sup>

Biscari is located on the southern portion of the island, not far from the Gulf of Gela in the southwest region of Sicily. After the initial landing, the American soldiers, part of Lieutenant General George S. Patton's Seventh Army, fought their way through light resistance by the Italian coastal divisions. However, they were soon slowed by a skillfully executed delaying action by German troops. These Americans from the 180th Regiment, 45th Division, part of Lieutenant General Omar Bradley's II Corps, were fresh troops experiencing their first combat after being federalized from their National Guard units in the American southwest. On the evening of 13 July, three companies of the 180th Regiment began their approach to the objective, the airfield north of Biscari, meeting resistance from both Italian and German troops. By the early hours of the next day, they were

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<sup>1</sup> Gerhard L. Weinberg, *A World at Arms: A Global History of World War II* (New York: Cambridge University Press, 1994), 593–95, <https://doi.org/10.1017/CBO9780511818639>.

<sup>2</sup> Although most often referred to in the singular form of *Biscari Massacre*, there were two separate incidents committed by different soldiers during Operation Husky, the invasion of Sicily in July 1943.

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involved in a bitterly contested struggle, which continued until the objective was secured in the afternoon.<sup>3</sup>

The wordy, if dry, summary of the events of the morning in question describes the violation of the 92d article of war for which Sergeant Horace T. West was tried by a general court-martial beginning on 2 September 1943:

Specification: In that Sergeant Horace T. West, Company "A", 180th Infantry, did, at a point along and about forty (40) feet off the road from Biscari Airport to Biscari, Sicily, at approximately 1000 o'clock on or about July 14, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill thirty-seven (37) prisoners of war, none of whose names are known, each of them a human being, by shooting them and each of them with a Thompson Sub-Machinegun.<sup>4</sup>

This, however, does not tell the entire story of the morning. The fighting had begun around 0400, and it was described as a severe, close-in fight, leading to considerable disorganization of the attacking, inexperienced Army units. Around 0800, with the battle ongoing, Sergeant West was given control of 46 prisoners, 3 Germans and 43 Italians, and ordered by the battalion executive officer to march them to the rear and away from the road where they could not observe troop movements. After separating nine of the prisoners to be taken to the regimental intelligence officer for questioning and having borrowed a machine gun from a nearby senior enlisted leader, he announced his intention to shoot the prisoners to the soldiers nearby. He claimed, "This is orders," and instructed the other guards around his nine-man detail that if they "did not want to see it

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<sup>3</sup> James Weingartner, "Massacre at Biscari: Patton and an American War Crime," *Historian* 52, no. 1 (1989): 24–25, <https://doi.org/10.1111/j.1540-6563.1989.tb00772.x>.

<sup>4</sup> Samuel Holmgren, O. Z. Ide, and Gordon Simpson, "(De-Classified) Review of the Trial by General Court Martial of Sergeant Horace West," Branch Office of Judge Advocate General North African Theater of Operations, U.S. Army Biscari Massacre, Sicily, 1943, working file, National Archives and Records Administration (NARA), 1. Usually, these opinions and reviews were published in bound volumes titled *Holdings Opinions and Reviews: Board of Review*, with volumes for specific theaters and years; however, this particular review was omitted from the volume for its theater and year because it was originally classified as secret.

to walk away.”<sup>5</sup> He then fired a full magazine of 30 rounds into the group of prisoners. After exhausting the first magazine, he obtained a second, moved through the group and shot the survivors. All testimony at the subsequent court-martial, including West’s, confirmed that he had done almost all the shooting.<sup>6</sup>

That same morning, Captain John T. Compton was commanding Company C of the 180th Regiment as it attacked the Biscari airport. During the fighting, the company sustained multiple casualties from concealed positions on the hillside. One of Compton’s men witnessed two enemy fighters, one in an Italian uniform and one in civilian clothes, emerge from a dugout with a white flag of surrender and waved them over. As they approached, another 40 occupants of the dugout, mostly, but not all, uniformed also emerged to surrender. A report was made to Captain Compton about the prisoners as the soldier took the prisoners to his sergeant. Captain Compton ordered the prisoners shot—an order that a firing squad of roughly two dozen men carried out.<sup>7</sup> Captain Compton, like Sergeant West, would be tried for violations of Article 92. The inspector general of the 45th Division—citing a paragraph in the U.S. Army’s 1928 edition of *A Manual for Courts-Martial* that stated in part, “Acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable”—decided to prosecute Captain Compton alone for this incident.<sup>8</sup>

At this point, it appears that although a crime had been committed, the system worked well enough to bring the perpetrators to trial to gain accountability for their actions. Two key reasons for this were the quick reporting and the subsequent initiation of an investigation, despite being in the middle of an ongoing combat campaign. Although these events occurred during fighting near the highest end of the range of military op-

<sup>5</sup> Holmgren, Ide, and Simpson, “(De-Classified) Review of the Trial by General Court Martial of Sergeant Horace West,” 2–3.

<sup>6</sup> Weingartner, “Massacre at Biscari,” 27.

<sup>7</sup> “De-Classified Testimony of Colonel Forrest Cookson,” interview of Col Forrest Cookson by BGen Philip Brown and Col Franklin Babcock, 16 February 1944, U.S. Army Biscari Massacre, Sicily, 1943, working file, NARA, 16.

<sup>8</sup> Holmgren, Ide, and Simpson, “(De-Classified) Review of the Trial by General Court Martial of Sergeant Horace West,” 3. The specific general rule quoted is found in the 92d article of war (murder) contained in the cited manual.

## Part One: World War II

erations continuum, there was a recognized need to assign responsibility and punish the guilty. Recognizing and acting on the need and actually seeing justice done, however, were two different things, and some of the other variables mentioned previously also affected the outcome. Among these were the defense used and the failings of the military legal system used to adjudicate these crimes.

Although both men were brought to trial for the violations of the 92d article of war, the defense strategies employed, and the outcomes of the trials, were very different. West's lawyers offered several points for his defense. Among these were that he had witnessed three Axis soldiers murder U.S. soldiers whom they captured just a short time before he had taken control of the prisoners; also, that the cumulative effects of the several hard days of fighting preceding the killings caused a fatigue that, combined with the other events, led him to believe that "he might not have been quite himself." Last, he had heard the regimental commander, Colonel Forrest E. Cookson, relay General Patton's orders, to his recollection, that "no prisoners would be taken and not to stop to take them."<sup>9</sup> This defense was essentially one of temporary insanity with the additional aspect of compliance with superior orders. Four members of the five-man medical board that examined him prior to the trial had, however, found him sane at the time of the massacre. At his trial, still overseas, Sergeant West was found guilty of the murder of 37 persons and sentenced to life imprisonment, although (unusually) without the addition of a dishonorable discharge from the Army. While that was not in keeping with normal policies, the omission of the discharge did not invalidate the sentence.<sup>10</sup> West remained in a detention center in North Africa until November 1944, when the unexecuted portion of his sentence was remitted and he was returned to duty as a private, ultimately only serving a little more than a year of confinement for the murder of more than 30 men.<sup>11</sup>

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<sup>9</sup> Holmgren, Ide, and Simpson, "(De-Classified) Review of the Trial by General Court Martial of Sergeant Horace West," 8.

<sup>10</sup> Holmgren, Ide, and Simpson, "(De-Classified) Review of the Trial by General Court Martial of Sergeant Horace West," 13.

<sup>11</sup> Weingartner, "Massacre at Biscari," 38-39. *Remission* refers to the act of canceling any unexecuted portion of a punishment.

Captain Compton's defense for his actions, which were in no more dispute than Sergeant West's actions, was tightly centered on the motive for why he gave the orders. He said he was complying with the direction he received from Patton when the regimental officers were assembled before leaving North Africa. According to various witness accounts, Patton brought the officers of the 180th Infantry Regiment together because the Sicily invasion was to be their first combat after being federalized. The main theme of Patton's message to the regiment was that, in addition to the need to be ready to take the enemy's life as a practical matter of survival, gaining the reputation as a lethal enemy would discourage the fierce resistance they may otherwise see.<sup>12</sup> The court, after deliberating, returned an acquittal verdict based on the belief that Compton acted within good faith of Patton's exhortations in North Africa before the landings. This, in effect, was the same reasoning for trying Compton alone, rather than alongside the members of the firing squad who killed the prisoners.

While at the time of these trials in 1943 the general rule concerning superior orders was acknowledged to be in force, the Allies had already announced in 1942 that they would try German and Japanese soldiers for obeying unlawful orders. By April 1944, Britain revised its law of war manual to invalidate a defense resting on execution of superior orders and, in November of that year, the United States took similar action, revising its relevant orders and manuals.<sup>13</sup> This would conveniently ensure that any further war crimes by Americans for which they were convicted would set a more recent precedent before the trials of German and Japanese soldiers began.

While both incidents ended in more than 30 enemy prisoners murdered, and both defendants used Patton's inflammatory North African speech to justify, at least in part, their actions, there were important differences. In West's incident, the prisoners, all in uniform, had been slain at a point further removed, in time and space, from where they were captured. Additionally, his use of Patton's remarks was secondary to his reliance on

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<sup>12</sup> "(De-Classified) Testimony of Colonel Cookson," 20-21.

<sup>13</sup> Gary D. Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums," *American University International Law Review* 15, no. 2 (1999): 481, 510.



## Part One: World War II

a defense of temporary insanity. Compton's defense was tightly focused on following a superior's orders, a defense theory that was also used by the 45th Division's inspector general in reasoning that Captain Compton should stand trial while the firing squad who shot the prisoners should not. Added to this was his assertion that some of the enemy soldiers were snipers and that some were wearing civilian clothes to avoid detection or engagement. The staff judge advocate presiding in both cases, Lieutenant Colonel William Cook, believed that Patton's speech, even if thought to be an order, would have been an illegal, and therefore invalid, one.<sup>14</sup> While he would not publicly criticize the verdict of Compton's court-martial, he was bothered by both the disparity between the outcomes and by the action attributed to an "order" he believed was "so foreign to the American sense of justice" that it should have been ignored due to its lack of legality. He pronounced himself in disagreement with the verdict, and this review made it to the highest levels of the Army: General Dwight D. Eisenhower in Europe and General George C. Marshall back in the United States.<sup>15</sup>

The documentation of the courts-martial was classified secret and top secret, and neither was declassified until 1958, so word of the killings and the trials were not reported by the media in the United States. The Army

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<sup>14</sup> While Patton was not on trial during these proceedings and the motives and exact content of his speech, which was quoted throughout both proceedings with slight variations, were not determined, he was professionally impacted by these events. In addition to his remarks or orders, whichever one believes them to be, his professional conduct was also questioned concerning the later assault of two soldiers he slapped when hearing they were suffering the effects of combat stress. The public reaction to the assaults aided in his being passed by Gen Dwight D. Eisenhower for command of the ground assault troops in the coming invasion of Europe in favor of his subordinate corps commander, LtGen Omar Bradley. This was the same Bradley who had quickly alerted him to the massacre and ordered further investigations. The War Department became sufficiently uncomfortable with the information obtained that it appointed an officer to directly question Patton on the allegations, which if proved accurate, would be "prejudicial to his character and standing." Had the invasion of Normandy not been imminent and a readily available and suitable replacement on hand, it is likely that Eisenhower would have relieved Patton of his command and sent him back to the United States reduced in grade, options Gen George C. Marshall had given Eisenhower. See Weingartner, "Massacre at Biscari," 34-35; and Martin Blumenson, ed., *The Patton Papers, 1940 to 1945*, vol. 2 (Boston, MA: Houghton Mifflin, 1974), 449-50.

<sup>15</sup> Weingartner, "Massacre at Biscari," 30-32; and Holmgren, Ide, and Simpson, "(De-Classified) Review of the Trial by General Court Martial of Sergeant Horace West," 1.

was concerned with both public reaction and with the possibility of enemy reprisals, something that has been seen also in the later cases of Abu Ghraib (2003) and Mahmudiya (2006) during Operation Iraqi Freedom.<sup>16</sup> Compton was reassigned to another unit and later killed in action in November 1943, but West remained imprisoned in North Africa. He was sent to Africa instead of the U.S. Disciplinary Barracks in Beekman, New York, which his sentence had indicated, to keep the incident quiet. General Eisenhower had determined he would return West to active service only after he had served enough time to demonstrate he was duly punished and fit to return, but continued correspondence from West's brother to the Army and Congress spurred Eisenhower to remit the rest of the sentence in November 1944.<sup>17</sup>

In the Biscari Massacre and many instances in the European theater, the U.S. military demonstrated, albeit through a system that was not perfect and at times ineffectual, that it felt compelled to uphold the law of war and even changed *Rules of Land Warfare*, Field Manual 27-10, during the ongoing conflict. In the attempt to keep information about these war crimes from the public, the military's concern about public perception and reactions betrayed a belief that these crimes against the European Axis enemy would potentially harm support. By moving this work's examination to the Pacific theater, the difference in the military's appetite to punish violators and in the level of care to shield the public becomes obvious, with weekly periodicals and newspapers publishing pictures or reports displaying obvious violations that drew much less negative feedback from the public than one might expect, given public reaction to U.S. war crimes in Europe.

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<sup>16</sup> BGen Philip Brown, USA, "Memorandum dated 5 February 1944." The degree to which the Army was willing to go to delay any news of the killings of enemy soldiers was evident in this and other memoranda prepared by BGen Brown between 7 January and 17 February 1944. They note the receipt of correspondence from West's brother and the difficulty that is presented by his inquiries, and they also discuss his retention in Africa for incarceration instead of the United States and the belief that if the press were to find out it would be "a columnist's field day."

<sup>17</sup> Fred L. Borch III, "War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943," *Army Lawyer* (March 2013): 1-6.

## CHAPTER 2

### Pacific Theater

As hard as the fighting in the North African and European theaters was between the Axis and the Allies, the level of savagery did not match that of the war waged against Japan.<sup>1</sup> Once the United States recovered from the initial shock of the attack on Pearl Harbor, Hawaii, and declared war on Japan, the task of pushing Japan back across the Pacific began. From the outset, this theater of the war would be different in the brutality displayed by both sides.<sup>2</sup> Both U.S. Marine and Army units fought against the Japanese. All Services would have incidents of law of war violations; however, since the Corps and Army conducted most of the ground fighting, Marines' and soldiers' face-to-face exposure to the enemy was greater, increasing both the enmity between them and the Japanese and the chances that law of war violations would occur. While there were obvious efforts in Europe to hold troops accountable for violations, there was little evidence of any concerted effort to do so in the Pacific. In a direct comparison, one is struck by the clear contrast in the U.S. military's efforts to uphold the law between the two theaters. This difference lends credence to the assertion that the most influential variable to the way the laws of war were enforced—or not—was the race of the enemy. And this influence had its roots not within the military, where the dehumanization of the enemy is often identified as a factor for a disparity in violence, but within broader American society.

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<sup>1</sup> James J. Weingartner, "Trophies of War: U.S. Troops and the Mutilations of Japanese War Dead, 1941–1945," *Pacific Historical Review* 61, no. 1 (February 1992): 53, <https://doi.org/10.2307/3640788>.

<sup>2</sup> Matthew Jones, *After Hiroshima: The United States, Race, and Nuclear Weapons in Asia, 1945–1965* (New York: Cambridge University Press, 2010), 7–9, <https://doi.org/10.1017/CBO9780511712197>; Craig M. Cameron, *American Samurai: Myth, Imagination, and the Conduct of Battle in the First Marine Division, 1941–1945* (New York: Cambridge University Press, 1994), 114; and John Keegan, *A History of Warfare* (New York: Vintage Books, 1993), 375–79.

In his book *War without Mercy*, John W. Dower outlines the racial components of fighting during World War II and offers a compelling argument for why some of the violations of the laws of war occurred with such high frequency in the Pacific theater. Among these components are the dehumanization of the enemy in the media and in the training of the armed forces; the Japanese record of atrocities in China dating from 1937; Japanese troops' tenacity, seemingly to the point nearing the suicidal; and the long record of contempt in many Western and White societies for "colored" races.<sup>3</sup> While there are many examples of violations from the European theater involving the failure to take prisoners (or killing them once taken), as well as violations against the civilian population in the form of rapes or indiscriminate offensive action (e.g., bombing), the Pacific theater included these as well as the desecration of remains and a more flagrant disregard of conventions concerning combatants rendered out of the fight, such as survivors of sinking vessels destroyed by Allied attacks.<sup>4</sup>

It is impossible to determine what percentage of U.S. Marines and soldiers took part in collecting Japanese body parts as trophies. The public reporting on it was, however, widespread, and it was concerning enough to the military that as early as just after the battle on Guadalcanal (August 1942–February 1943), higher headquarters released directives reminding troops that trophy-taking was a prohibited activity and ordering commanders to ensure the practice was stopped.<sup>5</sup> Later in the war, in January 1944, the Joint Chiefs of Staff felt compelled to issue a duplicative directive.<sup>6</sup> Judging by the continued reporting, neither directive accomplished its purpose. One widely known incident that resulted in an investigation was that of a Navy lieutenant who decapitated a body on a beach in New Guinea and sent the skull home to his girlfriend. According to the caption of the full-page-size photograph in *Life* magazine on 22 May 1944, he had

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<sup>3</sup> John W. Dower, *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon Books, 1986), 147–48.

<sup>4</sup> Dr. Alan Stephens, "The Battle of the Bismarck Sea," Central Blue forum, Sir Richard Williams Foundation, 2 March 2017.

<sup>5</sup> Simon Harrison, "Skull Trophies of the Pacific War: Transgressive Objects of Remembrance," *Journal of the Royal Anthropological Institute* 12, no. 4 (2006): 827, <https://doi.org/10.1111/j.1467-9655.2006.00365.x>.

<sup>6</sup> Walker S. Schneider, "Skull Questions: The Public Discussion of American Trophy Collection During World War II," *Penn History Review* 25, no. 2 (2018): 143.

promised her a skull before he left. While *Life's* editors received a number of letters deploring the act and their publication of the image, there was by far a greater sense of what Walker Schneider described as acceptance or apathy regarding the incident and others like it among the media and many civilians.<sup>7</sup> Reviewing the letters to *Life's* editor in the five subsequent issues of the magazine, only one of five published responses was completely negative in tone and questioned the morality of making a trophy of human remains. Similar response patterns were found in other noted published photos of the period by *Life*, with reactions split for two articles showing dead Japanese soldiers in a trench and a burnt Japanese head mounted on a tank published on 1 February 1943.<sup>8</sup> There were more letters concerning the perceived abuse of a cat being removed from a tree published than those criticizing the publicizing of enemy war dead. The editor's reply to those decrying the photograph of the withered enemy head decorating a tank was "War is unpleasant, cruel, and inhuman. And it is more dangerous to forget this than be shocked by reminders.-ED."<sup>9</sup> Only after the secretaries of the State and War Departments intervened did the Navy half-heartedly investigate the matter of the mailed skull trophy. In the end, the lieutenant received only a letter of reprimand for his "demonstrated poor judgment and lack of an appropriate sense of decency."<sup>10</sup>

Despite the lack of action on the part of the Services, in addition to violating the Articles of War and the edicts published by higher headquarters, the widespread collecting of trophies was a violation of the 1929 Geneva Conventions on sick and wounded, which reads, in part: "After every engagement, the belligerent who remains in possession of the field shall take measures to search for wounded and the dead and protect them from robbery and ill treatment."<sup>11</sup> Collecting Japanese body parts also violated customary laws of warfare and for some Americans, although surprisingly fewer than would be thought, their sense of decency. Many Americans viewed the power of the government and military as being derived from

<sup>7</sup> Schneider, "Skull Questions," 127; and Ralph Crane, "Picture of the Week," *Life*, 22 May 1944, 35.

<sup>8</sup> "Guadalcanal: Grassy Knoll Battle," *Life*, 1 February 1943, 27.

<sup>9</sup> "Maltreated Cat" and "Dead Jap," Letters to the Editor, *Life*, 22 February 1943, 6, 8.

<sup>10</sup> Weingartner, "Trophies of War," 60-66.

<sup>11</sup> Weingartner, "Trophies of War," 59.



Courtesy of Australian War Memorial

Alexishafen, New Guinea, 30 April 1944. Lt E. V. McPherson of Columbus, OH, with a Japanese skull that served as a mascot on board the U.S. Navy motor torpedo boat PT-341.

a moral superiority, and the servicemember was viewed as a representation of the United States and its virtues. The public, therefore, had a palpable “morally charged connection” to the American GIs.<sup>12</sup> The decided lack of indignation at, or at least justification for, the violations exemplified by the *Life* photographs, and other well-known stories, may be due in part to this feeling of connection and is discussed again in this book’s cases in parts two and three.

Another example of a violation in the Pacific theater of the war receiving hardly any criticism was the decision by General George Churchill Kenney, commander of Allied Air Forces in the South Pacific area from 1942–45, to order his U.S. and Allied aircraft to engage Japanese vessels

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<sup>12</sup> Schneider, “Skull Questions,” 128.



## Part One: World War II



Official U.S. Navy photo

Despite warnings from higher headquarters as early as 1942, in the Pacific there were many instances of the order being ignored with little repercussion. This image from 1944 shows skulls being boiled to remove the flesh. The photograph's original caption read: "Skull stewing: skulls supposedly worth \$35 in cash or trade from merchant marine sailors."

attempting a rescue—and the survivors—following the Battle of the Bismarck Sea.<sup>13</sup> Indeed, following the initial inflated reports of up to 15,000 casualties (a figure later estimated to be less than 3,000) from the sinking of eight transports and three escorts, and the "mopping up" operations by strafing aircraft, Kenney was lauded, appearing on the cover of *Life* magazine.<sup>14</sup> The operations were a violation of the Convention for the Adaptation to Maritime War of the Principles of the Geneva Conventions in the Hague Convention of 1907, which prohibited the killing of shipwreck survi-

<sup>13</sup> "Wau and the Bismarck Sea," in Douglas Gillison, *Australia in the War of 1939–1945*, series 3: Air, vol. 1, *Royal Australian Air Force, 1939–1942* (Canberra, AU: Australian War Memorial, 1962), 694–95.

<sup>14</sup> Lawrence Spinetta, "Battle of the Bismarck Sea," HistoryNet, 24 September 2007.

vors.<sup>15</sup> It also violated the later 1929 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. This second document was not ratified by the Japanese, although they signed it, however the United States had ratified it and was subject to its provisions.<sup>16</sup> Finally, Kenney's veneration was evidence of a double standard applied to Allied versus Axis acts as in the case of the sentencing of the captain of the Japanese prisoner ship SS *Lisbon Maru* (1920). The ship was transporting more than 1,800 British soldiers in 1942 when it was torpedoed by an American submarine. The Japanese captain ordered the prisoners locked in the holds, and even those who escaped were subject to being shot by Japanese soldiers in escort ships or run over by those same ships—not much of a different fate than the soldiers Kenney ordered killed. More than 800 British soldiers died in the incident, with many of the remainder being rescued by Chinese islanders before eventually being recaptured by the Japanese.<sup>17</sup>

Cases of violations of the laws of war, customary or ratified, were apparent throughout World War II and were not confined to specific theaters, countries, or Services. The idea of how prisoners and noncombatants should be treated evolved over time from early examples in ancient Greece and Rome, where noncitizen prisoners or noncombatants enjoyed little to no relief from the cruelest treatment to the later ideas that a standard treatment for prisoners and noncombatants should be enforced.<sup>18</sup> But from those earliest instances on, there remain multiple examples throughout history of the collection of trophies from enemy combatants that have remained fairly constant, through many disparate cultures. Common in those cases is the idea that there is a distinction between close and dis-

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<sup>15</sup> Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention, Hague Convention (X), 18 October 1907.

<sup>16</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention (I), 27 July 1929.

<sup>17</sup> Guy Walters, "Was This Japan's Most Heinous War Crime?: How 800 POWs Were Locked up and Left to Drown When Their Prison Ship Was Torpedoed," *Daily Mail*, 23 October 2017. Records of the trial are included in Records of the Office of the Judge Advocate General (Navy), entry A1 5, loc. no. 290/902/68/6, box 6, Record Group (RG) 125, NARA, College Park, MD.

<sup>18</sup> Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: Verso Books, 2010), 237–39.



tant enemies. According to Simon Harrison, close enemies—i.e., similar in terms of race or skin color and/or culture to the soldiers fighting them—are viewed as fully human, and distant enemies, either geographically or socially, are viewed as semi- or subhuman and therefore subject to the collection of trophies, whether scalps, heads, or other body parts.<sup>19</sup>

The implicit racist aspect embedded in this concept appears across the world and repeatedly during conflicts from the earliest recorded history. Even in a country that proclaims its ideals to be that all people are created equal and a belief in the universal nature of human rights, the underlying biases can be found within its society. The young, able-bodied men and women who were drafted (prior to 1973) or recruited are reflections of the society from which they come and bring with them to the Services those biases and prejudices that can determine their actions in the absence of strong leadership or command systems. Also, in addition to the inequity pointed out earlier in international law treatment of irregular fighters by authors like Scheipers, there is another aspect of inherent unfairness written into the international law in its early phases. Well after World War I, many still accepted that “international law is a product of the special civilization of modern Europe.” But by 1938, the system was being questioned, and some called it “discredited and on the defensive.”<sup>20</sup> After World War II, the clear dichotomy between how violations against an enemy of a similar cultural background in the European theater versus those against an enemy from a different culture in the Pacific theater were handled—or ignored—supplied more evidence for those who saw the international law as flawed.

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<sup>19</sup> Harrison, “Skull Trophies,” 818–19.

<sup>20</sup> Mark Mazower, “An International Civilization?: Empire, Internationalism and the Crisis of the Mid-twentieth Century,” *International Affairs* 82, no. 3 (2006): 558, 564.

# CHAPTER 3

## Discussion One

Differences are readily apparent in a comparison of the European and Pacific theaters of World War II, which may well be due to Simon Harrison's near and distant enemy context. To use the case studies of violations during this war as a baseline, though, it is important to assess the variables already introduced. First, when discussing conflicts, it is important to remember that not all military operations are equal in intensity, duration, or resources committed and are visualized by the U.S. land forces on a continuum. The current conception of this continuum is often referred to as the range of military operations (ROMO). This range, for the use of military force, commences with deterrence, security cooperation, and military engagement (training) with other militaries. It extends through limited actions, such as crisis response, counterinsurgencies, and limited contingency operations to the highly committed side of major campaigns and operations characterizing declared war.<sup>1</sup> At the most violent end of the spectrum, this declared war is total in nature, with not only military commitment but the deployment of all other instruments of national power to meet existential threats. The U.S. Marine Corps and Army scale their deployed forces not only to meet the threat at hand but in response to political and diplomatic restraints and constraints.

Of course, World War II was at the most violent end of the ROMO, and this certainly added to the conflict's savagery: more than 16 million Americans served during the war in all branches, including more than 11 million in the Army and 660,000 in the Marine Corps. Of the Army personnel, roughly 2.75 million served in the Army Ground Forces or ground combat units, although with engineers, military police, and other skill sets nor-

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<sup>1</sup> *Marine Corps Operations*, Marine Corps Doctrinal Publication (MCDP) 1-0 (Washington, DC: Headquarters Marine Corps, 2011), 2-10.

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mally in direct support of infantry recognized as Army Support Forces, the number in combat was much higher than the one-third of the Army recognized as ground forces.<sup>2</sup> In popular culture, World War II is called the Good War, a reflection of the belief in the moral right of the conflict. The percentage of the population to have served in World War II certainly dwarfed the percentage who served later in Vietnam and other conflicts.<sup>3</sup> Walker Schneider's assertion about the relationship between society and its armies during World War II was still valid in later conflicts, although possibly for a different reason. He wrote:

In the minds of many Americans, the power of the United States government and military stemmed from a superior morality. The American soldier was therefore viewed as the manifestation of the United States and its virtues, and the public had a strong, "morally charged connection" to American GIs.<sup>4</sup>

During World War II, part of the moral connection was also due to the sheer numbers of the population involved in that nationwide total war effort—every family had members serving or knew many friends who were. During Vietnam and later, more limited conflicts, however, a much smaller percentage served, but did so in numbers making it unnecessary for others to do so. The difference between World War II's position on the ROMO and that of later conflicts may account for just how readily certain violations were overlooked during World War II. After the draft ended in the closing days of Vietnam, and the U.S. military became even more wedded to aerial dominance to soften targets before committing formations of men and machines on the ground, society's growing detachment from its military provided both positive and negative consequences. On one hand, at the same time this detachment increased, the professionalization of the force

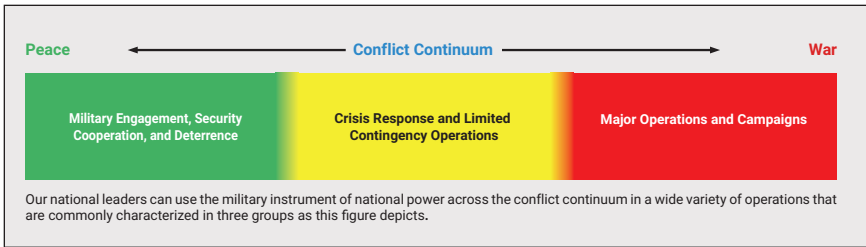
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<sup>2</sup> Allyn Vannoy, "Expanding the Size of the U.S. Military in World War II," *Warfare History Network*, 27 October 2014.

<sup>3</sup> In 1943, the midpoint of the war, the U.S. population was nearly 137 million. With more than 16 million in uniform during the war, 11.5 percent of Americans served in World War II. During the Vietnam War, with the U.S. population at 201 million near the end of 1968, a fair midpoint, and 8.7 million having served, the percentage of enlisted Americans exceeded 4.3 percent, despite the conflict running twice as long.

<sup>4</sup> Walker Schneider, "Skull Questions: The Public Discussion of American Trophy Collection During World War II," *Penn History Review* 25, no. 2 (2018): 127.

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Range of Military Operations, *Joint Operations, Joint Publication 3-0*  
(Washington, DC: Office of the Joint Chiefs of Staff, 2011), I-5

Continuum of the range of military operations (ROMO).

became more widely accepted and public esteem and trust in the military increased. On the other hand, this detachment meant that more than ever, the public's awareness of the absolute need for discipline and adherence to law of war in winning hearts and minds on the ground during the more prevalent limited wars was minimized. The American public's growing esteem and moral connection with its military combined with the lowered awareness of the stakes of lost discipline made it more likely that the public would readily excuse or ignore counterproductive and criminal violations of the law of war—writing letters, editorials, and opinion pieces, and even pressuring politicians to intercede to have charges dismissed or punishments reduced—to the detriment of military efforts to enforce its legal code and the laws of war.

But what explains the differences between theaters in World War II? Whether the widespread desecration of remains through trophy-taking or the willingness to disregard conventions to kill survivors of sinking ships—not to mention other types of grave breaches of international law—there were many cases of violations in the Pacific theater documented in service-member personal memoirs, officially released photos, and relics like the skull and enemy head documented in the *Life* photo. Despite this and the multiple prohibitive directives to commanders, no records of prosecution for these violations are readily found. In the European theater, there were instances of soldiers held accountable, but when comparing the fighting in each theater, there is evidence to argue that the race of the victims played a role in whether the perpetrators were held accountable. The differences in

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the brutalities committed on the enemy in each theater give credibility to Harrison's concept of near and distant enemies and reinforces the assertion that race played a role. While the Germans and Italians were viewed as "men just like us," the humanity of the Japanese was held in much lower regard by many American servicemembers.<sup>5</sup>

This is clear from the way each enemy was represented in the media and in popular culture. Frank Capra, the famous Hollywood director, was asked by the secretary of war to produce orientation documentary films about the Axis powers. He did so in prize-winning fashion, but although both films were effective pieces of propaganda, his approach from the first to the second differed slightly. In his *Here Is Germany* documentary, Capra begins with scenes of Germans going about their normal lives—lives not so different from Americans—before switching to scenes of Nazi atrocities. In the *Know Your Enemy—Japan* film, he focused on Japanese atrocities in China and elsewhere and the Japanese belief in their cultural superiority from the start.<sup>6</sup> Although *Know Your Enemy—Japan* was finished too late to be used effectively, it is representative of the overt racism in mainstream media of the day, portraying the Japanese in dehumanizing ways much more frequently than their European allies. This effect of underlying racism toward a people who do not resemble the average American servicemember of the time was repeated in future conflicts, although the dehumanization in media and public conversation was less overt in those later wars. The existential nature of World War II had removed some social constraints and allowed a more overt display of racism-driven enmity. As will be shown in later chapters, the fact that there was justice, however limited, in Biscari and other European theater cases but seldom any reaction to similar cases in the Pacific reflects a broader trend that would continue. In cases where there is a difference in race, religion, or culture—or a

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<sup>5</sup> Simon Harrison, "Skull Trophies of the Pacific War: Transgressive Objects of Remembrance," *Journal of the Royal Anthropological Institute* 12, no. 4 (2006): 819–21, <https://doi.org/10.1111/j.1467-9655.2006.00365.x>.

<sup>6</sup> John W. Dower, *War without Mercy* (New York: Pantheon Books, 1986), 15–23; *Here Is Germany*, directed by Frank Capra, starring Anthony Veiller (Washington, DC: Office of War Information, 1945), 52 min; and *Know Your Enemy—Japan*, directed by Frank Capra, starring John Beal, Howard Duff, and Walter Huston (Washington, DC: Office of War Information, 1945), 63 min.

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combination of these—reinforcing the need to adhere to the law of war is harder due to the view of the enemy as lesser by servicemembers and apathy on the part of society due to the racist undercurrents it wrestles with.

Another variable in the success of determining responsibility and ultimately gaining accountability for law of war violations is the interval of time between the crime and its discovery, investigation, and prosecution. There are several reasons for this that are exacerbated because of the violent environment in which war crimes are committed. The death or disappearance for various reasons of perpetrators or witnesses is one common circumstance, for instance the death before the events came to trial of the senior enlisted soldier who gave Sergeant West his machine gun.<sup>7</sup> Access to crime scenes that may be compromised or rendered useless by too much time and traffic of personnel or equipment—if the location is even noted and recorded—is another. It was fortuitous that a chaplain saw the bodies of the men executed by West when he did so that his report could initiate a timely investigation, as the movement of the units ever onward would have left the site behind rather quickly. Finally, with many civil functions, including mortuary affairs and normal funerary services, delayed or interrupted during conflicts, the location of physical evidence as important as the victim's body may sometimes be lost. While not an issue initially in the Biscari Massacre, in which investigation started quickly and prosecution began more than two months later, the effect of time on availability of evidence and witnesses will be seen in future cases.

In the case of the Biscari Massacre, it is unclear how Captain Compton's order and the ensuing murders were first reported to higher headquarters, although General Patton's diary mentioned his deputy, General Omar Bradley, being "in great excitement" delivering the news the day of the events. West's crime was discovered the next morning by the 45th Division's chaplain, who saw the bodies lying close together with bullet wounds to the chest or head and a great deal of expended ammunition brass close by. He noticed a lieutenant in the area who was investigating, likely sent by Bradley, and continuing on his way, found the second group-

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<sup>7</sup> "De-Classified Testimony of Colonel Forrest Cookson," interview of Col Forrest Cookson by BGen Philip Brown and Col Franklin Babcock, 16 February 1944, U.S. Army Biscari Massacre, Sicily, 1943, working file, NARA, 11.

ing of bodies—from the Compton-ordered firing squad—lying in line. He was engaged by several soldiers at the command post relating their shame at what their fellow soldiers had done, but others dismissed the killings since they had been “told not to make prisoners.”<sup>8</sup> When first informed, General Bradley’s recollection of the conversation made it seem as though Patton was inclined to dismiss and cover it up.<sup>9</sup> As the seriousness became apparent, however, the investigation was underway and the two most responsible, West and Compton, brought under charges. The investigation continued from that morning and West and Compton were tried in September and October 1943.

While the soldiers who executed the prisoners under Captain Compton’s orders escaped prosecution, it is evident that later in the war this would not have been the case. In 1943, they went free of prosecution due to the interpretation of the *Manual for Courts-Martial* paragraph that referenced the *Rules of Land Warfare*, Basic Field Manual (FM) 27-10. Later in the war, however, following the 1942 announcement that Nazis and Japanese would be tried for crimes and would be denied the use of a superior’s orders defense, the United Kingdom and the United States’ War Department changed the wording in the *Rules of Land Warfare*.<sup>10</sup> Captain Compton was acquitted, and Sergeant West had his confinement for life remitted after serving more than a year in custody. West’s reduction in sentence was due to a concern within the Army over the disparity in the outcomes of the courts-martial—between an enlisted man and an officer—but it was carried out quietly for fears of both aiding the enemy and incensing the gener-

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<sup>8</sup> James Weingartner, “Massacre at Biscari: Patton and an American War Crime,” *Historian* 52, no. 1 (1989): 25–26, <https://doi.org/10.1111/j.1540-6563.1989.tb00772.x>; and George S. Patton diary, 15 July 1943, images 26–28, box 3, call no. mss35634, George S. Patton Papers: Diaries, 1910–45, Library of Congress.

<sup>9</sup> Carlo D’Este, *Bitter Victory: The Battle for Sicily* (New York: Harper Perennial, 1988), 318. Patton’s words are found on page 210 of his handwritten diary of 15 July 1943, available digitally from the Library of Congress.

<sup>10</sup> *A Manual for Courts-Martial* (Washington, DC: U.S. Army, 1943); *Rules of Land Warfare*, Basic Field Manual (FM) 27-10 (Washington, DC: War Department, 1944), para. 345.1; and Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 19, <https://doi.org/10.1017/9781108917797>. The United Kingdom changed its law of war manual to omit the flagrant double standard in April 1944 and the United States did so in November of that year.

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al public.<sup>11</sup> This may indicate that, while American society had few qualms about the collecting of enemy skulls or strafing the swimming survivors of destroyed enemy ships in the Pacific, both highlighted in *Life*, the murder of White prisoners of war necessitated some measure of accountability. And while a small measure of accountability was gained by the enlisted West's conviction, the acquittal of an officer, due to Patton's exhortations, would not have seemed equitable or palatable to the public.

When considering how the knowledge of a war crime's occurrence leads to investigation and conviction, the role the civilian media can play should also be noted. While civilian news correspondents were assigned to theaters during World War II, much of the news that was reported was relayed through combat correspondents in the employ of the Services. Additionally, these reports were often subject to draconian censorship to maintain operational security. During later conflicts, especially after the advent of a 24-hour news cycle and, eventually, social media, the media played a much larger role in shaping public awareness and opinion. For a more recent example of this, look no further than the media coverage, public sentiment, and finally, the political intervention in the case of Chief Edward R. Gallagher, a U.S. Navy SEAL who was tried for killing a wounded Islamic State of Iraq and Syria (ISIS) captive.<sup>12</sup> This type of extramural influence is examined further in the chapters on Vietnam and Iraq.

As noted previously, West and Compton each used a defense that included following the orders of a superior. There was precedent for this in the military. During the Philippine-American War (1899–1902), Marine Corps major Littleton W. T. Waller was tried at court-martial for killing “natives” on the island of Samar.<sup>13</sup> His defense was that with the exception of poor wording in one of his orders, all actions he and his men took were under the orders of U.S. Army brigadier general Jacob H. Smith. Smith's orders were: “I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please me.” While Waller was acquit-

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<sup>11</sup> Weingartner, “Massacre at Biscari,” 38.

<sup>12</sup> Dave Philipps, “Anguish and Anger from the Navy SEALs Who Turned in Edward Gallagher,” *New York Times*, 27 December 2019.

<sup>13</sup> “Major Waller Acquitted: Court Stood Eleven to Two for that Verdict,” *New York Times*, 14 April 1907, 1.



ted, Smith was tried and convicted for inciting and ordering his subordinates to commit atrocities.<sup>14</sup> While West's argument was unsuccessful due to the defense's attempt to rely more on battle fatigue and temporary insanity as its primary focus, Compton's argument won an acquittal. Numerous writers, such as retired Army lawyer Colonel Frederic L. Borch III in his article about the Biscari Massacre and Ian Sayer and Douglas Botting in their book *Hitler's Last General*, question whether Compton's defense would have been successful after November 1944, when the Army revised its *Rules of Land Warfare*.<sup>15</sup> While in future conflicts, a superior's orders would not be considered as a defense, it took time for that to become the widely upheld standard. Indeed, after the killing of German civilians in March 1945, the officer who had shot several noncombatants and his soldiers, whom he ordered to kill others, were all tried for the murders. In this case the officer was found guilty, though of a lesser charge, and the three enlisted men—despite the change in the *Rules of Land Warfare* from the previous November invalidating a superior's order as a complete defense—were acquitted.<sup>16</sup> There were other circumstances considered, but this displayed a double standard from the trials held for similar Axis defendants. In the ensuing legal review of the case, the judge noted that a soldier in those circumstances “should follow a course of obedience, leaving the superior officer responsible for the consequences.”<sup>17</sup>

The Pacific theater provided no proceedings and therefore no defenses to analyze. Given the media treatment of the enemy and characterization

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<sup>14</sup> Solis, *The Law of Armed Conflict*, 63–65.

<sup>15</sup> Fred L. Borch III, “War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943,” *Army Lawyer*, 2013; and Ian Sayer and Douglas Botting, *Hitler's Last General: The Case against Wilhelm Mohnke* (London: Bantam Press, 1989).

<sup>16</sup> James J. Weingartner, “Americans, Germans, and War Crimes: Converging Narratives from ‘the Good War,’” *Journal of American History* 94, no. 4 (March 2008): 1175, <https://doi.org/10.2307/25095324>. This incident took place in Voerde, Germany. Because the court-martial panel did not include the phrases *malice aforethought* and *with premeditation* in the finding of guilt, the officer was found guilty of Article 93 (which included crimes such as manslaughter) instead of Article 92 (murder). The three enlisted men all testified that they had reservations about carrying out the orders but felt compelled to do so as they had been trained to obey the orders of their officers. All three were acquitted of Article 92.

<sup>17</sup> Weingartner, “Americans, Germans, and War Crimes,” 1167–75.

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of the fighting, though, one might expect a combination of battle fatigue or temporary insanity—based on the harrowing experiences of combat against a fanatical enemy—and military necessity. These were used by General George Kenney when explaining his order to strafe the Japanese sailors in the sea following the Battle of the Bismarck Sea.<sup>18</sup> A further illustration of the difference between the theaters is that in contrast to the few cases of accountability in the Pacific, between June 1944 and May 1945 more than 90 soldiers were court-martialed and executed in Europe for misconduct against noncombatant civilians or prisoners.<sup>19</sup> This disparity in accountability for those who violated the law of war against a “different” foe and for those whose crimes was against an enemy that closely resembled themselves demonstrates the prevailing attitudes of not only the fighting men but of society at the time, as well. Evidence of those biases will again appear in later chapters.

Although the prevalence of war crimes is hard to determine with any accuracy, the number of instances for which court records exist or are mentioned in memoirs seems dwarfed by the exceedingly large number of soldiers and Marines serving in both theaters. While this could be attributed to the censorship of media or the obstacle noted earlier of law of war violations labeled by their Uniform Code of Military Justice specification, the distaste for the action as described by the men complaining to the 45th Division chaplain about their comrades at Biscari may argue in favor of a lower overall prevalence of such crimes. A culture of underreporting may also be to blame.

Training and education in the Army and Marine Corps during World War II differed due to the differences in each Service’s size and primary mission; although because of their focus on land combat, both used the Ar-

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<sup>18</sup> Time and again during interviews with military law experts and historians familiar with the Pacific theater, the answer to the question “Where can I find examples of prosecutions?” has been “There weren’t any.” Due to COVID-19 shutdowns and safety protocols, access to the National Archives and Records Administration facility in College Park, MD, which houses the Army and Navy disciplinary records for this era, was restricted. Those restrictions have recently begun to lift, and the author is currently waiting to interview one of the archivists of those records to confirm the absence of accountability in the Pacific theater through an examination of existing primary sources.

<sup>19</sup> W. Hays Parks, “Crimes in Hostilities,” *Marine Corps Gazette* 60, no. 9 (September 1976): 17.

## Part One: World War II

my's *Rules of Land Warfare*, FM 27-10, as the basis for their basic military training in the law of war. The basic information in this manual included the rights of both combatants and noncombatants when taken prisoner, the prohibition against summary execution of prisoners, the principle of military necessity, and other applicable rules and principles.<sup>20</sup> In the early stages of the war, the need to greatly expand the size of the military required shortened initial training times. However, as feedback from the front showed that more skill was needed, both Army and Marine Corps initial basic training and follow-on infantry training were lengthened. This training included the initial law of war classes in basic training and refresher classes under the heading of general military subjects, most often given by officers—not lawyers—to units during training before deploying.<sup>21</sup>

In the case studies that comprise the following chapters, the same variables are compared to assess whether the U.S. military made any positive efforts to reduce the prevalence of violations and improve its ability to hold perpetrators accountable. In addition, the growing role of media coverage and changes in the public's awareness, attitudes, and reactions on the military and the politicians who have the ability to affect military policy is assessed. Finally, the following chapters examine the evidence for indications that the American public really cares about its military's behavior during conflicts. These are all factors in determining the military's share in the responsibility for the law of war or ethical violations committed by its troops.

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<sup>20</sup> *Rules of Land Warfare*, FM 27-10, 1, 6–9.

<sup>21</sup> Kenneth Condit, *Marine Corps Ground Training in WWII* (Washington, DC: Historical Branch, G-3, Headquarters Marine Corps, 1956), 102–3.

# **PART TWO**

**VIETNAM WAR**  
**Does a Massacre Matter?**



## INTRODUCTION

In March 1968, more than 20 years after World War II's brutal campaigns in Europe and the Pacific, the U.S. Army and Marine Corps were once again engaged in a war. This was also almost 20 years after the 1949 Geneva Conventions, which greatly expanded protections for noncombatants, including personnel rendered prisoners or hors de combat. A comparison of cases from the Vietnam War against the baseline cases in the first three chapters might be expected to show a more robust effort to observe the rights of these protected individuals. Yet with as many as 500 unarmed civilians murdered by U.S. Army soldiers, the massacre at My Lai, several years into the Vietnam War, resonates to this day as probably the worst behavior of any American fighting unit. Just after revelations about what happened at My Lai were published, Marine Corps personnel carried out a massacre at Son Thang. Was there no improvement? Were the causes of these horrific crimes similar to the cases from World War II? Was there a lack of prevention effort on the part of the military? Were the perpetrators held accountable in any more meaningful way than the World War II Pacific theater cases? Did the public clamor for justice in a war that was covered much more meaningfully than World War II—for example, by more widely and frequently expressing their disdain, either in letters to the editor or other forms, of reported episodes of violations against noncombatants? Did the Services learn from the law of war violations and subsequent trials of World War II? These questions all play a part in determining the

## Part Two: Vietnam War

extent to which the U.S. military or other influences are at fault for continuation of violence against noncombatants.

This conflict was different from World War II in a number of ways, including its relative place on the range of military operations (ROMO), which influenced how the Vietnam War was fought and the public's perception and support of the conflict. Also changed was the media's coverage, which up to the Tet Offensive, had been, by and large, supportive of the war effort—as had public sentiment. But the Tet Offensive in January 1968 proved much of the earlier positive reporting about the war effort's progress false, which added an eroding level of trust to the public's weariness with the war.<sup>1</sup> Had the sort of coverage possible during Vietnam been available during the Good War, its favorable reputation may not have endured a side-by-side comparison of its Pacific theater violations and those of Vietnam. The type of war and media exposure impacted the politicians and generals running the Vietnam war and the soldiers fighting it. One way this conflict remained the same as those that came before, however, was that violence was committed against those who were supposed to be protected by the law of war.

The following chapter and others examine the culpability of the military for these crimes but also whether other factors influenced the occurrences. To this end, the results of the judicial processes of several cases show that while the military seemed to have more of a desire to hold its soldiers accountable, the attempted cover-up of My Lai notwithstanding, they were often hampered by several outside influences.

The chapters in part 2 of this work compare cases of law of war violations with the baselines from World War II, spanning an approximately 50-year period from the Vietnam War to the Global War on Terrorism in Iraq, for causal factors, public reaction, and the military responses. Have the causes of violations or the responses to them changed? Have any efforts at better training been instituted showing a willingness to learn from the past? Is there evidence that the undercurrent of racism demonstrat-

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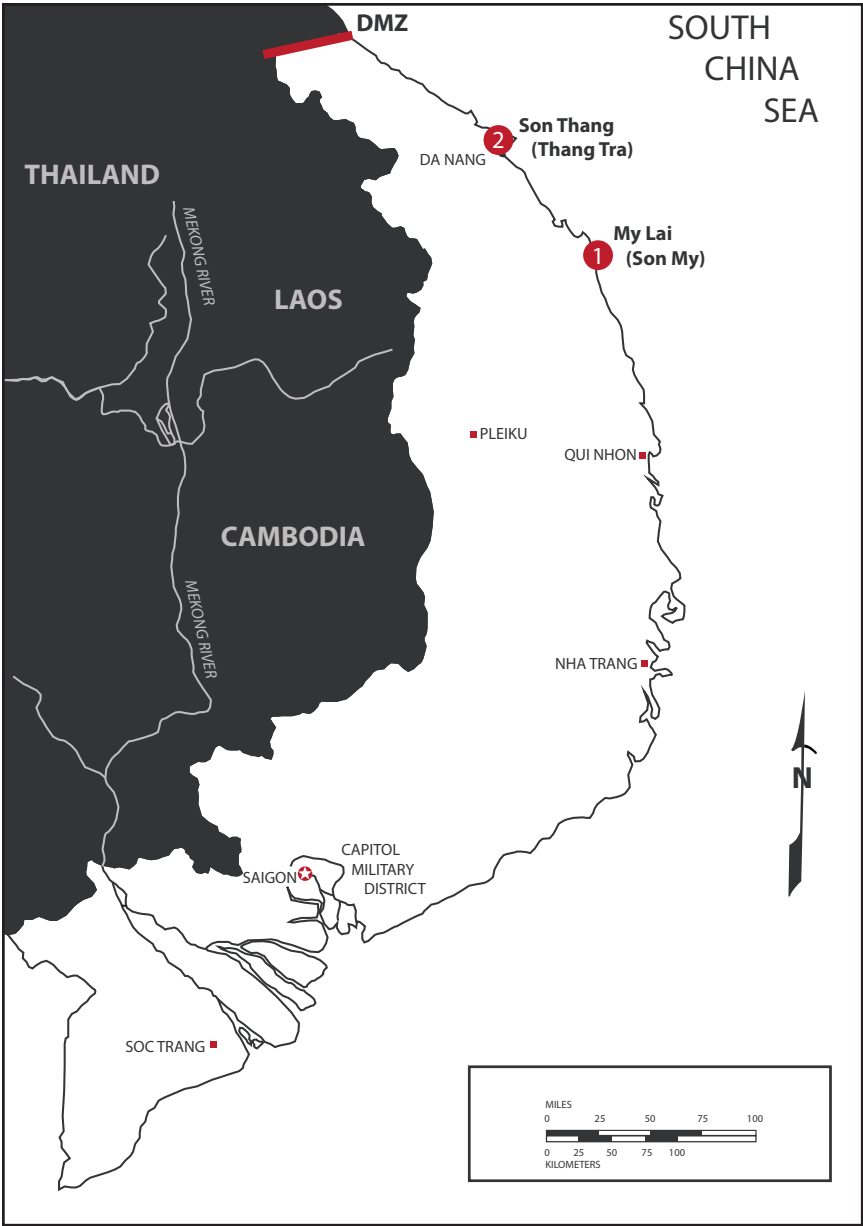
<sup>1</sup> Barry Sussman and Kenneth John, "War Bequeaths a Distrust of Government," *Washington Post*, 15 April 1985; Paul J. Noto, *At the Crossroads of Justice: My Lai and Son Thang—American Atrocities in Vietnam* (Bloomington, IN: iUniverse, 2011), xii; and Edwin B. Moise, "Tet in the News," *Vietnam* magazine, February 2019, 32–34.

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ed during World War II by the differing responses to violations between theaters continued? Were there differences between how each Service responded to violations, and if so, why? Examining both the civilian reactions to the cases outlined in this part as well as the military responses—to the incidents and also to the civilian reaction—illustrates a complex relationship between the word of the law and the actual expectations of society and the military. The My Lai and Son Thang case studies represent just two incidents from the Vietnam War, but they happened in fairly close proximity to each other both temporally and geographically and help to answer these questions. Because so many of the charges against the parties implicated in the My Lai massacre were dropped before a trial or the parties, save Lieutenant William L. Calley, were acquitted, while four of the five accused perpetrators from Son Thang were tried at court-martial, this second incident and its trials is examined in more detail.



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Adapted by MCUP

Map of Vietnam showing proximity of My Lai and Son Thang.

## CHAPTER 4

### My Lai

On the morning of 16 March 1968, the soldiers of Company C, known as Charlie Company, of the 11th Light Infantry Brigade of the U.S. Army's Americal Division entered a hamlet in the village of Son My. That day, Charlie Company's 1st Platoon indiscriminately killed many, though not all, of the more than 300 old men, women, and small children in the village. A number of victims endured rape and torture before death.<sup>1</sup> How this infantry unit in the U.S. Army arrived at the point it mercilessly inflicted that sort of criminal behavior on noncombatants is not a unique story. There are parallels to be found with the story of the 180th Regiment at Biscari from its early "blooding" of troops new to battle; loss of familiar, popular soldiers that hit the small units hard; and leadership that exhorted the men to press forward and be aggressive as they operated in enemy-controlled areas. Casualties are a part of war, and who lives or dies is sometimes no more than a matter of luck or timing, and the exhortation to men to move swiftly and aggressively is often the best way to maneuver them through dangerous areas in a way that minimizes exposure and risk. These alone do not point to a lack of lessons learned from Biscari or an absence of effort by the military to better protect noncombatants. However, careless language that hints at avenging losses or acting to instill fear for its own sake, rather than accomplishing specific missions, often plays a role in creating the conditions that lead to law of war violations and indicates that the lessons that ought to have been learned from past events have been lost.

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<sup>1</sup> Kendrick Oliver, *The My Lai Massacre in American History and Memory* (New York: Manchester University Press, 2007), 1; and Paul J. Noto, *At the Crossroads of Justice: My Lai and Son Thang—American Atrocities in Vietnam* (Bloomington, IN: iUniverse, 2011), 29–30.

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Charlie Company had arrived in Vietnam only a few months before and missed the Tet Offensive, being laagered on a base that was not hit but observing the sounds and the lights in the night sky as other nearby bases were attacked. Through February 1968, the company began actively patrolling as part of Task Force Barker to try to locate and destroy the enemy's *48th Local Force Battalion*. The 1st Platoon took its first casualty on 12 February after a mine detonated, causing injuries. Young Lieutenant William L. Calley made a poor tactical decision to let his platoon move back to safety by following a dike. Exposed on the high mound and easy targets, a sniper shot and killed one of their soldiers, Specialist 4th Class William J. Weber. Knowing he had made a mistake, Lieutenant Calley compounded his error by radioing a false battle damage assessment, claiming six enemy dead to justify the loss of one of his own. During the next month, the company continued to take casualties, which weighed heavily on the men. On 14 March, the company once again took a casualty when the popular Sergeant George J. Cox was killed by a land mine.<sup>2</sup> At the memorial service the next day, Captain Ernest L. Medina, the company commander, told the men they would have a chance at revenge for Sergeant Cox and the rest of their comrades the next day.

Prior to the memorial service, Lieutenant Colonel Frank A. Barker, the commander of Task Force Barker, which was clearing out the areas around Son My to locate and destroy the *48th Local Force Battalion*, gathered his company commanders for an informal operations order. He described the following morning's operation as a typical "hammer and anvil" operation in which several units would sweep through an area and drive any enemy into another stationary unit waiting to engage the unsuspecting enemy as it moved. He wanted the area "cleaned out, wanted the area neutralized," according to the intelligence officer, Captain Eugene M. Kotouc. After the memorial service, Captain Ernest L. Medina relayed this guidance to his company and left a "definite impression" that the impending operation would be the company's best chance to avenge the losses it had endured to date. Lieutenant Calley also claimed that Captain Medina made it clear

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<sup>2</sup> William Thomas Allison, *My Lai: An American Atrocity in the Vietnam War* (Baltimore, MD: Johns Hopkins University Press, 2012), 25-26.

that, “all civilians had left the area, there were no civilians in the area. And anyone there would be considered enemies.”<sup>3</sup>

The next morning, the operation began. While a number of units participated (in fact, another was guilty of an almost equally egregious atrocity, killing more than 100 civilians), the actions of 1st Platoon would become most widely associated with the name My Lai—as Son My was labeled on some maps—in the consciousness of most Americans. Lieutenant Calley had several of his men enter the village firing from the start, shooting into hooches, throwing grenades into the bunkers that the civilians throughout the south built to protect themselves, and shooting at Vietnamese fleeing the hamlet. As the morning progressed, they gathered large numbers of old men, women, and children into groups massed in ditches and shot them dead. Lieutenant Calley would later claim that during the morning, Captain Medina reached him on the radio and asked why his movement through the hamlet was so slow. Calley said he replied that processing so many detainees was slowing him down and then he claimed Medina responded, “Get rid of ‘em” and “waste all those goddamn people.” Calley reported that he took that to mean he should kill the villagers, while Medina claimed that he meant for Calley to just get moving due to expected contact with the *48th Local Force Battalion*. Throughout the morning, witnesses reported that Calley repeatedly ordered soldiers to fire on groups of civilians, shot several himself at close range, and also threatened his own soldiers who would not obey his orders to shoot the Vietnamese.<sup>4</sup> It was not until Warrant Officer Hugh C. Thompson, the pilot of a Hiller OH-23 Raven observation helicopter, positioned his aircraft between some soldiers and civilians, risking being fired on himself, that some of the villagers were spared. This occurred after Thompson observed wounded civilians and reported their position to higher headquarters only to see the same groups lying dead during his next overflight. Passing over the area later, he witnessed a captain (later identified as Captain Medina, the company commander) walk toward a woman who was among those marked by the smoke grenades earlier to be helped and nudge her with his foot be-

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<sup>3</sup> Allison, *My Lai*, 28–31.

<sup>4</sup> Noto, *At the Crossroads of Justice*, 29; and Allison, *My Lai*, 32–42.

## Part Two: Vietnam War

fore firing a burst from his rifle into her.<sup>5</sup> Thompson later observed women and children entering a bunker with soldiers making their way toward them. He landed the helicopter and, with his crew covering him with machineguns, told a nearby lieutenant he was going to get those people out. After flying back to the ditch where he had seen the largest number of dead and finding a wounded young girl, he flew her back to the base where she could get medical attention and relayed all of his observations to his chain of command.<sup>6</sup>

The response of the Army to the events of that day failed to uphold the requirements of either international laws of war, the U.S. Military Assistance Command, Vietnam (USMACV), mandatory reporting directives, or the ethics of the profession of arms. While Warrant Officer Thompson immediately reported what he had seen and his crew verified everything, there was an initial reluctance to believe the situation was as bad as he related. Thompson and his crew chief were interviewed by the infantry brigade commander, Colonel Oran K. Henderson, two days later, not by his own chain of command.<sup>7</sup> They were neither sworn in nor asked to write out or sign any written testimony, but the colonel took notes. Thompson was not interviewed again regarding the incident until August 1969, more than a year later.<sup>8</sup>

During the next year, there were several missed opportunities for the Army to investigate and determine what actually happened. Within two days of the incident, two general officers had already been given information that *something* had happened, and there were allegations of indiscriminate shooting and noncombatant casualties. The assistant division commander of the Americal Division, Brigadier George H. Young, ordered Colonel Henderson to look into the allegations and report back in three days. Unfortunately, his investigation appears at best to have been little more than a pretense, and despite questioning Warrant Officer Thompson and his crew, nothing was included in this report concerning the charges Thompson made. It is curious that Brigadier General Young chose Hender-

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<sup>5</sup> LtGen W. R. Peers, *The My Lai Inquiry* (New York: W. W. Norton, 1979), 66–72.

<sup>6</sup> Noto, *At the Crossroads of Justice*, 30–31.

<sup>7</sup> Thompson fell under an aviation unit's command, not under Henderson.

<sup>8</sup> Peers, *The My Lai Inquiry*, 72–75.

## My Lai



Official U.S. Army photo by Ronald L. Haeberle (USA)

Vietnamese civilian dead clustered on a road near My Lai, 16 March 1968.

son to conduct the investigation, as Henderson had been observing the operation from a helicopter overhead and thus probably already knew some civilians had been killed.<sup>9</sup> Later tried but acquitted on charges of covering up the massacre by inadequately investigating, Henderson was one of several officers who failed in their duty to report such crimes.<sup>10</sup> Whether his insufficient effort was due to an attempt to hide the atrocity or for another reason is unknown but shows a failure to take seriously the standing orders to report and investigate fully any incident of this kind. By mid-April, USMACV was made aware of the massacre by its South Vietnamese counterpart. During the next year, the Viet Cong and North Vietnamese used the incident as propaganda—something that was reported on by intelligence gatherers. In May 1968, the division commander ordered a formal

<sup>9</sup> Oliver, *The My Lai Massacre*, 32.

<sup>10</sup> Douglas Robinson, "Col. Henderson Acquired in Last of the My Lai Cases," *New York Times*, 18 December 1971.

## Part Two: Vietnam War



Official U.S. Army photo by Ronald L. Haeberle (USA)

Many of the villagers of My Lai lived in small thatched huts that soldiers called hooches. Here, PFC (first name unknown) Delpome sets fire to one on 16 March 1968.



investigation, and Colonel Henderson appointed Lieutenant Colonel Barker, despite the obvious conflict of interest, to conduct the investigation.<sup>11</sup> As rumors circulated throughout the brigade and division headquarters, many heard them, but Specialist 5 Ronald L. Ridenhour, a helicopter gunner, collected statements and accounts from those who had been there. He eventually wrote to the president, to senior members in the Pentagon, and to 24 members of Congress detailing what he had learned in late March 1969. In mid-April, the Army began to investigate the details in Ridenhour's letter. While the investigator concluded that the letter had factual merit, others needed more proof, and they got it after viewing the photographs taken by Sergeant Ronald L. Haeberle, an Army combat correspondent who had taken photographs with his own camera in addition to the Army-issued camera he possessed. These conclusions came in time for Lieutenant Calley to be placed in a legal hold status, preventing his pending separation from the Army scheduled to occur on 6 September. The day before he would have separated, formal charges were preferred against him. They eventually included charges of murdering 109 South Vietnamese civilians.<sup>12</sup> What became known as the Peers Inquiry, after its senior member Lieutenant General William Peers, recommended charges for 28 officers and 2 enlisted personnel involved in the cover-up, and U.S. Army Criminal Investigation Division (CID) determined that 30 soldiers could be charged for crimes at My Lai. In the end, 25 officers and enlisted faced charges.<sup>13</sup> While the recommendations for charges show that the work Peers's team conducted was thorough and willing to assign culpability up and down the chain of command, the military justice processes that followed failed demonstrably to measure up to the same commitment to justice.

Lieutenant Calley was convicted of the premeditated murder of 22 civilians and sentenced to dismissal from the Service and life imprisonment with hard labor at the Fort Leavenworth Disciplinary Barracks in Kansas. He was the only person, officer or enlisted, to be convicted for the atrocities at My Lai. Major General Samuel W. Koster and Brigadier General George H. Young, the leadership of the division, were given letters of cen-

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<sup>11</sup> Allison, *My Lai*, 60–74.

<sup>12</sup> Oliver, *The My Lai Massacre*, 33–40.

<sup>13</sup> Peers, *The My Lai Inquiry*, 221–28.



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sure. Colonel Henderson and Captain Medina were tried but acquitted, as were Staff Sergeant David Mitchell and Sergeant Charles Hutto. Others charged had their charges dismissed.<sup>14</sup>

The civilian response to Lieutenant Calley's conviction contrasted dramatically with its general reaction to the massacre. It is difficult to predict with certainty how the population would have reacted to the news during World War II. The heavy wartime censorship of that period kept many instances, such as Biscari, from being made public during the fighting. This was done, in part, due to the military's fear of the public's reaction to the news of its own soldiers behaving in precisely the way for which the media denigrated the enemy.<sup>15</sup> Examining the public reaction to My Lai, then, gives some evidence of the "morally-charged connection" Walker Schneider mentioned in his work on skull trophies in the Pacific.<sup>16</sup> While there was disgust at the massacre, there was also a groundswell of support for Calley when he became the only soldier held accountable following the completion of Colonel Henderson's trial, the last regarding the incident. His singular conviction seemed to refute the principle of command authority and responsibility that had been more heavily emphasized in the new Uniform Code of Military Justice (UCMJ) instituted after World War II. Had he and his unit been operating independently or unobserved during the course of the day the crimes occurred, his lone conviction would make more sense, but his company commander was on the ground and visited Calley's platoon area of operations during the massacre, while several higher-level commanders flew overhead in helicopters. The public frustration at the lack of responsibility in any higher-level commander then seems justified, although it would ultimately affect the punishment Calley—rightfully as the on-scene commander and a participant in the atrocity—bore.

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<sup>14</sup> Oliver, *The My Lai Massacre*, 89.

<sup>15</sup> James Weingartner, "Massacre at Biscari: Patton and an American War Crime," *Historian* 52, no. 1 (1989): 38, <https://doi.org/10.1111/j.1540-6563.1989.tb00772.x>; and Rick Atkinson, *The Day of Battle: The War in Sicily and Italy, 1943–1944*, vol. 2, *The Liberation Trilogy* (New York: Henry Holt, 2007), 20.

<sup>16</sup> Walker Schneider, "Skull Questions: The Public Discussion of American Trophy Collection during World War II," *Penn History Review* 25, no. 2 (2018): 127.

There were some 15,000 letters written to the White House following Calley's trial, almost all critical of the conviction; entire draft boards resigned in protest at his trial and conviction and some veteran groups sold "Free Calley" bumper stickers.<sup>17</sup> A Gallup Poll found 11 percent of Americans agreed with the verdict, while 79 percent thought it too severe. In a Louis Harris poll, 77 percent felt he had been made a scapegoat and the Army bore more responsibility.<sup>18</sup> It appears that the Army attempted to shield more senior individuals from accountability and that caused the result of Calley alone being found guilty. With the difficulty in successfully prosecuting law of war violations under the UCMJ and its inherent limitations, other culpable parties were acquitted or not even tried. Despite the wide disapproval of the result in Calley's case, only a small number took this stance because they did not believe the massacre to be a crime.<sup>19</sup> It appears that while the behavior of the soldiers mattered to the public, the impression that only Calley bore the accountability mattered more. The reasons for this are examined later.

This public opinion factored into some of the decisions, though not all, that were made in mitigating the sentence Calley served. During the normal review of the results of the court-martial by the convening authority, which occurred even while Calley began an appeal process, Lieutenant General Albert O. Connor affirmed the jury's guilty verdict but reduced the life sentence to 20 years at hard labor. While President Richard M. Nixon, acutely aware of the public opinion, had keen interest in the case, his lawyers advised against granting clemency before military avenues of appeal were exhausted. Nixon did announce publicly, possibly in an attempt to help his popularity during a difficult period—but certainly adding pressure on the Army—that he would make a final review of the case. The secretary of the Army, Robert F. Froehlke, rejected Calley's request via a clemency board in 1973, but his successor, Howard H. Callaway, further reduced the sentence to 10 years in April 1974. After Nixon reviewed the case (but took no action despite the public interest remaining high) and

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<sup>17</sup> W. Hays Parks, "Crimes in Hostilities," *Marine Corps Gazette* 60, no. 9 (September 1976): 16.

<sup>18</sup> Allison, *My Lai*, 111.

<sup>19</sup> Oliver, *The My Lai Massacre*, 89.

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a complex series of appeals culminated in a decision by the U.S. Supreme Court not to review the case, Callaway eventually paroled Calley in November 1974.<sup>20</sup> While the initial rejection of Calley's clemency request signaled that the Army was intent on upholding its professional ethics, the ultimate parole suggests political and public pressure, and quite possibly the tacit acknowledgment of the inequity of prosecuting Calley alone, were factors too influential to withstand.

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<sup>20</sup> Allison, *My Lai*, 113–14.

# CHAPTER 5

## Son Thang

While the My Lai massacre is the best-known atrocity against civilians committed by U.S. troops during the Vietnam War, it is only one of many instances of crimes against noncombatants. In 19 February 1970, just a few months after the massacre at My Lai came to the public's attention, the U.S. Marines of Company B (Bravo Company), 1st Battalion, 7th Marine Infantry Regiment, were conducting a patrol near the village of Son Thang, only 40 kilometers from My Lai. As dark approached, the company laagered for the night on Hill 50, some 500 yards from the village of Son Thang.<sup>1</sup> To rest the Marines and keep them in as strong a defensive position as possible, the company commander, Lieutenant Louis R. Ambort, made the decision to send out a five-man "killer team" to harass any enemy in the vicinity and keep their attention away from the bedded-down company.<sup>2</sup> Volunteering for this dangerous patrol were five relatively junior-ranking Marines, including its leader, Private Randall D. Herrod, who had been court-martialed not long before for unauthorized absence and demoted to private from lance corporal. The junior man of the group, in length of service, was Private First Class Samuel G. Green, who had only joined the Marine Corps five months earlier and had been in Vietnam for just three weeks.<sup>3</sup>

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<sup>1</sup> Gary D. Solis, *Son Thang: An American War Crime* (Annapolis, MD: Naval Institute Press 1997), ix-x.

<sup>2</sup> Paul J. Noto, *At the Crossroads of Justice: My Lai and Son Thang—American Atrocities in Vietnam* (Bloomington, IN: iUniverse, 2011), 54. *Killer team* was not a widely used or accepted tactical term, rather it was fairly confined to the parlance of the 1st Battalion, 7th Marine Regiment. It refers to a small number of men, moving quickly and silently, patrolling away from the main body to create chaos for the enemy by executing small attacks or ambushes. Its duties were flexible depending on who was asked to define it.

<sup>3</sup> Solis, *Son Thang*, 12-28.

## Part Two: Vietnam War

In a variation on a theme found repeatedly in the violations by ground troops discussed in this book, the company had been subject to heavy casualties in the preceding months and had lost a popular leader, Staff Sergeant Jerry E. Lineberry, just a week before and another of their own the day the Son Thang incident occurred. Additionally, those who were leading the Marines abdicated their roles by their own failures to submit accurate reports or by exhorting their men in careless ways.

Through October and November 1969, Bravo Company was in the field participating in a number of operations and patrolling continuously, losing 15 Marines killed in action (KIA) and 84 wounded in action (WIA). On 6 January 1970, while supposed to be resting on Fire Support Base Ross, a major attack claimed the lives of 13 more Marines and wounded 63, with 40 requiring evacuations.<sup>4</sup> The high number of casualties in this unit, like others, required many replacements to fill the ranks. This process was unlike Marines' experiences in previous wars, where units receiving high casualty rates would be pulled from the lines to reconstitute and absorb new personnel. The battalion commander, Lieutenant Colonel Charles G. Cooper, testified later during the trial that this constant inflow of unknown replacements played an "unnoted but important role" in the Son Thang incident.<sup>5</sup>

The first few weeks of February were among the most brutal. On 12 February, the unit was ambushed and among those killed was the platoon sergeant for 2d Platoon, Staff Sergeant Lineberry. He was one of nine Marines killed that week. On 19 February, the company was moving by day back to Fire Support Base Ross. As dark approached, First Lieutenant Lewis Ambort made the decision to use Hill 50 as his company's position overnight. As the company's required perimeter was fairly large, he decided to send out just a few Marines as an economy of force measure on a route he picked to occupy the enemy's attention. He tasked 2d Platoon and Sergeant Harvey E. Meyers, Lineberry's successor, went about finding volunteers.<sup>6</sup> In addition to Private Herrod and Private First Class Green, Lance Corporal Michael S. Krichen and Private First Class Thomas Boyd of 2d

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<sup>4</sup> Noto, *At the Crossroads of Justice*, 52–54.

<sup>5</sup> LtCol Gary D. Solis, *Marines and Military Law in Vietnam: Trial by Fire* (Washington, DC: Marine Corps History and Museums Division, 1989), 174.

<sup>6</sup> Solis, *Son Thang*, 14–17, 22–24.

Platoon volunteered. A sniper from the headquarters section, Private Michael A. Schwarz, also volunteered, bringing the total to five Marines. Just before they were to depart at 1830, Lieutenant Ambort briefed the team. He finished by telling Herrod, the nominal leader by experience, if not by rank, "Don't let them get us anymore. I want you to pay these little bastards back."<sup>7</sup>

Son Tra, a designation given the cluster of buildings on the Marines' maps by analysts, was known to the Vietnamese familiar with the small area by the name Son 4, Thang Tra Hamlet. The Marines patrolling the area knew it simply as Son Thang-4. It was the first checkpoint on the route the killer team took that evening and just a few hundred yards from the company's lines.<sup>8</sup> The team left the company's lines between 1900 and 1930. As they marched northwest under a bright full moon, "the weather was clear and they could all see good," according to Private First Class Boyd.<sup>9</sup> Here, the first deviation from their orders for the evening occurred; Herrod sent the point man, Private Schwarz, to search the first hooch they approached. Knowing that civilians, albeit ones unsympathetic to the Marines' cause, inhabited the village, there was no reason to enter or search it, it was merely a geographically recognizable checkpoint on their assigned patrol route for the night. When the first hooch proved empty, Herrod moved the team 25 meters farther up the trail to the next hooch, where voices could be heard. Although Krichen would later testify that he thought he heard the voices of men, when Schwarz commanded those in the hooch to come out, the occupants were four females, two women 50 and 21 years old, and two girls 16 and 5 years old. As Schwarz searched inside the emptied hooch, he heard Herrod order the team outside to "shoot them! Shoot them all! Kill them!"<sup>10</sup> The team opened up as Schwarz ran out in time to see Herrod fire at one of the women running toward the tree line and was told to "finish her off."<sup>11</sup>

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<sup>7</sup> Solis, *Marines and Military Law in Vietnam*, 175.

<sup>8</sup> Noto, *At the Crossroads of Justice*, 57.

<sup>9</sup> Solis, *Son Thang*, 35.

<sup>10</sup> Solis, *Marines and Military Law in Vietnam*, 176.

<sup>11</sup> Noto, *At the Crossroads of Justice*, 58.

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The team then retraced their steps to the first hooch they had searched and now heard excited voices inside. Schwarz edged inside and found six Vietnamese, a 43-year-old woman, two 10-year-old girls and three boys, aged 12, 5, and 3. As Schwarz once again searched the hooch, looking to find the entrance to the bunker the occupants had probably been hiding in earlier, Green yelled outside that the woman had reached for something in her waistband. Someone fired a shot, but no one was hit, however Herrod then called the team to get on line and ordered the team to shoot the civilians. When everyone hesitated, Herrod said, "I want these people killed immediately!," and everyone opened fire.<sup>12</sup>

The team reversed course through the village once more, passing their original victims, and came to a third hooch, the occupants already standing outside. Krichen, testifying under immunity, said he recalled a shot—from Herrod's M79 grenade launcher, he believed—and then Herrod ordering the team to fire again. Again, the team hesitated and Herrod screamed, "I told you that I want these people killed, and I mean it!" Once again, the team opened fire, leaving six more Vietnamese dead, this time a pair of women, 50 and 40 years old; two girls, 12 and 6 years old; and two boys 10 and 6 years old. When a baby continued to cry after the firing stopped, Herrod ordered Schwarz to shoot it and stop the crying, he did so at nearly point-blank range with a .45-caliber pistol. No weapons were recovered at any of the hooches. It was following the third series of gunfire that the team received a radio call from the company telling them to return to the company position on Hill 50.<sup>13</sup> During the radio call, they falsely reported six confirmed enemy kills.

When the team returned, Private Herrod found Lieutenant Ambort to produce the required situation report to higher headquarters. At that time, Herrod told Ambort there could have been as many as 12–16 enemy killed. With no weapons collected, Ambort called for an enemy rifle captured several days before and submitted it along with the report to add credibility to the claim of six enemy killed. The battalion operations log that evening included the report that the team spotted 15–20 Viet Cong at 1950, set up

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<sup>12</sup> Solis, *Son Thang*, 49.

<sup>13</sup> Solis, *Son Thang*, 46–69.

an ambush, and killed 6 enemy and 1 woman. Afterward, the report notes that the patrol withdrew to company position with one rifle.<sup>14</sup>

Recalling Lieutenant Calley's false report about My Lai to higher headquarters alongside Ambort's fabrication efforts, a pattern emerges that is repeated in subsequent case studies throughout this work and is reflected in an unfortunate number of law of war violations. That trend is the complicit or compromised status of leaders in positions close enough to effectively affect the outcomes of the situations that eventually became crimes.

This false report soon came under scrutiny. The next morning, First Lieutenant Lloyd Grant, the battalion's intelligence officer, was leading a patrol to check on buried sensors in the area when he was approached by a Vietnamese woman. The woman, through an interpreter, angrily told him that Americans had entered the village the night before and killed many women and children. After receiving permission to deviate from his planned route, he was led to Son Thang and shown the carnage. He returned from his patrol that day with a sandbag full of expended casings from M16 rifles, an M79 grenade launcher, and .45-caliber pistol and immediately recounted finding the bodies.<sup>15</sup> The battalion's operations officer, Major Richard E. Theer, was an experienced Marine infantry officer on his third tour in Vietnam and immediately did not like the way things looked. After briefing the battalion commander, Lieutenant Colonel Cooper, he was assigned to investigate the incident. He radioed Lieutenant Ambort and although they were not due to arrive back at Fire Support Base Ross until the next day, asked them to return directly.<sup>16</sup> That evening, the 1st Marine Division sent a secret-classified message to its parent command, III Marine Amphibious Force (III MAF).

Eyes only for LtGen [Herman] Nickerson [Jr.]: This is an initial report of possible serious incident involving elements of B/1/7 [Company B, 1st Battalion, 7th Marines] and Vietnamese civilians. Civilians allege U.S. Marine unit entered hamlet on 19 Feb 1970 and killed women and children. Patrol sent to check allegation found the bodies of approximately sixteen women and children

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<sup>14</sup> Solis, *Marines and Military Law in Vietnam*, 177-78.

<sup>15</sup> Solis, *Son Thang*, 2-4, 60.

<sup>16</sup> Noto, *At the Crossroads of Justice*, 61.



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recently slain by small arms fire. . . . Earlier a patrol from B/1/7 had reported a contact . . . in the same area with an estimated 25 VC [Viet Cong] resulting in 6 enemy kills. There are some indications that this report is inaccurate. Full scale inquiry commencing immediately.<sup>17</sup>

The Marines had apparently learned something from the My Lai Massacre, which was still making headlines. While Son Thang did not measure up to My Lai in the count of victims, “there was concern that it would be blown up to the proportions of My Lai regardless of how III MAF handled the incident.”<sup>18</sup> The incident was therefore handled closely according to law and in the open.

The next morning, Major Theer ran into Lieutenant Ambort outside the battalion combat operations center and told him he had been assigned to investigate what had happened at Son Thang-4. By 0830, he was interviewing the team members, starting with Private Herrod. After each was read their Article 31 warnings, the military’s broader version of Miranda rights, he questioned each and then asked if they would be willing to write their statements down for the record. Each of the team members and Lieutenant Ambort gave written statements. Through the course of his interviews, Major Theer became aware that the night before, Ambort told three of the team members that the battalion had some suspicions regarding the incident and that he intended to come clean and encouraged them to do likewise.<sup>19</sup>

Major Theer became concerned that his talk may have influenced them to self-incriminate; he also sensed that all the team members’ stories in their interviews and statements seemed a bit too identical. The personal experience of combat is different for every person, as is the reaction to witnessing the kind of up-close and personal destruction of another human,

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<sup>17</sup> Solis, *Son Thang*, 61–62.

<sup>18</sup> Graham A. Cosmas and LtCol Terrence P. Murray, *U.S. Marines in Vietnam: Vietnamization and Redeployment, 1970–1971* (Washington, DC: History and Museums Division, Headquarters Marine Corps, 1986), 346. In this passage, he was quoting LtGen Leo J. Dulacki’s comments about the subject when reviewing the draft manuscript.

<sup>19</sup> Solis, *Son Thang*, 62–67.

let alone unarmed women and children. The similarity of the details each member wrote down caused Major Theer to believe they had rehearsed their new version of the incident. This version had them being fired on at each of the first two hooches and hitting the civilians in the crossfire as they defended themselves.<sup>20</sup> The victims at the third hooch were killed under the belief they were party to the ambushes or were the snipers themselves, according to Herrod's statement, although those of the other team members failed to note that fact.<sup>21</sup> Major Theer briefed the battalion commander about what he had discovered to that point and his fear about the men's compromised statements. Here, the speed with which the investigation began probably aided Theer, as a longer period after the event would have allowed the team to further solidify and practice their contrived story. He reported that he needed legal advice. Lieutenant Colonel Cooper contacted division headquarters and the next day a Criminal Investigative Division (CID) team and the division's staff judge advocate made their way to Fire Support Base Ross. As scarce as legal resources were in Vietnam at the time, the system worked well to support Theer as quickly as it did. Coming so soon after the public revelations of My Lai, it may be that the timely support was an attempt to show that the allegations were taken seriously.

Major Theer, although not a trained legal specialist, did much to ensure that the investigation was successful. Following a conference with the battalion commander and the division judge advocate, Theer reinterviewed all members of the team, this time with a written warning of their Article 31 rights to sign and an opportunity to withdraw their first written statements, if they chose to do so, with no ramifications. Prior to these reinterviews, he and the CID team traveled to Son Thang to search for any evidence of enemy, and especially sniper, presence. An experienced infantry leader with three tours in Vietnam, Theer carefully examined potential sniper hide sites covering the areas the team would have occupied and the buildings and trees for traces of small arms fire but found only expended casings for U.S. weapons. During the course of the new interviews, Boyd, Krichten, and Schwarz all admitted to lying about taking enemy fire; Green

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<sup>20</sup> Noto, *At the Crossroads of Justice*, 61–62.

<sup>21</sup> Solis, *Son Thang*, 63–66.

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became openly hostile; and Herrod stuck by his original statement.<sup>22</sup> On 22 February, Lieutenant Ambort was relieved of command, and the battalion commander decided to have the members of the killer team put in pretrial confinement at the III MAF brig near Da Nang.

Military justice was swift in application, but the results of the courts-martial were varied.<sup>23</sup> Likely because the Marine Corps did not want their own version of the media free-for-all the Army was contending with in the stateside My Lai trials, the proceedings were kept in Vietnam, limiting media access and speeding up the process. Article 32 hearings began on 12 March 1970, less than a month after the events at Son Thang and, while normally conducted for individuals, were conducted as a consolidated hearing for the entire team.<sup>24</sup> First Lieutenant Ambort was initially charged with three offenses, and his Article 32 hearing began on 9 April and took six days. The first offense was failure to obey lawful orders, in that he failed to report an event thought to be a war crime. The second was dereliction of duty for failing to take proper steps to minimize non-combatant casualties or to ensure his Marines knew the rules of engagement. The third was for making a false official statement during the report of contact and capture of a rifle. The witness list for Ambort's hearing included most of the key players in the chain of command and its staff, including the battalion commander, operations officer (who conducted the initial investigation), intelligence officer (who found the bodies on the 19 February patrol), and fellow company commanders, among others. At the conclusion of their testimony, Marine lieutenant colonel James C. King, assigned to conduct the hearing, was left with a substantial amount of testimony as to Lieutenant Ambort's professionalism, false report notwithstanding, and the danger of the Son Thang area, especially at night. Against this testimony, though, weighed the transcript from an interview with Am-

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<sup>22</sup> Solis, *Son Thang*, 66-74.

<sup>23</sup> The complexity of the individual cases and background tensions involved in this incident are beyond the scope of this chapter but are captured in great detail in Solis, *Son Thang*. The details that are provided in this case study help illustrate some of the processes inherent to the U.S. military justice system that arise in this work's chapters.

<sup>24</sup> An Article 32 hearing is the military equivalent to a preliminary hearing, designed to ensure there is a chargeable offense and that there exists probable cause to believe the accused was responsible, before charges are sent to a court-martial.

bort recalling the prepatrol brief he regarded more as a pep talk. The transcript said he told them in part:

Go out and get some, to pay the motherfuckers back, to pay them back good. To shoot everything that moved. To shoot first and ask questions later and to give them no slack. . . . If the killer team . . . saw anything moving along the trail, that if they saw anyone cutting across a rice paddy, that they were to shoot these people.<sup>25</sup>

This was in the context of the generally understood danger of the area, curfew in place on all movement at night for the Vietnamese, and location of the hamlet on the border of a free fire zone.<sup>26</sup>

The testimony left King with the additional task of determining if, in a parallel to General Patton before Biscari, the content of the pep talk intentionally exhorted his men to commit the crimes of murder. On the first charge, he decided that at the time Ambort had reported the initial incident—although containing false details—he did not know at the time to be a war crime. On the second charge, based on testimony from other company commanders and others, it was determined that he had done at least as much as others in the battalion to try to prevent noncombatant deaths and make his Marines aware of the rules of engagement. As to the question of whether he was responsible for the murders, due to Ambort's words during the pep talk, Lieutenant Colonel King wavered on the decision, admitting that it was a very close call, but in the end decided Ambort was not responsible but was grossly negligent.<sup>27</sup> He felt this lack of responsibility was due to Herrod's false assertion that they had been under contact when he first reported the incident to Ambort. In King's mind, this

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<sup>25</sup> Solis, *Son Thang*, 91–94.

<sup>26</sup> A *free fire zone*, a tactical control term used by both the Army and Marine Corps, is not meant to imply that anything within the boundaries are targets but that firing at valid targets within the zone does not require preapproval before engaging.

<sup>27</sup> There was precedent for this in the military. During the Spanish-American War, U.S. Army BGen Jacob H. Smith ordered a subordinate Marine commander: "I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please me." He was tried and convicted for inciting and ordering his subordinates to commit atrocities. *U.S. v. BGen Jacob H. Smith*, Court-Martial 30739, Records of the Office of the Judge Advocate General, RG 153, General Courts-Martial 30739, National Records Center, NARA, Suitland, MD.

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showed that Herrod knew that the killing of noncombatants was not what Lieutenant Ambort had meant by paying the Vietnamese back.<sup>28</sup> That left the third charge for a false official statement, for which King recommended a letter of reprimand from a nonjudicial punishment by the division commanding general, which would effectively end Ambort's career.<sup>29</sup> On 15 May 1970, Lieutenant Ambort received the nonjudicial punishment of a letter of reprimand and forfeiture of \$250 per month for two months. Despite his 13-month tour in Vietnam being complete, he was also put on a legal hold status to keep him in Vietnam for the duration of the trials in order to testify.<sup>30</sup>

Lance Corporal Michael Krichen made a deal with the prosecution during the Article 32 hearing. In exchange for testifying truthfully during the courts-martial of the other four team members, he would not be prosecuted. While at that point in the investigation it looked as though the prosecution would have everything necessary to convict the team members, the grant of immunity from prosecution (rather than dismissal of charges) by the convening authority acknowledged the possibility in a war zone of key witnesses being killed or unavailable when needed.<sup>31</sup> The difficulty in investigating and prosecuting serious crimes in Vietnam, for this reason, as well as availability and access to Vietnamese witnesses and sometimes of the crime scenes or victims themselves, was well understood by all the Services.<sup>32</sup> If the prosecution was hedging against the unavailability of witnesses, a stronger agreement that tied the witness to testimony rather than a "promise of truthfulness" should have been sought. As author and retired professor of law Gary Solis said in an interview with the author regarding immunity: "Part and parcel of an immunity grant, is the prosecutor nailing down the testimony expected and letting the witness know that if he

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<sup>28</sup> Solis, *Son Thang*, 100–2.

<sup>29</sup> *Nonjudicial punishment* refers to an administrative punishment, rather than judicial at a court-martial, just as the term implies. It is a form of punishment given for less egregious disciplinary infractions and limits the punishment given to the rank of the commander imposing the punishment. In Ambort's case, the fine he received was the maximum allowed to the commanding general.

<sup>30</sup> Solis, *Son Thang*, 106–7.

<sup>31</sup> Solis, *Son Thang*, 89–91.

<sup>32</sup> George S. Prugh, *Law at War: Vietnam, 1964–1973* (Washington, DC: Department of the Army, 1991), 101–2.

or she equivocates, saying well, I can't remember that, or changes the story that there will be consequences."<sup>33</sup> The poor use of grants of immunity occurred in future cases, as well.

The court-martial of Private Michael Schwarz proceeded first, a month after Lieutenant Ambort received his nonjudicial punishment. The charges were for 16 specifications of premeditated murder at Son Thang-4 village. After several pretrial motions were heard and decided, his hearing began with his statements to Major Theer being ruled admissible, despite the motions and his plea of not guilty. Among the pretrial considerations were Schwarz's ability to understand some of the concepts that would be applied to his case, such as lawfulness of orders. His preenlistment testing was low enough that, before the application of Project 100,000 lowered the requirements for IQ and bars against some preservice civil law convictions, few with his background and scores would have been accepted for service.<sup>34</sup> The program, initiated by Secretary of Defense Robert S. McNamara in October 1966, inducted 100,000 otherwise-ineligible men a year into the armed Services, and because all Services were required to take a portion of these enlistees, the Marine Corps, which had a higher volunteer rate, had to turn away some qualified men in favor of the unqualified. Studies indicated that these men were responsible for a disproportionately large number of disciplinary problems.<sup>35</sup> For the sake of political expediency—saving a few more middle-class youths from the draft or failing to call up more Reserve units—underqualified individuals were added to units to the detriment of efficiency and good order and discipline.<sup>36</sup>

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<sup>33</sup> Gary D. Solis, interview with author, 24 November 2020, hereafter Solis first interview.

<sup>34</sup> Solis, *Marines and Military Law in Vietnam*, 182–84. For more on Project 100,000, see Capt David A. Dawson, *The Impact of Project 100,000 on the Marine Corps* (Washington, DC: History and Museums Division, Headquarters Marine Corps, 1995).

<sup>35</sup> Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (Abingdon, UK: Routledge, 2010), 222. The Services bitterly resented the program, which McNamara touted as a way for these men, often from underprivileged backgrounds, to better themselves. At My Lai, 13 of the 130 men of the company who committed the law of war violations were part of the program.

<sup>36</sup> Christian G. Appy, *Working-Class War: American Combat Soldiers and Vietnam* (Chapel Hill: University of North Carolina Press, 1993), 31–36, 80.

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In the end, the defense attempted to, once again, get the written admission excluded—the better to show that Schwarz believed the team was under attack when they fired on the victims.<sup>37</sup> Failing at that, the defense did its best to underscore the danger of the area, the prevalence in the past of both women and children taking part in combat against Marines, and that Schwarz only acted in obedience to Herrod's direct orders. He was found guilty of 12 of the 16 specifications of premeditated murder. During the sentencing phase, the members of the court were made aware of Schwarz's extensive prior disciplinary history; he had received three other, less severe, courts-martial and five nonjudicial punishments in three years of service. The court awarded a sentence of confinement at hard labor for life, forfeiture of all pay and allowances, and a dishonorable discharge from the Marine Corps.<sup>38</sup> This seemed to be progress in terms of real accountability for an obvious crime against a noncombatant.

Private First Class Thomas Boyd's court-martial began on 22 June 1970, the day after Schwarz's was completed. Unlike Schwarz, Boyd was represented by both military counsel and a civilian lawyer. The notoriety that cases such as Son Thang-4 garnered due to media coverage, especially following the revelations of My Lai, often led lawyers to offer to defend servicemen pro bono. Another difference in Boyd's case was that rather than 16 unique specifications, his charges, this time for unpremeditated murder, were grouped by location, one for each hooch, totaling three. His defense counsel had observed the last days of Schwarz's trial and concluded that a jury of career Marines was likely to find Boyd guilty, just as they had Schwarz, and that the only hope was for Boyd to be tried only by a judge and hope they could present the evidence in a way that the judge would find that it did not meet the measure required for conviction. During the proceedings, several things went right for the defense. Krichen, with his immunity for truthful testimony, related during questioning that he observed Boyd firing high—not at the victims. Boyd took the stand on the third day and testified to that fact as well and went on to explain that his several weeks of unauthorized absence before being deployed to Vietnam

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<sup>37</sup> William Coughlin, "U.S. Marine Gets Life Sentence for Slaying of 12 Viet Civilians," *Washington Post*, 22 June 1970.

<sup>38</sup> Solis, *Marines and Military Law in Vietnam*, 182–84.

was to try and evade combat and having to kill anyone. Despite the existence of conscientious objector status available for people with Boyd's self-proclaimed aversion to killing, the prosecution did not bring up his failure to apply for such status—another win for the defense. After closing arguments, judge Lieutenant Colonel Paul A. A. St. Amour closed the proceedings to deliberate on his verdict.<sup>39</sup> When he returned, he delivered a verdict of not guilty.<sup>40</sup> He later explained, "My intuitive feeling at the trial, and now, was/is that Boyd did at some time shoot at one or more of the victims. However, there was insufficient probative evidence introduced to this effect. Boyd's guilt was simply not established beyond a reasonable doubt."<sup>41</sup>

Private First Class Green's court-martial was delayed due to a number of requests from a civilian lawyer who intended to represent him until lack of funds caused him to withdraw. It finally began on 13 August 1970. As in Boyd's trial, the 16 specifications brought against Green were for unpremeditated murder. His lawyer, who had assisted on the two previous courts-martial, intended to argue that there was no proof that Green had shot anyone and that he was too junior to have aided and abetted. To strengthen the defense that Green was acting under orders, his lawyer's argument emphasized that Green had been with the company less than three weeks and the Marine Corps under six months. Green's statement containing his admission that at the third hooch he began firing when he saw a woman reach into the waistband of her trousers was included as evidence. Also included was Krichen's testimony that although Green had fired at every hooch, he had not witnessed any of Green's rounds hit a victim. Green's testimony was that he had fired but intentionally aimed to miss and that he only fired at first because of Herrod's orders. After a three-day trial, the jury—comprising different individuals than the one that convicted Schwarz—deliberated for a fourth before returning a verdict of guilty for all but one of the specifications. The one specification on which Green

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<sup>39</sup> LtCol St. Amour was the only general court-martial level staff judge advocate in South Vietnam; consequently, he sat on three of the four courts-martial for the killer team (the exception was Herrod's).

<sup>40</sup> Noto, *At the Crossroads of Justice*, 67.

<sup>41</sup> LtCol Paul St. Amour to Gary Solis, 4 March 1991, used with permission of Gary Solis.



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was not found guilty was the young child Schwarz had killed with a pistol. The jury deliberated for two and a half hours before returning. For his role in 15 murders, Green was sentenced to confinement at hard labor for five years, reduction in rank to private, forfeiture of all pay and allowances, and dishonorable discharge from the Marine Corps.<sup>42</sup>

Last to be tried was the leader of the killer team that night, the now-demoted Private Randy Herrod.<sup>43</sup> Beginning on 20 August 1970, more than six months from the night of the patrol, Herrod's trial differed from that of his peers in several substantial ways. The presiding judge who had heard the three previous courts-martial, Lieutenant Colonel St. Amour, had been replaced by Navy commander Keith B. Lawrence, the general court-martial staff judge advocate from Subic Bay in the Philippines. Commander Lawrence was not new to murder cases in Vietnam, having sat on several previously, but his personality was a departure from St. Amour's driving and direct style. Like Boyd, Herrod had civilian representation, although he had two civilian attorneys, Gene Stipe and Denzil Garrison, two state senators from Oklahoma. Assisting were a military attorney and two more civilian members handling research and appellate review matters—a strong legal team, ready to overwhelm the prosecution with additional motions they would need to respond to in addition to preparing their prosecution. Additionally, a Marine first lieutenant teaching at The Basic School had seen Herrod's name in the newspapers. He had been Herrod's platoon commander in a previous unit and Herrod had saved his life twice in combat. Lieutenant Oliver L. North (who years later would be lauded by some and reviled by others for his sense of loyalty during hearings on the Iran-Contra Affair) took personal leave and paid his own way to Vietnam to testify as a character witness on behalf of Herrod.

As in Schwarz's trial, Herrod faced 16 specifications for premeditated murder. He pled not guilty to all specifications. Prior to the jury entering the court, the defense unleashed a flurry of pretrial motions, most of which were denied on the basis of existing military law rules. Two that

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<sup>42</sup> Solis, *Son Thang*, 201–9.

<sup>43</sup> Although an earlier court-martial had removed his rank prior to the patrol on 19 February, because of the appellate review process, his reduction from lance corporal to private did not technically take effect until a few days after the fateful patrol.

were not denied were for funding of a defense psychiatrist and the exclusion of the color photographs of the bodies taken by Lieutenant Grant's patrol. This second was key and would not have happened with the previous judge, having been included for all other trials to date. During the opening statements, the defense made clear they were going to defend using the line of argument that Herrod and the team were defending themselves, and the defense went one step further, saying they would prove that the team was fired on.<sup>44</sup>

The prosecution proceeded as it had with the previous trials, calling a parade of the same witnesses to testify, including the platoon sergeant who had warned against doing something stupid and the patrol members who discovered the bodies and such evidence as the expended brass from the weapons. This time, however, two female residents of Son Thang were introduced and, through interpreters, verified that it was an American patrol in the village that evening, not a Viet Cong patrol trying to produce propaganda using American weapons. The prosecution was relying on the same information they had successfully used in two of the three preceding cases. The defense in this case used an entirely different playbook to defend Herrod and it seemed to put the prosecution off-balance.<sup>45</sup>

The defense first brought two sergeants from another of the battalion's companies to testify that a few weeks after Son Thang, their unit had been brought under fire by and then captured an American M60 machine gun being used by Viet Cong fighters. They then paraded a number of witnesses reaffirming the dangers of the area, as had the previous defense teams.<sup>46</sup> They then brought forward Lieutenant North. During pretrial motions, Commander Lawrence had rightfully excluded a copy of a Silver Star recommendation for Herrod submitted by his previous command.<sup>47</sup> By having North testify to Herrod's character and reaction under fire, they

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<sup>44</sup> Solis, *Son Thang*, 224, 226-27.

<sup>45</sup> Solis, *Son Thang*, 228, 231.

<sup>46</sup> Solis, *Son Thang*, 236-38.

<sup>47</sup> The Silver Star Medal is the third highest award for combat valor in the Marine Corps, behind only the Congressional Medal of Honor and Navy Cross. While standing policy within the Marine Corps is that an award that is approved may be rescinded if already presented or merely administratively disapproved if subsequent conduct fails to meet honorable standards, due to his acquittal, Herrod eventually received the award after his discharge.

were able to introduce the information contained in the denied award recommendation anyway. The defense additionally presented secret messages from the division to higher headquarters. The first said that Vietnamese officials were not upset about the incident, as the families were considered Viet Cong, and the other incorrectly informed higher headquarters that the team had observed the rules of engagement.<sup>48</sup> The final two important witnesses for the defense were Herrod and a psychiatrist that the defense brought from Oklahoma. Herrod described the actions of that night as the team's reaction to being brought under fire. He explained away his false report to his company commander as trying to bring him good news and not wanting him to think Herrod had messed up. He denied that he hoped a post-patrol artillery barrage, called in on Son Thang to possibly kill any remaining enemy, had been to cover up his crime. The psychiatrist testified that on the night of the patrol, following months in combat and seeing friends and enemy die, he was most likely suffering from combat fatigue. After closing arguments and final motions by the defense, 12 days after pre-trial motions had begun, the members of the court began deliberation.<sup>49</sup>

They deliberated for nearly three hours before returning to the courtroom. Herrod was found not guilty of all specifications of the charges. When asked later about the process, jurors remembered that the initial vote had been four to three but could not remember whether for conviction or acquittal. Since a two-thirds majority is required to convict, it would not have mattered in any case. The officer who conducted the Article 32 investigation believed Herrod's Silver Star, prevailing racist attitudes toward the Vietnamese, and the exclusion of the photographs were cumulatively enough to tip the verdict to not guilty.<sup>50</sup> The apparent leader of the massacre being acquitted of the crime shows the difficulties in prosecuting these types of crimes under the Uniform Code of Military Justice.

Despite convictions in the cases of both Private Schwarz and Private First Class Green, the sentencing—as for the My Lai case—was not the

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<sup>48</sup> Solis, *Son Thang*, 241–43.

<sup>49</sup> Solis, *Son Thang*, 243–49.

<sup>50</sup> Solis, *Son Thang*, 224–56.

end of the story.<sup>51</sup> Schwarz was sentenced to confinement at hard labor for life and Green to confinement at hard labor for five years. In the subsequent mandatory staff judge advocate review, the division staff judge advocate recommended a reduction in Schwarz's sentence to 20 years and no change to Green's. Two months before the courts-martial, Major General Charles F. Widdecke, who had assumed command of the division and therefore had final approval authority of the cases, sought to address the inequity between the Herrod and Boyd acquittals and the Schwarz and Green sentences and approved the guilty verdict but reduced both Schwarz's and Green's confinement to one year.<sup>52</sup>

In the case of Son Thang, III MAF kept the press fully informed throughout the proceedings, and early in the process, before the trials began, there was little interest and the Marine Corps even received compliments for its forthright and candid handling in one report. Later, though, as political interest and arguing intensified, the massacre drew increasing attention from the press and eventually from the public. As in Lieutenant Calley's case for My Lai, many letter writers expressed ire at the Marine Corps for prosecuting young men for killing as "they had been trained and sent to do." Additionally, the letter writers often cited the emotional stresses the men had to have been under as mitigating circumstances, showing a willingness to excuse the crimes. Given the record of trials against American soldiers for law of war violations in the European theater of World War II, the lack of trials in the Pacific for the same types of violations against a different enemy, and little media attention regarding either, this willingness likely would not have existed had the victims been White. The Marine Corps, for its part, responded to these letters in a restrained way, acknowledging the stress of combat but firmly stating that fighting on behalf of the nation requires standards of conduct be maintained and that when a crime is committed it must be dealt with according to the law.<sup>53</sup>

Although it is clear from the numbers that only a small percentage of individuals within the Services commit these types of violations, when it

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<sup>51</sup> Despite My Lai occurring almost two years before the events at Son Thang, the trials for Son Thang were completed seven months before Lt William Calley's.

<sup>52</sup> Solis, *Son Thang*, 264–76.

<sup>53</sup> Cosmas and Murray, *U.S. Marines in Vietnam*, 346–47.

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does occur it can be linked to both the command climate present in the military organization and the prevailing attitudes of society. During the period from 1965 to 1971, III MAF reported that 27 Marines were convicted of murder in cases where the victim was Vietnamese, another 16 were convicted of rape, and 15 of manslaughter.<sup>54</sup> The Army's numbers from 1965 to 1973 were 41 convictions for murder, 25 for rape, and 26 for manslaughter.<sup>55</sup> There are several issues to consider affecting both the overall number of deployed troops and the number of prosecutions against Marines and soldiers for crimes against Vietnamese citizens, such as the relationship between accountability for the crimes and where in the range of military operations the conflict in which the crime happens occurs.<sup>56</sup> Other issues include the speed of reporting and accountability measures, including awarded punishments; the legal defenses used; prevalence of incidents; and the education and training regarding the law of war received by those guilty of these crimes.

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<sup>54</sup> Cosmas and Murray, *U.S. Marines in Vietnam*, 346–47. Few of these crimes occurred in combat, for example, one manslaughter victim was a South Vietnamese soldier known to be a drug pusher. The total number of Marines serving in Vietnam from 1965 to 1972 was more than 390,000.

<sup>55</sup> W. Hays Parks, "Crimes in Hostilities," *Marine Corps Gazette* 60, no. 9 (September 1976): 18. The number of soldiers serving in Vietnam exceeded 1.7 million throughout the war.

<sup>56</sup> This relationship is often inverse. The higher on the continuum toward total war a conflict rises, the lower the probability for accountability. In an existential fight like World War II, many atrocities on the U.S. side went little punished or not at all, but in more limited wars, there is a much greater chance society expects its military to abide by the law of war—even if sometimes societal impressions that a soldier was being held accountable unfairly made justly punishing them difficult.

# CHAPTER 6

## Discussion Two

The Vietnam War ranked considerably higher on the range of military operations (ROMO) than many later conflicts and operations but was still limited when compared to World War II. During Vietnam, 4.3 million individuals served in the Army (which had shed the Army Air Corps component after World War II, creating the U.S. Air Force), and 794,000 served in the Marine Corps.<sup>1</sup> Walker Schneider's "morally charged connection" would seem to be as present during this conflict as it had been in World War II.<sup>2</sup> While the Vietnam War was growing unpopular by the time of the two cases highlighted in this section, there were multiple arguments by the public for excusing violations, with one of the more popular being that the soldier or Marine was "just doing what they were trained to do."<sup>3</sup> During World War II, part of the moral connection, it could be argued, was due to the sheer numbers of the American population involved; every family had members serving or knew many friends who served. In Vietnam, however, a much smaller percentage served but did so in sufficient numbers that made it unnecessary for others to do so. John Grenier, in his book *The First Way of War: American Warmaking on the Frontier*, pointed out that many soldiers and students of military history do not acknowledge some of the more inconvenient truths and ignominious events of the United States' evolution in warfighting because of the dearth of sophisticated literature on the sub-

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<sup>1</sup> "Principal Wars in which the United States Participated—U.S. Military Personnel Serving and Casualties: 1775–1991," U.S. Military Casualties: Conflicts 1775–1996, Defense Casualty Analysis System, Department of Defense, accessed 5 September 2024.

<sup>2</sup> Walker Schneider, "Skull Questions: The Public Discussion of American Trophy Collection During World War II," *Penn History Review* 25, no. 2 (2019): 127.

<sup>3</sup> Maj W. Hays Parks, "Crimes in Hostilities," *Marine Corps Gazette* 60, no. 9 (September 1976): 16–17; and Michael R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley* (Lawrence: University Press of Kansas, 2013), 130–31.

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ject.<sup>4</sup> If this is the case, it is not surprising that the public at large embraced Schneider's connection, having little real in-depth knowledge of the profession of arms to give it any reason to question the actions of its soldiers or question how well those that violate the law of war represent the public.

There was less blatant dehumanization of the Vietnamese than of the Japanese during World War II in the mass media during the Vietnam War and, in general, a higher level of respect and admiration among some sectors of the American public.<sup>5</sup> The Vietnamese Communists fought an insurgency; they knew their forces were weaker than their opponents in conventional military terms and they fought to their advantage using ambushes, booby traps, and hit-and-run tactics. Despite less focused societal demonization of this enemy, these guerrilla tactics caused just as much enmity among the U.S. infantryman and, before long, the civilians among whom the enemy often faded after attacking became guilty by association, if not for their outright support for the Vietnamese enemy. This same result was evident in the Philippines at the turn of the twentieth century and in the Iraq case studies discussed in part three.

During testimony at Lieutenant Calley's trial, one servicemember related, "The rule in Vietnam was the M.G.R.—the 'mere gook rule': that it was no crime to kill or torture or rob or maim a Vietnamese because he was a mere gook."<sup>6</sup> These sorts of feelings among the servicemen fighting every day meant that there would be violence against those protected by the Geneva Conventions and other laws, although less than in World War II.

Although further down the continuum from total war, it is still hard to determine just how many violations occurred, but there are some quantifiable measures that point to more accountability than in World War II. Among a much smaller population of American troops than fought in

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<sup>4</sup> John Grenier, *The First Way of War: American Warmaking on the Frontier* (New York: Cambridge University Press, 2005), 223, <https://doi.org/10.1017/CBO9780511817847>. The unacknowledged events include the attacks targeting both Native American non-combatants and their crops.

<sup>5</sup> Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980), 220.

<sup>6</sup> Richard Hammer, *The Court-martial of Lt. Calley* (New York: Coward, McCann, and Geoghegan, 1971), 392. The term *gook* came into use during the late 1890s and early 1900s, likely during the war in the Philippines, and is a derogatory term for a non-White, non-American person and especially for someone of Asian descent.

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World War II's Pacific theater, there were 41 soldiers and 27 Marines prosecuted for murder or manslaughter of Vietnamese noncombatants. From 1965 to 1975, the Army recorded 241 allegations of war crimes of all types besides the massacre at My Lai. Of those, 78 were found to be substantiated and 56 were taken to courts-martial, although only 36 convictions were attained for various reasons.<sup>7</sup> During the course of a 10-year conflict, this does not seem substantial, but when considering the aspect of race and how damaging to a Service's reputation pursuing these convictions can be, it is still an improvement over the level of accountability during World War II, especially when compared specifically to the Pacific theater. This may seem counterintuitive, because while many portrayals within popular culture—and by some orthodox scholars of the Vietnam War—tend to paint the servicemen of this time as running rampant and higher headquarters as caring little about their actions, World War II could have a much worse reputation than it does if censorship and myth did not preclude an easier side-by-side comparison.

The speed of initial reporting in most cases leading to court-martial assessed throughout this work (the brutality in the World War II Pacific theater notwithstanding) was actually quite good and reflects well on the individual character and the organizational training and education of soldiers and Marines. This probably reflects the efforts of the military Services—admittedly, at times due to fear of public perception—to inculcate service as a profession requiring the highest standards of discipline and deportment and to educate the force on not only the law of war but the practical advantages to a military of following such laws. These efforts were buttressed with orders and directives at several levels within the chain of command, although at times there were failures by subordinate units to comply.<sup>8</sup> There would, of course, be exceptions in all conflicts—a notable

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<sup>7</sup> Gary D. Solis, "Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam," *Transnational Law and Contemporary Problems* 59, no. 1 (Spring 2000): 65–66.

<sup>8</sup> Parks, "Crimes in Hostilities," 20–22.



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one from Vietnam being the Tiger Force.<sup>9</sup> However, memoirs from World War II onward make it clear that individual and leadership reactions to the discovery of most violations brought either immediate informal action or reporting and investigation with subsequent trials. At Biscari, details of the event made it through the chain of command to the commander of the Army within a day. Warrant Officer Hugh Thompson reported on the crimes at My Lai as they happened and again after they concluded that day. News of the murders at Son Thang were relayed to the patrol, which relayed the information to the battalion headquarters, triggering an investigation inside two days from the incident. The differences between how the two cases selected for this book were handled occurred after their initial reporting.

After the My Lai Massacre, perhaps as many as 50 people in command billets knew there was something amiss yet did nothing. The massacre and attempted cover-up were investigated by an Army inquiry and yielded results Lieutenant General William Peers said “had the most damaging effect upon the image of the U.S. Army as a professional institution and has cast doubt upon the integrity of all its officers and men.”<sup>10</sup> Of the more than 20 people for whom the inquiry forwarded recommendations for charges, only Lieutenant William Calley was convicted and his sentence, in the end, was greatly reduced.

Four courts-martial were held for the perpetrators of Son Thang, which left 16 Vietnamese women and children murdered. Each used slightly different defense tactics. The differing Son Thang outcomes could be explained, of course, by a number of variables that are also found in the civilian courtrooms of any American city. The higher percentage of convictions against the accused of Son Thang versus My Lai was assisted by the

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<sup>9</sup> The so-called Tiger Force was a small unit of the Army’s 1st Battalion, 327th Infantry Regiment, 101st Airborne Division, founded to “out-guerrilla the guerrilla.” Joe Mahr, “Tiger Force: Unit’s Founder Says He Didn’t Know of Atrocities,” *Blade* (Toledo, OH), 28 March 2004. In 2003, a reporter with the *Toledo Blade* obtained the previously unreleased confidential papers of a commander and, after corroborating many of the stories in the papers with Army records at the National Archives, published a series of stories and later a book detailing the appalling actions of this unit, which included crimes against noncombatants. It is one of the units that writers such as Nick Turse point to when claiming the existence of a policy of violence against civilians on the part of the U.S. military.

<sup>10</sup> LtGen W. R. Peers, USA, *The My Lai Inquiry* (New York: W. W. Norton, 1979), 209.

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quicker investigation and prosecution. Contributing factors to the difference in convictions include prosecutors of varying skill in identifying and countering defense tactics; evidence allowed in some cases but disallowed by a different judge in other cases; and members of the court identifying with and, if not excusing then condoning the accused's actions due to the stress of the situation. Weighing equally to any of those in the final outcome was an underlying racist attitude that was summed up by the "mere gook rule" used by some as the justification for crimes committed against the Vietnamese, whether enemy or noncombatant. This was not a phenomenon unique to the battalion, the Marine Corps, or even to Americans; in fact, it was pervasive in and out of the Services. Although not as prevalent as in previous wars, it could be found expressed in the media or in conversations with average citizens about the violence waging in Vietnam.

Another influencing factor on the behavior of troops of this generation was the Cold War-era men's adventure magazine (or pulp), depicting scenarios in which any man, regardless of class, job, or social status could be a hero. Simply put, these magazines offered a world wherein young men asserted their manhood by saving the day—killing the enemy while seeking release and reward—while distorting their understanding of war and expectations of interactions with women.<sup>11</sup> In South Vietnam, reality was much more complex than these storylines and led to disappointment and frustration in many cognitively immature men not wholly prepared for the deadly and impersonal nature of war. The similar narratives of the pulp magazines, prominently featuring femme fatales and willing damsels in distress, also left the young men expecting something more than the sexual isolation inherent in war and helped make violence against the Vietnamese population, and women in particular, at times tacitly tolerated if not acceptable.<sup>12</sup> These warped expectations in readers of pulp magazines were layered over preexisting, societally accepted gender roles and attitudes, including the importance of masculinity in military soldiers as described by Joshua S. Goldstein in his book, *War and Gender: How Gender*

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<sup>11</sup> Gregory A. Daddis, *Pulp Vietnam: War and Gender in Cold War Men's Adventure Magazines* (New York: Cambridge University Press, 2021), 22–23, 83, <https://doi.org/10.1017/9781108655774>.

<sup>12</sup> Daddis, *Pulp Vietnam*, 6.

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*Shapes the War System and Vice Versa*.<sup>13</sup> His work points out the in-group and out-group dynamic that gender causes between males and females, which parallels Simon Harrison's idea of near and distant enemies, and explores how gender roles affect treatment of combatants and noncombatants alike. It also explains the compulsion to exert dominance sexually, seen in rapes committed at My Lai and elsewhere, and the emasculation and sexualization of the torture at Abu Ghraib, examined later. Goldstein also used others' research to illustrate how the fear of becoming an outcast of the group can cause those normally opposed to sexually assaulting others to join the group.<sup>14</sup>

Turning again to the role of the media, while during World War II the reporting was often heavily censored and relayed through combat correspondents in the employ of the Services, during the Vietnam War, the combat theater had a much more permissive attitude toward allowing civilian correspondents, and many major news outlets had representatives in Saigon and dispersed throughout the country. That said, in both World War II and early in Vietnam, at least prior to the Tet Offensive, the media was much more pro-war, or at least willing to accept the government reports at face value, in its reporting. Later in Vietnam, as the public's disapproval of the war was matched in editorials and reporting tone, calls for the United States to leave the war appeared more frequently.<sup>15</sup> Additionally, support for the idea that servicemembers who committed war crimes had in some way been failed by the Services rather than themselves failed to uphold laws and regulations were given more voice. This is evident in the turnaround in press coverage of Son Thang once it was politicized. This led to increased interest in the cases, both by lawyers seeking to make their name, and by the antiwar establishment which pointed to them as yet one more reason the United States should cease involvement in the war.

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<sup>13</sup> Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (New York: Cambridge University Press, 2001).

<sup>14</sup> Goldstein, *War and Gender*, 197, 365.

<sup>15</sup> Joel Achenbach, "Did the News Media, Led by Walter Cronkite, Lose the War in Vietnam?," *Washington Post*, 25 May 2018. Although it is debatable whether the "Cronkite moment" led to the eventual outcome in Vietnam, there is no question that the tenor of coverage changed after February 1968.

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When discussing the final accountability—what price the guilty really paid—for these crimes in Vietnam, reviewing a sample of the overall relevant Service numbers is illustrative. The Marine Corps had 27 members court-martialed for murder of Vietnamese noncombatants. Of those cases, 15 had sentences of confinement for life imposed, and in 3 others the confinement imposed was for 20 years or longer. In only five cases was the sentence less than five years. After passing through the mandatory review by the convening authority (usually the commanding general of the Marine's higher headquarters), those numbers dwindled to 17 approved sentences of at least 20 years, 5 of those still confinement for life, and 7 of less than 5 years. After further actions by Navy and Marine Corps Court of Criminal Appeals, U.S. Court of Military Appeals, and clemency or parole boards, only 1 Marine served longer than 10 years, and 10 others served longer than 5 years. These results, while initially calling into question the seriousness with which the military regarded these crimes, was better than a sample from the civilian records of the same time. In Pennsylvania, there were 132 homicide convictions during the first half of 1970, when several of the Marine cases, including the Son Thang cases, were prosecuted. Sentences ranged from probation in more than one-quarter of the Pennsylvania civilian cases to confinement for life in three cases. In 77 cases, the sentences were for less than five years, in only 14 cases sentences were given for five years or more, and there was only 1 death sentence. No data is available on whether those sentences were potentially reduced by any subsequent appellate actions.<sup>16</sup> This demonstrates that while not holding the Marines to the level of accountability the members of the courts-martial initially directed, the system still held them more accountable than the equivalent civilian courts.<sup>17</sup> The military's apparent desire to hold accountable its soldiers will also be evident in later case studies, as will outside influences working against this accountability.

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<sup>16</sup> Solis, "Military Justice, Civilian Clemency," 70–71.

<sup>17</sup> One consideration in the numbers mentioned in this section is that there is no way of determining in military or civilian cases how many involved one victim or many, in how many cases were other crimes committed collaterally, or any other number of variables leading to sentencing.

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The problems endemic to investigating and prosecuting allegations of violations in a war zone have been covered earlier in this work, and it is beyond question that not all war crimes are either reported or make it to a trial conclusion. The Vietnam War, owing in part to the vociferous antiwar movement and part to tropes trotted out in popular entertainment mediums like movies or novels, for a time was often associated with the antitroop epithets of “baby killer” and the like. Writers such as Nick Turse argue that violence against noncombatants was systemic and a matter of policy without acknowledging many of the efforts to prevent and encourage reporting of such crimes. The “mere gook rule” or similar feelings are unfortunate byproducts of all wars. This is, in part, because the dehumanization of an enemy, especially to immature and—in the heat of combat—scared young fighters, quickly morphs from a tool to overcome social and religious taboos against killing into ill feelings toward a population whose culture is foreign and difficult to understand and among whom the enemy hides. Despite this and the fact that reported violations do not tell the whole story, efforts by other writers to thoroughly research and vet stories of atrocities—many of which were used in venues such as the Winter Soldier Investigation of 1971—make it clear that more than a few anecdotal and published reports lack real substance.<sup>18</sup> In examining standing directives, procedures, and orders it is clear that, while not foolproof, efforts to both prevent and gain accountability for law of war violations existed. The question in the following years were—and will continue to be—which lessons were learned and applied more efficiently to prevent such crimes.

When further contemplating the civilian reactions and military responses to the incidents highlighted in these chapters, the legal defenses that were posed and the make-up of the defense teams should also be considered. As previously discussed, while Captain John Compton successful-

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<sup>18</sup> Gary Kulik, “War Stories”: *False Atrocity Tales, Swift Boaters, and Winter Soldiers—What Really Happened in Vietnam* (Lincoln: University of Nebraska Press, 2009), for example, investigates the credibility of several of Turse’s sources, such as activist and former Marine Scott Camil, LtCol Anthony B. Herbert (USA), and Michael Hunter. Some of these individuals testified during the Winter Soldier Investigation—a media event sponsored by the Vietnam Veterans Against the War group in early 1971—and others were interviewed for Nick Turse’s dissertation-turned-book *Kill Anything that Moves: The Real American War in Vietnam* (New York: Henry Holt, 2013).

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ly used a defense revolving around following the orders of a senior officer, by 1944 soldiers and Marines were not able—at least for the most part—to argue that they bore no responsibility for the acts committed. In the cases of Lieutenant Calley, Private Michael Schwarz, and Private First Class Samuel Green, variations on the argument that they were following the orders of superiors failed to gain them acquittals. In the cases of Thomas Boyd and Randy Herrod, each used different defenses to win their freedom. In Boyd's case, he was able to use weak prosecution and enough plausible doubt to undermine the government's case against him. Herrod's team brought new and disputable evidence of a captured American machine gun in the area of operations to provide enough reasonable doubt to avoid prosecution. In both of these failed government cases, as in Calley's My Lai trial, civilian lawyers either replaced or augmented the appointed military counsel. Lieutenant Calley's case was one of few where the presence of a civilian attorney did not materially help the defense, and this was also a factor that played into the decision to reduce the sentences of Schwarz and Green.<sup>19</sup>

Illustrating what Walker Schneider called the “morally charged connection,” there were more than a few citizens writing to their politicians or editorializing in their local papers during the Vietnam War about the situations in which these soldiers and Marines had been placed by their leadership.<sup>20</sup> Many lawyers saw a direct benefit in providing pro bono defenses to American servicemen accused of these crimes, whom some citizens saw as being “scapegoated.”<sup>21</sup> In many cases, civilian defense teams lent the advantage of experience in capital cases to their defendants, although they often lacked familiarity with military law's idiosyncrasies. The lawyers gained prestige in many cases, and though they offered their services for free, they often suffered fewer out-of-pocket expenses than they otherwise might have due to the donations of citizens wishing to see the defendants exonerated. This was not possible during the cases at Biscari as they were carried out in a war zone, as were the Son Thang courts-martial,

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<sup>19</sup> Gary D. Solis, *Son Thang: An American War Crime* (Annapolis, MD: Naval Institute Press, 1997), 266.

<sup>20</sup> Walker Schneider, “Skull Questions: The Public Discussion of American Trophy Collection during World War II,” *Penn History Review* 25, no. 2 (2018): 127.

<sup>21</sup> Solis, *Son Thang*, 91; and Peers, *The My Lai Inquiry*, 227.

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albeit under much tighter access to media or civilians than was the case in Vietnam. The frequency that either pro bono legal interest or political interest were raised during these types of cases again points to a society that feels a connection to its military and a desire to see blame mitigated. A question that remains is why this desire exists when the actual prevalence of crimes of this magnitude lends weight to an argument that the individuals responsible are aberrant in their actions. With the sheer number of ground forces committed during the four years of World War II and almost 10 years of the conflict in Vietnam, the number of cases that have been alleged should send a signal to society that these violations must be dealt with as crimes and punished accordingly.

To be clear, there is no way to accurately assess the number of war crimes in any conflict. The moral victory will always go to the side that facilitates the trials and assesses guilt and, further, many crimes on the battlefield are never reported or discovered. In most conflicts, grave breaches of existing laws, conventions, and protocols were adjudicated as violations of military law. All of the crimes highlighted in these chapters were in violation of laws of war and also of the Articles of War or the Uniform Code of Military Justice.<sup>22</sup>

Until 1996, there were no state or federal statutes in the United States that made war crimes punishable in civilian courts. This led to a legal loophole that existed for the guilty when their war crimes were discovered after discharge from the Service.<sup>23</sup> Because violations were adjudicated most often as breaches of military law or sometimes within the civilian courts, after 1996, in line with Title 18 of the U.S. Code, it became difficult to determine merely by the information in specifications or charges which cases were war crimes or which were not. Adding to the difficulty in determining the aggregate number of war crimes by U.S. personnel in any conflict is the fact that until recently there was no reporting requirement to a central De-

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<sup>22</sup> The Second Continental Congress originally published 69 Articles of War to govern the Continental Army's conduct in 1775. These were expanded to 101 articles in 1806 and revised again between 1912 and 1920. The Uniform Code of Military Justice replaced the Articles of War in 1951 (Library of Congress Military Legal Resources).

<sup>23</sup> Solis, "Military Justice, Civilian Clemency," 63.

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partment of Defense authority.<sup>24</sup> Each Service kept its own records. Added to the problem of defining which crimes were war crimes, especially during the Vietnam conflict, was the fact that fighting occurred throughout South Vietnam, into neighboring Laos and Cambodia, and in the air over North Vietnam. It involved combatants and noncombatants from even more nations. There was never a formal declaration of war by either the United States or North Vietnam, although South Vietnam issued a state of emergency in 1964 and of war in 1965. North Vietnam (the Democratic Republic of Vietnam) was loathe to acknowledge South Vietnam (the Republic of Vietnam) as a separate country or to officially admit involvement in South Vietnam. All of these variables and more made applying traditional principles of international law to the conflict very difficult.<sup>25</sup> Regardless, the immunity of noncombatants—either prisoners and survivors of destroyed aircraft or ships who were removed from direct combat or of civilians—clearly delineated in the Hague and Geneva Conventions was still applicable through military law.

Despite the difficulty in determining an accurate number of war crimes, there is ample evidence that there were more incidents than those of which the average American was made aware. This is due in part to the reporting, or lack thereof, by the media as previously discussed and also to measures taken by the Services to keep efforts at disciplining these crimes out of wide public awareness, for obvious reasons. Although certain accounts of incidents within his book *Kill Anything That Moves: The Real American War in Vietnam* have been disputed, Nick Turse's description of finding a trove of allegations in the National Archives of 300 allegations against U.S. Army soldiers is in line with the numbers discussed previously from aggregated sources within the Department of Defense (DOD) and Army records.<sup>26</sup> Any war crime has a detrimental effect on the discipline, readiness, and psychological health of the servicemember committing it

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<sup>24</sup> Solis, "Military Justice, Civilian Clemency," 65. The new DOD Civilian Protection Center of Excellence (addressed more fully later) initiates policies and reporting more stringent than presently required by either the Geneva or Hague Conventions.

<sup>25</sup> George S. Prugh, *Law at War: Vietnam 1964–1973* (Washington, DC: Department of the Army, 1975), 61–62. Unfortunately, the complexities surrounding conflicts in the late twentieth century remain in the twenty-first century.

<sup>26</sup> Nick Turse, "Civilian Killings Went Unpunished," *Los Angeles Times*, 6 August 2006.



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and on their Service more broadly. These effects pale in comparison to the effects on the victims, their families, and communities. They are abhorrent deviations of international law and military orders and directives and need to be prosecuted to the fullest measure available. Their prevalence, though, even in the extreme numbers cited by Turse and others when taken in comparison with the numbers of soldiers who served, thankfully suggests breaches committed by these ground forces are not widespread or policy-driven but are, rather, aberrant. To decrease the prevalence of such violations in the future, more robust means of enforcing initial sentencing along with more effective training and education may yet be required.

The training and education of both enlisted soldiers and Marines and their officers in matters pertaining to the law of war begins in entry-level training. There, the basic fundamentals of the requirements of the law of war, the reporting of violations, and how adherence to these requirements conforms to the values and good leadership practices the Services value, are taught. This basic knowledge is expanded through follow-on training at later schools and before deployments and in more detailed fashion for those who, by billet, are involved in planning operations or in the legal sections. Knowledge is assessed during schools with tests and through practical application during exercises and is appraised during command inspections.<sup>27</sup> This has been the case during the time periods of the conflicts highlighted as well, with varying levels of success. Success through the years was affected as much by societal influences as it was by military effort. For example, the acceptance by many during World War II of trophy-taking, as discussed by Walker Schneider, Simon Harrison, and James Weingartner point to societal acceptance of the practice, which was in direct conflict with the principles being taught during military education and training. One criticism during that time, summed up by Lieutenant General Bruce Palmer, the deputy commander of U.S. Forces in Vietnam, was that most law of war training was too academic in nature and not practical or concrete enough to be truly effective.<sup>28</sup>

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<sup>27</sup> *Marine Corps Order 3300.4, Marine Corps Law of War Program* (Washington, DC: Headquarters Marine Corps, 20 October 2003); and Parks, "Crimes in Hostilities," 20.

<sup>28</sup> Parks, "Crimes in Hostilities," 20.

## Discussion Two

During Vietnam, in addition to the entry-level and follow-on training, the 1st Marine Division's policy was that every servicemember receive initial training on arrival and that subordinate commands were responsible for refresher training every two months thereafter. Additionally, the Marine Corps used its chaplains to train Marines in Vietnamese culture, traditions, and customs through its Personal Response Program in the hopes of lessening the negative effects of cultural bias.<sup>29</sup> Every servicemember entering Vietnam received additional training on the Geneva Convention, per U.S. Military Assistance Command, Vietnam (USMACV), directives, and issued two 3-by-5-inch information cards for dealing with civilians and the treatment of prisoners.<sup>30</sup> On the first of these cards were printed the "Nine Rules" concerning interactions with noncombatants, aimed at promoting acceptance of the U.S. forces through positive behaviors. The second bore reminders that "mistreatment of any captive is a criminal offense."<sup>31</sup> As early as March 1966, existing USMACV directives initially dealing with reporting and investigating Geneva Conventions violations against U.S. personnel were expanded to include violations by U.S. personnel. This directive stated very clearly that the killing, harming, or other grave breaches of or against noncombatants, whether civilians or surrendered combatants, were war crimes.<sup>32</sup> A notable deficiency in the Army's execution of required predeployment training was underscored during the My Lai inquiry, when Lieutenant General William Peers discovered that much of the 11th Brigade, of which Calley's Bravo Company was a part, were shipped to Vietnam without the required training.<sup>33</sup>

There were clearly efforts made, although sometimes not nearly strong enough, to educate the forces on what the law said and requirements to periodically remind servicemembers of the law. To achieve greater results, education and training need to make the connection between the proper

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<sup>29</sup> Graham A. Cosmas and LtCol Terrence P. Murray, *U.S. Marines in Vietnam: Vietnamization and Redeployment, 1970–1971* (Washington, DC: History and Museums Division, Headquarters Marine Corps, 1986), 348–49.

<sup>30</sup> Solis, *Son Thang*, 188.

<sup>31</sup> Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (Abingdon, UK: Routledge, 2010), 230–31.

<sup>32</sup> Prugh, *Law at War*, 72–73.

<sup>33</sup> Peers, *The My Lai Inquiry*, 230.

## Part Two: Vietnam War

conduct of soldiers and Marines in accordance with the law of war and greater accomplishment of assigned mission goals. There was clearly little evidence of efforts to do this.<sup>34</sup> My Lai, Son Thang, and incidents like them did cause the Army to produce excellent training films on the law of war and the Marine Corps to develop scenario-based instructions that officers had to analyze for all types of considerations, including tactics and law of war issues. Both the Army and Marine Corps added extensive training regimes to officer schools at all levels. The DOD issued *DOD Directive 5100.77, DOD Program for the Implementation of the Law of War (Short Title: DOD Law of War Program)* in 1974, aligning all Services' instructional responsibilities as well as the reporting, investigation, and prosecution procedures for violations.<sup>35</sup>

When comparing the civilian reactions and military responses to the war crimes cases of World War II and Vietnam, a number of similar conditions become apparent. The responses were affected by how far on the range of military operations the conflicts fell from total war. In Vietnam, this affected directly how the press could cover the war, the societal attitudes about the enemy, and about crimes against combatants or noncombatants for which society would excuse servicemen in a war that did not mobilize the nation. The speed of reporting crimes initially has always reflected acknowledgment by the individual soldier or Marine that the crime was in violation to their mission and the laws and regulations by which they are sworn to abide militarily and to their personal sense of right and wrong. Shifting media attitudes can play a part in publicizing a case and gaining widespread public awareness, but that may work against those convicted paying full measure for their crimes, if they are convicted at all. Over the years, the defense of merely following a superior's orders has lost most of its utility to one who violates the law of war, but public opinion about the pressures under which those individuals work may adversely affect prosecution or prevent the convicted from serving the sentenced punishment in full. While the full number of incidents can only be estimated and those reported are most assuredly only a fraction of what occur, the relation of the numbers known to the numbers of ground forces active-

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<sup>34</sup> Peers, *The My Lai Inquiry*, 230–33.

<sup>35</sup> Parks, "Crimes in Hostilities," 21–22.

## Discussion Two

ly serving in each of the conflicts makes the case that there is some value in the training and education received. Many of the cases show, however, that periodic refresher training at times of increased stress, particularly of combat, should be employed to increase effectiveness, although this still may not be able to overcome the negative effect of poor leadership attitudes toward the law of war.



# **PART THREE**

**IRAQ**  
**A New Generation of Crimes**



## INTRODUCTION

Throughout the long history of the U.S. military, there have been several incidents that led to public reflection and discussion about the actions of its soldiers and to periods of introspection about U.S. policies. The 27 February 1968 declaration on the *CBS Evening News* by Walter Cronkite, “the Most Trusted Man in America,” that the conflict in Vietnam was in a stalemate and negotiations offered the only way out following the surprising Tet Offensive was one such event.<sup>1</sup> As we have seen, the revelation released over the Associated Press newswire of the massacre at My Lai on 12 November 1969—exposing not only an abhorrent crime committed by U.S. servicemen but an attempt to cover it up as well—was another. To a country already questioning the war in the wake of Cronkite’s pronouncement, the My Lai news inflamed the antiwar movement and united disparate groups within America.<sup>2</sup> The 29 October 1991 breaking story in the *San Diego Union* titled “Women Reportedly Abused by Navy Pilots at Seminar” dampened some of the euphoria of a military that had experienced rising public esteem in the 15 years since the Vietnam War and was flush from the recent victory of Operation Desert Storm (7 January–28 February 1991). The Tailhook scandal of 1991 was, in the words of a member of the

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<sup>1</sup> Edwin B. Moïse, “Tet in the News,” *Vietnam* magazine, February 2019, 33–34; and William M. Hammond, “The Press in Vietnam as Agent of Defeat: A Critical Examination,” *Reviews in American History* 17, no. 2 (1989): 312, <https://doi.org/10.2307/2702936>.

<sup>2</sup> Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Strauss, and Giroux, 2021), 11.



### Part Three: Iraq

Presidential Commission on Assignment of Women in the Armed Forces, “a bombshell . . . amazing timing that it took place during the commission.” It amplified the conversation about the role of women in the military and accelerated efforts to provide them additional opportunities to serve.<sup>3</sup>

The evening of 28 April 2004 was another such event. The United States had invaded Iraq more than a year prior (on 19 March 2003—10 days shy of 30 years from its last combat troops leaving Vietnam), engaging in another protracted counterinsurgency conflict.<sup>4</sup> Details about the abuse of detainees started trickling out in the preceding months, and then the weekly television news show *60 Minutes II* aired a story detailing the scope of abuses at one prison, Abu Ghraib (officially known as the Baghdad Central Confinement Facility), that April evening. The story was amplified by descriptions of physical and mental abuses and accompanied by graphic photographs, and it caused an immediate public impact. Two and a half years after the attacks of 11 September 2001 (9/11), after two years of fighting in Afghanistan and more than a year in Iraq, the revelations about the abuses at Abu Ghraib spurred public discussion and reflection about revulsion at the acts but failed to serve as the same kind of change agent as earlier war crimes. Again, the effects of race and gender were apparent, this time augmented by the lingering societal emotions about the 9/11 attacks.

Between the Vietnam War and the Iraq War, the military leaders shaping strategy spent the intervening years refusing to acknowledge the possibility of fighting in another unpopular war against an enemy that moved among the population, instead focusing on the possibility of the Cold War heating up to the point of a conventional conflict against a near peer, at least until the Soviet Union collapsed. In many ways, the Services failed to make the hard lessons learned from Vietnam a major part of the professional military education of its officers and enlisted personnel. Contributing to this failure were the successes of the Persian Gulf War (1990–91), which seemed to vindicate and further entrench those who advocated

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<sup>3</sup> Thomas V. Draude, interview with author, 15 January 2021, 46:43; and Jean Zimmerman, *Tailspin: Women at War in the Wake of Tailhook* (New York: Doubleday, 1995), 100–1, 136–38. The Commission on the Assignment of Women in the Armed Forces was established by the National Defense Authorization Act of 1992 (P.L. 102-190).

<sup>4</sup> The last U.S. troops left Vietnam on 29 March 1973. The U.S.-led invasion of Iraq during Operation Iraqi Freedom began 19 March 2003.

preparation for conventional fights instead of a repeat of Vietnam's counterinsurgency fight. When the effects of combat were taught, discussed, or tested in annual battle skills assessments, the context was almost always that of a large-scale conventional conflict.<sup>5</sup> There were clear improvements after Vietnam and through the Persian Gulf War in how the U.S. military taught its forces about the law of war, including the requirement to use lawyers and more formal systems to record training completion. However, due to the institutional focus on preparation for conventional conflict, little was done to prepare those same forces for the stressors that the fight in Iraq during the early 2000s entailed until that conflict was underway.

After the collapse of the Soviet Union, the U.S. Marine Corps and Army continued to train their forces to conduct missions along the range of military operations (ROMO) in their doctrinally prescribed units using the techniques developed throughout the twentieth century and honed during the Cold War.<sup>6</sup> While the Army and Marine Corps thought about where the next conflict would come, not much time was devoted to training for the possibility that the enemy in a future conflict might not be a conventional, state-sponsored armed force.<sup>7</sup> So, following the success of the invasion by U.S., British, Australian, and Polish troops in the early days of 2003, and despite warnings from experts that the worst-case scenario for the conflict would be Saddam Hussein's forces discarding their uniforms to conduct an irregular war, the United States found itself, due to its own failings of policy, with an insurgency on its hands after major combat operations ceased in May 2003.<sup>8</sup> Although initially calling the insurgency—fought be-

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<sup>5</sup> Mark Berger et al., "Déjà vu All Over Again: Counterinsurgency and the 'American Way of War,'" *Intelligence and National Security* 22, no. 6 (2007): 912; and Andrew West, "The U.S. Failed to Learn the Lesson of Vietnam: Will It Learn from Afghanistan?," *Washington Post*, 16 August 2021.

<sup>6</sup> Discussed earlier, this continuum of conflict moves from limited engagements and the use of only selected means at a nation's disposal on one end to total war at the opposite end, bringing to bear all the instruments of power available to a nation.

<sup>7</sup> Stephen Hosmer, *The Army's Role in Counterinsurgency and Insurgency* (Santa Monica, CA: Rand, 1990), 30–32; and Alan J. Vick et al., *Air Power in the New Counterinsurgency Era: The Strategic Importance of USAF Advisory and Assistance Missions* (Santa Monica, CA: Rand, 2006), 27–28.

<sup>8</sup> There were several factors that brought about the insurgency, including the disbanding of the Iraqi Army and early policies attempting to eliminate Baathist influence in any form.

### Part Three: Iraq

tween 2006 and 2011—a civil war, a U.S. National Intelligence Estimate clarified later that the situation was even more complex than that term described. These elements, the “hardening of ethno-sectarian identities, a sea change in the character of the violence . . . and population displacement” added to the complexity of fighting inherent with any counterinsurgency effort.<sup>9</sup> It was into this environment of uncertainty and seemingly all-consuming violence that three separate incidents of violations of the law of war by U.S. troops occurred within a span of only five months and within 225 kilometers of each other.

As in the violations that occurred during World War II and Vietnam discussed in parts one and two, the four incidents in Iraq each included several key factors and themes that have been noted repeatedly. These cases include the abuse of prisoners at Abu Ghraib and the killing of noncombatants in Haditha, Mahmudiyah, and Hamdania. In all four cases—two showing clear evidence of methodical planning and intent, one displaying the chaos that results when boredom and lack of purpose in a unit are exacerbated by the stress of being over-tasked, and one illustrating overkill in the immediate aftermath of an attack—leadership was either lacking or toxic. The influence ineffective leadership at the lowest levels has on such events is probably best described by a member of the platoon responsible for the unlawful killing at Hamdania:

There is something that could easily have prevented it. Command climate is something we create. If the 1stSgt was making his rounds, we could have brought up concerns and removed uneasiness with what was going on. The 1stSgt failed in his duties, he was one individual who could have prevented this. That’s the importance of mentoring on the enlisted side—we had no voice. But how do you express that without consequences?<sup>10</sup>

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<sup>9</sup> “Elements of ‘Civil War’ in Iraq,” *BBC News*, 2 February 2007; and *National Intelligence Estimate—Prospects for Iraq’s Stability: A Challenging Road Ahead* (Washington, DC: National Intelligence Council, 2007), 8.

<sup>10</sup> Member of Pendleton 8 Hamdania platoon (anonymous), interview with author, 13 December 2022, hereafter anonymous Pendleton 8 interview. *Pendleton 8* refers to the eight servicemembers from the Camp Pendleton-based 3d Battalion, 5th Marines, involved in the incident.

## Introduction

At Hamdania, the anonymous platoon member felt the company's senior enlisted Marine was the person who could have best influenced the outcome, but in every other case examined so far, a lieutenant or senior noncommissioned officer more diligently discharging their duties of supervision and leadership could have just as easily prevented such incidents.

In all the cases of noncombatant killings, paralleling Biscari, My Lai, and Son Thang, the units had recently lost a popular member of the unit to some sort of action, a situation in which engaged leadership and observation of junior or inexperienced soldiers would have been extra warranted. Additionally, in each case of noncombatant killings and in the Abu Ghraib abuse case, the main perpetrator or planner of the incident was described as someone who looked to prove themselves, either because they were on their first combat deployment or because they were trying to measure up to others in the unit who were more respected. Finally, in three of the four cases, as in the Biscari, My Lai, and Son Thang cases, there was resistance further up the chain of command to the idea that their Marines or soldiers could be responsible for crimes. This resulted either in investigative delays or in apparent cover-up efforts. When contemplating the parallels throughout the previous cases examined and those found in the following chapters, this resistance, or blind spot, helps to understand the outcome of all the noted similarities despite ongoing efforts to reduce violations.

When researching the case studies examined in this book, it became clear that at the moment law of war violations occur, the hierarchical structure of the military works against the discipline required in such urgent situations. Those best equipped due to experience and age to temper the responses of soldiers are removed from the critical point by other duties. Junior soldiers or Marines, often still developing cognitively and emotionally, are the ones at the crucial point of battle where they are most likely to encounter combatants or noncombatants and be affected by exhaustion, casualties, fear, and other battlefield stimuli. In the heat of the moment, due to their proximity to danger and other effects, many may feel disconnected from professional values and ideals. Worse, immature soldiers may lack appropriate respect for the value and importance of the laws of war or, when communication is lacking in a unit, may feel their ef-

forts and sacrifices are viewed as inadequate. Moreover, today these junior servicemembers are much more likely to be subject to the effects of first-person shooter video games—early and continuous exposure to the violence of which ongoing studies suggest may lead to aggression, behavioral problems, and possible desensitization to violence—alongside post-9/11 popular culture media that often uses stereotyped Arabic villains.<sup>11</sup>

The careerist commanders and more-senior enlisted soldiers and Marines who subscribe more to the professional standards of the Services and respect the need to uphold the laws of war are not always in positions to directly affect events firsthand as they occur due to their duties overseeing larger elements or coordinating support for those engaged. What is more, the appreciation or love of their Service gained from prolonged immersion in the culture can blind them to their subordinates' potential to act in ways that fail to meet the standards of professional values or legal standing. Additionally, these feelings help explain why some leaders seek to insulate their Service from harm by not investigating aggressively or, worse still, are tempted to cover up violations, as seen in several of the cases thus far.

All the cases garnered attention in the civilian press once they came to light and elicited an initial outcry from the public. The abuses at Abu Ghraib occurred between October and December 2003 and, in the words of a subsequent Army investigation, “were sadistic, blatant, and wantonly criminal.” They included physical assaults such as punching, slapping, kicking, arranging detainees in a pile and jumping on the mass or their exposed limbs, and even a male military police (MP) guard “having sex with a female detainee.”<sup>12</sup> Additionally, there were psychological abuses that included coerced acts, such as threats from unmuzzled working dogs, videotaping or photographing naked male and female detainees—sometimes while arranged in sexually explicit positions or while forced to

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<sup>11</sup> Claire McCarthy, “Dangers of Virtual Violence,” *Harvard Health Blog*, 6 October 2021; and Jack G. Shaheen, *Guilty: Hollywood's Verdict on Arabs after 9/11* (Northampton, MA: Interlink Publishing, 2012).

<sup>12</sup> While the initial inclination is to assume the sexual intercourse between the military police guard and female detainee was rape, the specific language used in MajGen Taguba's investigation offered no amplifying explanation to provide additional context. MajGen Antonio Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* (Camp Doha, Kuwait: Coalition Forces Land Component Command, U.S. Central Command, U.S. Army, 26 February 2004), 17.

masturbate—wearing underwear of a detainee of the opposite sex or dog collars, or being photographed with soldiers posing next to them in these degrading scenes.<sup>13</sup> Combined with an article by Seymour Hersch, who also helped break the My Lai Massacre story, and the release of the investigation into the military police unit responsible for the prison by Army major general Antonio M. Taguba during the next month, the Abu Ghraib prison scandal became a topic of debate throughout the summer for many different news outlets.<sup>14</sup>

Unlike My Lai and Vietnam however, instead of reigniting a movement that more than a year before sought to forestall and avoid war, Abu Ghraib might instead have helped to prolong the war despite prompting dialogue about the law of war and legality of different aspects of that conflict. Samuel Moyn argues that Abu Ghraib fueled a debate about torture that diverted debate about the war itself. He asserts that combined with a “humane” style of warfare defined by reduced, or perhaps even immunity from, casualties on one side and “unprecedented care when it comes to killing people on the other,” the shift in debate from “should we be here?” to “why was there (*and what is*) torture?” helped the war drag on.<sup>15</sup> Despite the public conversation focusing on the abuse, partisan politics ensured it moved quickly from how American soldiers could behave in such a way to arguments over legality of methods to gain intelligence. Regardless, the torture was a violation of the law of war.

Many saw the killings in the Haditha, Mahmudiyah, and Hamdania cases as sad reminders of the horrors that civilians endure when war is carried out in their neighborhoods, while others—both for and against the war—additionally saw an opportunity to use the cases to support their arguments about the war’s legitimacy or execution. Those against the war pointed to the continued presence of troops in Iraq as the cause for the violence and a sign that the United States should not be there. Those in favor of the war pointed to the unfortunate actions of the involved units as at least partially caused by their being stretched thin as support for their arguments for a larger commitment to the war. The aforementioned anon-

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<sup>13</sup> Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 16–17.

<sup>14</sup> Seymour M. Hersch, “Torture at Abu Ghraib,” *New Yorker*, 30 April 2004.

<sup>15</sup> Moyn, *Humane*, 8–12, 163, 253.

### Part Three: Iraq

ymous member of the Hamdania platoon described the stress the company's large area of operations posed for the unit:

The Op-tempo [operational tempo] was unrealistic. At all times, the expectation was there would be a patrol out. With security and engagement patrols also, plus ambush patrols, we would only have a few hours in between. That was taken up by weapons maintenance, filling sandbags, etc. There were a few of us who would have hallucinations from the severe exhaustion.<sup>16</sup>

No matter the argument, and in contrast to Vietnam, even when the war's legitimacy was questioned, critical remarks by politicians or media personalities were qualified by sentiments supporting the troops—remaining signs of Walker Schneider's "morally charged connection."<sup>17</sup> In three of the case studies examined here in part three, once again the military court sentences were reduced at higher-level reviews or appeals, and in the case of Mahmudiyah (arguably the most heinous), there was little response when the convicted served just fractions of their 90- or 100-year sentences. Was the connection between soldiers and society in the following cases strengthened by the outrage over the 9/11 attacks? Such feelings could be responsible for a dampening effect on public disappointment or outrage over law of war violations.

One difficulty of trying war crimes in the past, the jurisdictional limits of the Uniform Code of Military Justice (UCMJ), was made easier in Iraq. In the case of several earlier violations, such as My Lai, soldiers or Marines left the Services after fulfilling their obligated service times and before a crime was suspected or discovered. The passage of the 1996 War Crimes Act and the 2005 Military Extraterritorial Jurisdiction Act (MEJA) finally closed several important loopholes in the U.S. laws regarding law of war violations. These laws finally empowered authorities to try civilians working for the military, such as interpreters or contractors, family members living in countries with their military spouses, or servicemembers who had left the military at the expiration of their service obligations. The MEJA was

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<sup>16</sup> Anonymous Pendleton 8 interview.

<sup>17</sup> Walker Schneider, "Skull Questions: The Public Discussion of American Trophy Collection During World War II," *Penn History Review* 25, no. 2 (2018): 127.

particularly key in prosecuting one of the perpetrators of the Mahmudiyah Massacre examined in chapter nine.

The War Crimes Act of 1996 was enacted to close a loophole that U.S. legislators did not originally foresee in 1950 when the UCMJ was settled on as the primary method to punish those who violated the Geneva Conventions. Particularly in mind when the later legislation was drafted were the numerous soldiers who were discharged between the Massacre at My Lai and the incident being revealed, investigated, and trials starting—a long 15 months.<sup>18</sup> Despite its creation to ease the prosecution of these difficult cases, it has never been used, unlike the MEJA. Possible reasons for this may be the appointed U.S. attorneys' awareness of the expense of a trial for an allegation located in a foreign land, with investigations to be conducted, foreign witnesses to be transported and housed, etc., for an outcome that is not guaranteed. Additionally, the requirement to prove that the crime was committed in a "war" is another politically charged requirement for the attorneys. In 2006, the expansion of the UCMJ's court-martial jurisdiction to include discharged servicemembers who committed a newly discovered crime before discharge and certain other civilians may have been caused by the difficulties of using the War Crimes Act.<sup>19</sup>

Passed in 2000, but not enacted until 2005, the MEJA provided a federal means of trying any crime that would constitute an offense punishable by a year's confinement if committed within the maritime or territorial jurisdiction of the United States.<sup>20</sup> This closed the loopholes for not only servicemembers who had exceeded their obligated service time and were discharged, but also contractors and civilians stationed with the military,

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<sup>18</sup> Although the number of soldiers was put at 22 in the federal court case of *William Calley v. Howard Callaway*, there were only 25 members of Calley's platoon the day of My Lai, so this number has to include members of adjacent units who were also known to have killed civilians during the same sweep operation that day.

<sup>19</sup> The other civilians are listed in Article 2 of the expanded UCMJ jurisdiction as "persons serving with or accompanying the armed forces in the field" (in fighting or near areas actual hostilities are underway). While this could be interpreted to include contractors, civilian courts are loathe to cede jurisdiction for civilians to military courts. See §802, Art. 2, Persons subject to this chapter, *Appendix Two, Uniform Code of Military Justice* (Washington, DC: Department of Defense, 20 December 2019), A2-2.

<sup>20</sup> Military Extraterritorial Jurisdiction Act of 2000, S. 768, H.R. 3380, 106th Cong. (2000).



### Part Three: Iraq



Adapted by MCUP

Map of Iraq showing locations of 1) Abu Ghraib prison, 2) Hamdania, 3) Mahmudiyah, and 4) Haditha.

who were immune to prosecution due to Status of Forces Agreements with host countries.<sup>21</sup>

<sup>21</sup> Status of Forces Agreements, known as SOFA status, are agreements between the United States and countries in which its military is serving that delineate how crimes by servicemembers or their family, or by contractors, will be prosecuted. Most often, these agreements allow the United States to retain the right to try individuals, however, they allow the partner country the ability to expel individuals.

# CHAPTER 7

## Abu Ghraib Prison

As in the previously examined case studies, several questions regarding the Abu Ghraib prison scandal are paramount: To what extent is the U.S. military at fault for the law of war or ethical violations committed by the troops in this instance? Has the military done enough to curtail them? How have its efforts changed over time? To what extent have public or political pressures affected military efforts? Does news of violations matter enough to the public to make a difference? While it is hard to answer the last definitively, there is enough evidence to suggest answers.

Given that every branch holds training time to be precious within both their entry-level pipeline and its annual training requirements, the time spent by today's Army and Marine Corps on the law of war, treatment of prisoners, code of conduct, and rules of engagement is evidence that the military leadership takes seriously its obligations under the law of war. The time devoted to these subjects has only increased since World War II.<sup>1</sup> With the abuses at Abu Ghraib happening so soon after the beginning of the Iraq War, compared to the incidents during World War II or the Vietnam War previously discussed, it appears that using newly or expediently trained soldiers was not the issue. The demand by Secretary of Defense Donald H. Rumsfeld to keep the overall numbers of troops involved lower than what military leadership desired (leading to troops stretched inexcusably thin) combined with some bad planning assumptions and a

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<sup>1</sup> During World War II, after initial classes on prisoners of war in recruit training, commanders were given great latitude on training of topics including prisoner handling and the law of war according to Kenneth Condit, *Marine Corps Ground Training in World War II* (Washington, DC: Historical Branch, G-3, Headquarters Marine Corps, 1956). By the invasion of Iraq in 2003, in addition to recruit training classes, annual training on law of war and military skills training including prisoner handling were required and included as additional training during predeployment regimes.

### Part Three: Iraq

slackening of restrictions on interrogation enabled by administration legal guidance all point to culpability for the prisoner abuses at higher levels than the soldiers who committed them. That culpability seems to be shared between administration officials trying to conduct a war “on the cheap” and operational commanders further down from the highest military leadership not effectively voicing requirements for sufficient levels of troops and then being content to let the most junior soldiers bear the brunt of the consequences.<sup>2</sup> That is not to say the soldiers involved in the scandal did not deserve punishment for their actions, despite some conditions leading to the incident being set by much more senior individuals. It is every American servicemember’s duty to conform to the laws of war.

Public response to Abu Ghraib was visceral but unfortunately did not have the effect of forcing full accountability at levels above the lower ranks. Some of the information discussed below, concerning the training of the soldiers involved and the planning assumptions that helped set poor conditions, was the result of oral history interviews conducted with members of the military police unit at Abu Ghraib at the time of the prisoner abuses or with those who later guarded it. It confirms assertions that the soldiers received good training—although not all the required training needed when the nature of their detainees changed—as well as the effect that bad planning had on the primary unit. The scandal also displays how the culture of a small group can diverge from an organization’s stated value set, especially when given the opportunity and encouragement to exceed previous restraints to their actions. At Abu Ghraib prison, the accused soldiers were given explicit instructions to exceed regulation-mandated techniques by those senior to them in rank, albeit outside their normal chain of command.

Following the invasion of Iraq and quick coalition victory from March through May 2003, the Baathist government of Saddam Hussein was dissolved, and the Iraqi Army likewise disbanded. These moves, along with subsequent banning of any former Baathist from the new government and Shia moves to limit Sunni influence within the country all helped lead to the major sectarian violence in the years that followed. Before much of

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<sup>2</sup> Tatiana Morales, “Rumsfeld vs. the Generals?,” *CBS News*, 1 April 2003.

this violence started, however, reports from organizations such as Human Rights Watch and Amnesty International warned of abuses taking place within American detention centers across Iraq.<sup>3</sup> By November 2003, the Associated Press had picked up the story, chronicling the experiences of Iraqis in facilities throughout the country, including Abu Ghraib. Although Brigadier General Janis L. Karpinski, the U.S. Army commander of all detention facilities in Iraq, had maintained prisoners were treated humanely and fairly, the Associated Press questions submitted in reference to the news were not answered.<sup>4</sup>

In January 2004, a little-noted news release by U.S. Central Command announced an investigation into reported detainee abuse at a Coalition forces' facility.<sup>5</sup> By February, the *Washington Post* ran the news of the suspension of 17 soldiers and followed up with a story announcing charges against 6 soldiers on 21 March.<sup>6</sup> A *New York Times* story, also on 21 March, covered the investigation into abuse of about 20 detainees, dating back to November and December 2003, and also announced a significant review of commanders' policies regarding detainees and of the internal procedures of U.S. military prisons in Iraq.<sup>7</sup> On 28 April 2004, *60 Minutes II*, a weekly television news show, ran a story detailing abuses at a major prison in Iraq run by the U.S. Army. Despite the previous articles in major newspapers and outlets mentioning abuse, investigations, and charges, it was not until the CBS program and associated images detailing the actions of the soldiers and suffering of the detainees did it truly become part of the consciousness of the American public.<sup>8</sup> On 7 May, in response to the rev-

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<sup>3</sup> "The Legal Prohibition against Torture," Human Rights Watch, 1 June 2004; and Amnesty International, "Iraq: Human Rights Must Be Foundation for Rebuilding," press release, 20 June 2003."

<sup>4</sup> Charles J. Hanley, "AP Enterprise: Former Iraqi Detainees Tell of Riots, Punishment in the Sun, Good Americans and Pitiless Ones," Associated Press, 1 November 2003.

<sup>5</sup> U.S. Central Command Baghdad, "Detainee Treatment Investigation," press release, 16 January 2004.

<sup>6</sup> MajGen Antonio Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* (Camp Doha, Kuwait: Coalition Forces Land Component Command, U.S. Central Command, U.S. Army, 26 February 2004), 17; and Michael Getler, "The Images Are Getting Darker," *Washington Post*, 9 May 2004.

<sup>7</sup> Thom Shanker, "The Struggle for Iraq: The Military; 6 GIs in Iraq Are Charged with Abuse of Prisoners," *New York Times*, 21 March 2004.

<sup>8</sup> Rebecca Leung, "Abuse of Iraqi POWs by GIs Probed," *60 Minutes II*, 27 April 2004.

### Part Three: Iraq

elations of the abuse, 110 members of Congress formally requested the secretary of defense have the DOD inspector general supervise the investigations into abuse and other violations of the law of war at Abu Ghraib prison. By 13 May, the DOD inspector general notified the Service secretaries of the formation of a multidisciplinary team to monitor allegations of detainee abuse that levied reporting requirements on all the military criminal investigation organizations.<sup>9</sup> On 15 May, Secretary Rumsfeld appeared before Congress. During his testimony, he took responsibility “for the terrible activities that took place at Abu Ghraib,” apologized to the Iraqis who were mistreated, and called their abuse “un-American and . . . inconsistent with the values of our nation.”<sup>10</sup>

Much like what happened at My Lai, it took the moral will of one individual to overcome deep-seated in-group loyalty to peers and report the crimes occurring at Abu Ghraib. Specialist Joseph M. Darby was a military policeman and member of the unit responsible for detainee operations and security at the facility. Wanting to send home photographs of Iraq, he borrowed a compact disk of images from a fellow soldier, Specialist Charles A. Graner. As he looked through the images, his original amusement at what he thought were pictures of other soldiers involved in run-of-the-mill horseplay disappeared when he realized the images documented abuse and dehumanizing acts committed against the detainees he was there to oversee. It took him three weeks to decide what to do, and even then, he turned in the photographs with an anonymous note and initially hoped to remain anonymous to avoid retribution. Despite the initiation of the ensuing investigations coming from the actions of this lower-ranking soldier, during his ensuing investigation, Major General Antonio Taguba became convinced that there was awareness of the abuse within higher headquarters in Iraq and elsewhere.<sup>11</sup> While Darby’s request to remain anonymous

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<sup>9</sup> Shelton Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6 (Washington, DC: Deputy Inspector General for Intelligence, Department of Defense, 25 August 2006), i.

<sup>10</sup> Dean Bland, “The Abu Ghraib Scandal: Impact on the Army Profession and the Intelligence Process” (master’s thesis, U.S. Army War College, 2005), 1.

<sup>11</sup> Seymour M. Hersh, “The General’s Report,” *New Yorker*, 18 June 2007, 7–8.

was initially honored, he was later quickly removed from Iraq after Secretary Rumsfeld publicly lauded his actions during a press conference.<sup>12</sup>

The images passed up the chain of command from Darby in January 2004 initiated many subsequent investigations, the first of which by Army Criminal Investigation Division involved interviewing numerous military personnel and 13 detainees.<sup>13</sup> There were 13 executive-level investigations or assessments led by general officers from the Army, National Guard, Navy, and the broader Department of Defense and even the Independent Panel to Review DOD Detention Operations, chaired by the retired secretary of defense and energy, James R. Schlesinger. The review panel had produced two assessments of detainee operations that preceded Darby's revelation. While not all of the investigations were directly related to Abu Ghraib, it is indicative of how seriously the military took the exposure of the abuse there and how it would affect the DOD's reputation when considering the large number of investigations was necessitated by the limited scope and jurisdiction assigned to each. The number of investigations would seem to indicate a real interest on the part of the U.S. military to accurately assess the depth of the problem, however, the limitations on scope and subject of the investigations undoubtedly hindered the investigatory efforts and kept the government, and therefore the public, from receiving a complete appraisal.

In late August through early September 2003, Major General Geoffrey D. Miller, who was the Army commander of the Joint Task Force Guantánamo Bay, assessed the strategic interrogation of detainees in Iraq, and among his recommendations were that the guard force be trained to assist in setting "conditions for the successful interrogation and exploitation of internees/detainees."<sup>14</sup> This recommendation was countered in a subsequent comprehensive assessment on detainee and corrections systems in Iraq conducted by Major General Donald J. Ryder, a onetime provost marshal general of the Army, which stated that "the [Operation Enduring

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<sup>12</sup> Dawn Bryan, "Abu Ghraib Whistleblower's Ordeal," *BBC News*, 5 August 2007.

<sup>13</sup> Keith Rohman, "Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study," *Penn State International Law Review* 28, no. 1 (2009): 7.

<sup>14</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32-33; and Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 5, 8-9.

Freedom] OEF template whereby military police actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility.”<sup>15</sup>

Major General Taguba’s investigation followed these first two assessments into the operation of detention centers, which had not investigated deeply any of the then-alleged abuses. The scope of his investigation was the conduct of detention operations by the 800th Military Police Brigade.<sup>16</sup> During his investigation, conducted 19 January–9 March 2004, he and the 23 members of his team found that, contrary to the findings and guidance in Ryder’s earlier investigation, there had been active requests by military intelligence personnel to change facility procedures to “set the conditions” for interrogations.<sup>17</sup> While certainly not a mitigating circumstance, it expands culpability for the crimes committed beyond members of the 800th Military Police Brigade, but those Taguba felt were responsible were outside the scope of his investigation. An unfortunate reality of the Abu Ghraib scandal was that each of the major investigations that were conducted were limited in scope to specific units or processes, which made it difficult for any one investigator to truly outline the full scope of crimes and involvement of individuals and to assign culpability. Additionally, Taguba’s report noted that there were members of the command who failed to take responsibility for their actions or those of their subordinates, that basic standards were not met or enforced, and that leaders were unable or unwilling to confront situations of misbehavior or misconduct.<sup>18</sup> While these particular issues are basic principles to enforce good order and discipline in a unit, there are distinct parallels between the breakdowns in this

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<sup>15</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 34; and Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 9. The provost marshal general of the Army is the highest-ranking member of the Army that handles investigations of Army personnel. They answer to the Chief of Staff of the Army.

<sup>16</sup> Most of the soldiers who would be charged for the abuses were from the 372d Military Police Company of the 320th Military Police Battalion. The 800th Military Police Brigade was the higher headquarters for these units and supervised all units responsible for detainee operations within Iraq at the time.

<sup>17</sup> Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 6, 18; and Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 36–38.

<sup>18</sup> Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 2–3.

case and those of My Lai and Son Thang, as well as several of the incidents detailed in the other Iraq case studies that follow. Breakdowns of discipline unaddressed, or tacitly accepted, by leadership seem to foreshadow most of the violations within these cases. While Taguba's report was certainly not the only investigation to illuminate shortcomings outside of the military police unit and to intimate a wider knowledge and lack of action about the abuses, it seemed to particularly anger Secretary Rumsfeld.<sup>19</sup> This may have been due to the report being leaked after it was submitted, giving Rumsfeld and others within the DOD and the administration little time to prepare for the inevitable onslaught of questions.<sup>20</sup> Seven soldiers were charged following the release of the Taguba report.

While Taguba and his team carried out their investigation, the acting secretary of the Army announced that he had directed the Army's inspector general, Lieutenant General Paul T. Mikolashek, to assess ongoing detainee and interrogation operations and the doctrine and training of those personnel. This assessment ran for four months from February to June 2004. The overall thrust of the findings was that the majority of soldiers were conducting detention and interrogation operations honorably and in accordance with the international laws of war, and that the uncovered abuses resulted from the illegal and immoral acts of a few, exacerbated by leadership failures in supervision. It identified doctrinal failings where specific, interdependent yet independent roles for military police and military intelligence were not observed.<sup>21</sup> This assessment was followed closely by a nine-month assessment by the U.S. Army Reserve inspector general, which examined the training of Reserve units on law of war, detainee treatment requirements, ethics, and leadership. This report focused on military police units but assessed other units across all job types. Although deficiencies were noted in some of the training, there persisted an overwhelming confidence in the ability and propensity of peers and leaders to treat de-

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<sup>19</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32.

<sup>20</sup> Hersh, "The General's Report," 4.

<sup>21</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 39-44. These roles are assigned to care for and confine the detainees (military police) and those that interrogate the detainees (military intelligence). Without the need for intelligence, some of the detainees would not be in U.S. custody, and to gain useful intelligence the detainees must be kept secure and healthy enough for interrogation.



tainees ethically and in accordance with the applicable laws of war.<sup>22</sup> While that confidence in the preponderance of soldiers, active and Reserve, was probably well-founded, it did not take into account the effects of overcrowded conditions, poor understanding of command structures when intelligence personnel were introduced into prisons seeking information, or the effects of lack of effective supervision by leadership.

As the Army inspector general's assessment ended and the Army Reserve inspector general's assessment began, yet another investigation commenced. Major General George R. Fay was designated to investigate the alleged misconduct by members of the 205th Military Intelligence Brigade at Abu Ghraib. His team's investigation found that of 44 instances of abuse by the military police at Abu Ghraib, 16 involved military intelligence personnel soliciting, encouraging, or condoning the actions of the military police. It was made clear that these instances of abuse were individually directed and not officially sanctioned or approved.<sup>23</sup> Because Major General Fay could only interview people subordinate in rank to himself, Lieutenant General Anthony R. Jones was appointed as an additional investigating officer by higher headquarters and directed to focus on whether organizations or personnel higher than the 205th Military Intelligence Brigade chain of command were involved, directly or not, in the alleged abuse at Abu Ghraib.<sup>24</sup> Following the release of Fay's report, another 3 soldiers of the 800th Military Police Brigade were implicated, in addition to 27 members of the 205th Military Intelligence Brigade, including 4 civilian contractors. This report also asserted that responsibility for the abuses went higher than the brigade levels.<sup>25</sup>

In total, five senior-level assessments and investigations began in May 2004. The Independent Panel to Review DOD Detention Operations, headed by Schlesinger, commenced immediately after the completion of a sim-

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<sup>22</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 45–46.

<sup>23</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 47–53.

<sup>24</sup> Karen Greenberg and Joshua Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), 988, <https://doi.org/10.1017/CBO9780511511127>.

<sup>25</sup> Steven Komarow, "30 More Implicated in Iraq Abuse," *USA Today*, 25 August 2004.

ilar examination of the Navy's two facilities responsible for securing and interrogating detainees at Guantánamo Bay and the Naval Consolidated Brig Charleston, South Carolina, by the Navy's inspector general. The independent panel's report, released in August 2004, fixed some of the blame for creating conditions that led to brutal acts and purposeless sadism at Abu Ghraib on senior military commanders and top Pentagon officials, including Rumsfeld.<sup>26</sup> It was released the day before the Fay report. A second, more complete investigation tasked Vice Admiral Albert T. Church with reviewing all DOD interrogation techniques from Guantánamo through Operations Iraqi Freedom and Enduring Freedom and including DOD support or participation in non-DOD entity interrogations. The scope of this report was such that, while not specifically examining Abu Ghraib, its investigation into the use of contractors to support DOD interrogation, or of DOD support for interrogations by other government agencies (OGA) illuminated some of the conditions that led to the abuse in Abu Ghraib as well.<sup>27</sup> Two other reports compiled during May sought to formalize command and control and investigate reports of abuse for the six tactical interrogation facilities run by the Joint Special Operations Task Force in Iraq, and a top-to-bottom review of detainee operations across Afghanistan.<sup>28</sup>

There were two other major assessments that began during the Independent Panel to Review DOD Detention Operations' duration. One was initiated by the U.S. Army surgeon general to assess medical care and policies for detainees and reporting of alleged detainee abuse by medical personnel. One of the findings of this report was insufficient assets allocated to support detainee/prisoner of war medical care during planning. The last investigation was wholly uninvolved with Abu Ghraib and was specifically concerned only with eight Federal Bureau of Investigations allegations of

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<sup>26</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 56-57; and Dave Moniz and Donna Leinwand, "Panel: Top Officials Played Role in Prison Abuse," *USA Today*, 24 August 2004.

<sup>27</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 54-55, 64-70.

<sup>28</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 58-63. The Joint Special Operations Task Force tactical interrogation facilities were often only temporary, and run by SEALs, Delta Force operators, and at the task force headquarters to quickly obtain follow-on intelligence following the capture of high value targets before turning them over to a conventional detention facility.

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detainee abuse at Guantánamo Bay during the three previous years.<sup>29</sup> The revelations of abuse at Abu Ghraib occurred 60 years from the creation of the DOD and almost two decades following the Goldwater-Nichols Department of Defense Reorganization Act of 1986, both of which aimed to consolidate and streamline functions throughout the armed forces, with the aim of increasing interoperability. But the lesson that becomes obvious from the numerous investigations with limited scopes and jurisdictions that followed is that parochial actions in Service interest were still present in 2004.

As a result of the multiple investigations into the abuses, most directly the Taguba and Fay reports, a total of 17 soldiers, including Brigadier General Janis Karpinski, the commanding general of the 800th Military Police Brigade, were relieved of their duties.<sup>30</sup> In the end, 11 soldiers were convicted of various charges. These included seven Reserve military police and two Reserve military intelligence members. Additionally, two dog handlers from the Army were charged with crimes.<sup>31</sup> While the convictions show some measure of accountability—a positive—as was the case with My Lai, accountability was laid at the lowest level, despite reports outlining true failings further up the chain of command. This must be viewed as a failure when taken in the context of how the military views the burden of command.<sup>32</sup> The second assessment done by the Navy's inspector general, which came to be known as the Church report, reported that despite the high profile instance of a contractor participating in abuse at Abu Ghraib, there were very few allegations levied overall toward contracted personnel in support of intelligence operations.<sup>33</sup> A common theme among the results of the numerous assessments, investigations, and reports is that one-third or fewer of the deaths or abuse allegations (across all detention centers) that were substantiated occurred during or were related collat-

<sup>29</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 32, 71–77.

<sup>30</sup> Rebecca Leung, "Abuse at Abu Ghraib," *CBS News*, 5 May 2004.

<sup>31</sup> Komarow, "30 More Implicated in Iraq Abuse"; and Lueng, "Abuse at Abu Ghraib."

<sup>32</sup> A commander is responsible for the failings of their unit when they have not provided enough direction, support, or leadership to prevent such failings. As we shall see, multiple reports and investigations outline true failings within the chain of command, suggesting culpability further up the chain than the convictions went.

<sup>33</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 68.

erally to interrogations. While in a significant number of cases this statistic shows a troubling linkage of abuse to the relaxation of torture rules, it also shows that many more were seemingly abuse for abuse's sake, and therefore, law of war violations.<sup>34</sup> The Church report also found that there was an expectation by DOD that any use of DOD-run facilities for interrogation purposes would require outside entities, including the Central Intelligence Agency, to follow DOD policies covering interrogations. This expectation is in direct contrast to testimony from those charged at Abu Ghraib. Many expressed confusion regarding which rules applied and the belief that other entities had separate standard operating procedures and approved methodologies.<sup>35</sup> The Schlesinger report, as the independent panel's review came to be known, contrasted with the Church report and others, finding that "there is both institutional and personal responsibility at higher levels."<sup>36</sup> While the Schlesinger report points toward accountability at least as high as Secretary of Defense Rumsfeld, Samuel Moyn explores accountability within the administration by examining the role of John Yoo, a lawyer within the Department of Justice, who authored legal guidance on forms of torture allowable in the Global War on Terrorism for the Bush administration, helping to set the stage for Abu Ghraib.<sup>37</sup>

When reviewing the effects of the scandal on those most closely involved, it is fitting to begin with the soldier whose actions did the most to bring the scandal to light. Joseph M. Darby, then a specialist in the National Guard assigned to the 372d Military Police Company, initially brought the images to his chain of command with the hope he would be able to remain anonymous out of a fear of reprisal from those who had perpetrated the abuses. The living conditions of the soldiers of the unit, and throughout most of Iraq, meant that there was no personal space or hope for a secure space when one slept, and one of his greatest fears was that he could

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<sup>34</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 55–56, 64.

<sup>35</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 69; and Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 18–19.

<sup>36</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 67; and Moniz and Leinwand, "Panel: Top Officials Played Role in Prison Abuse."

<sup>37</sup> Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Strauss, and Giroux, 2021), 242–45.

be killed while sleeping. After being named by Rumsfeld during a press conference, Darby feared even more for his safety while still in Iraq, but with the perpetrators having already been removed, he found that those remaining instead lauded him.<sup>38</sup> This was not the case, however, once he returned to the United States, where he and his family were all subjected to ill-feelings and even vandalism of property by people who felt he had put American soldiers in prison over actions against an American enemy.<sup>39</sup>

As noted earlier, Brigadier General Janis Karpinski, the brigade commander for the 800th Military Police Brigade and officer in charge of Abu Ghraib and three other prisons in Iraq, was relieved of her duties, and subsequently demoted to colonel for an unrelated offense, following the abuse coming to light.<sup>40</sup> While the senior officer who actually suffered repercussions from the scandal, she did not accept the punishment without sharing her views regarding even greater culpability further up the chain of command. Following the first court-martial for the abuses, Karpinski told the BBC in an interview that she had been made a “convenient scapegoat” for the abuse and that Lieutenant General Ricardo S. Sanchez, who commanded all forces in Iraq at the time, should be asked what he knew about the abuse.<sup>41</sup> Following the revelations of the Taguba report, which cast doubt that the military police had acted without prodding from the military intelligence personnel responsible for the interrogations at the prison, Colonel Thomas M. Pappas received a nonjudicial punishment, a general officer memorandum of reprimand, and was relieved of command.<sup>42</sup> The fact that he was punished while most of the convicted soldiers were members of another command is fundamentally irreconcilable with the narrative that the

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<sup>38</sup> Bryan, “Abu Ghraib Whistleblower’s Ordeal.”

<sup>39</sup> Bryan, “Abu Ghraib Whistleblower’s Ordeal”; Hannah Rosin, “When Joseph Comes Marching Home,” *Washington Post*, 17 May 2004; and Associated Press, “Praise for Iraq Whistleblower,” *CBS News*, 10 May 2004.

<sup>40</sup> While named in the Taguba report as culpable for lack of leadership, Karpinski’s demotion was technically for other charges.

<sup>41</sup> “Iraq Abuse ‘Ordered from the Top,’” *BBC News*, 15 June 2004.

<sup>42</sup> The relief of his command, the nonjudicial punishment for dereliction of duty (and its accompanying \$8,000 fine), or the general officer memorandum of reprimand would each on their own be enough to terminate Col Pappas’s career; but with all three punishments awarded, a clear statement was made indicating his unit was equally culpable for the horrific offenses.

soldiers responsible for the abuse were merely bad apples. Another figure whose actions were called into question in the Taguba investigation was Lieutenant Colonel Steven L. Jordan, whose role was never well-defined but who clearly had access to the most secure facilities during interrogations as the officer supervising the interrogations task force. Charges were brought against him (he was the only officer to face a court-martial related to abuse) for oppressing the detainees, lying about his knowledge of the abuses, and dereliction of duty.<sup>43</sup> These charges were dismissed, however, after Major General Fay admitted he did not read Jordan his rights before the interview. Ultimately, he was found guilty only of disobeying Fay's order to not talk about the case with anyone else.<sup>44</sup> Although an investigator of the violations rather than a participant, Major General Taguba felt repercussions from the scandal. After his report was leaked prior to its release, the ire of Secretary Rumsfeld and his Army chain of command was evident in Taguba's treatment by his seniors, Rumsfeld's remarks during congressional testimony, and his future assignments until retirement.<sup>45</sup>

Reviewing the Abu Ghraib trials shows similarities to several other cases already examined. As in the cases at Biscari and Son Thang, the courts-martial were conducted in the war zone, which restricted access by reporters to the proceedings. By choosing to conduct the courts-martial there, the Army could show that it was moving quickly to address the issue in a location where Iraqi witnesses were available. In the earlier examples, the trials that proceeded more quickly after incidents were reported and investigated had better cumulative records of convictions, and the same was true in this case. While civilian attorneys were permitted and used by many defendants, they were not as successful as they were in the Vietnam cases at Son Thang. While the trials of soldiers from different units, both intelligence and military police, could be interpreted as an effort by the

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<sup>43</sup> Ann Scott Tyson, "Army Officer Charged in Abu Ghraib Prison Abuse," *Seattle (WA) Times*, 29 April 2006.

<sup>44</sup> Josh White, "Officer Acquitted of Mistreatment in Abu Ghraib Case," *Washington Post*, 29 August 2007; and Hersh, "The General's Report," 7.

<sup>45</sup> Hersh, "The General's Report," 1–4. Unfortunately, this seems to be a pattern, as LtGen William R. Peers, who led the exhaustive investigation into My Lai, also had a career that seemed to derail after an investigation that was critical of the Army, as noted in Ron Milam, *Not a Gentleman's War: An Inside View of Junior Officers in the Vietnam War* (Chapel Hill: University of North Carolina Press, 2009).

### Part Three: Iraq

Army to seek the widest accountability, the fact that the defendants were all relatively junior would suggest that full accountability was lacking. The focus on the perpetrators—most of whom were junior—with little accountability for either the apparent lack of supervision or for tacit approval signaled by the length of time these abuses persisted suggests that the Army was content to punish those directly responsible for torture without taking steps to fix the policies that enabled them or to enforce commanders' culpability for those under their command. If Moyn was correct that events at Abu Ghraib shifted the attention of the national conversation away from the actual torture in the prison to the question of what constituted torture, the lack of public attention may have encouraged the Army to complete its proceedings as quickly as possible and not pursue either a more thorough accounting or systemic fixes.

Of the enlisted soldiers who were charged and disciplined, several accepted plea deals and others went through the entire court-martial process and were found guilty. Many of these courts-martial were held in Iraq, guaranteeing a certain measure of speediness, access to deployed witnesses, and less-than-normal media access. While the first two conditions were beneficial to the government's pursuit of accountability, the third caused some concern and gave rise to complaints from the defense and others who argued that it made it easier for these soldiers to be made scapegoats.<sup>46</sup> Pleas by civilian attorneys to move the trials out of Iraq due to possible command influence on witnesses and the inability to force witnesses in the United States to appear in Iraq as well as attempts to bar contents of some defendants' computers were all denied.<sup>47</sup> Specialist Jeremy C. Sivits, who took the infamous photographs of the abuse, pled guilty at a special court-martial for conspiracy to maltreat detainees, maltreatment of detainees, and dereliction of duty. He was sentenced to a year in prison, a bad-conduct discharge, and reduction in rank to private. His guilty plea was part of a deal and his testimony implicated at least five other sol-

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<sup>46</sup> Ryan Ashley Caldwell, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (Surrey, UK: Ashgate Publishing, 2012), 21. Caldwell asserts that the three women especially were made scapegoats and that all suffered from being labeled early in the proceedings as "rotten apples" by the media.

<sup>47</sup> Fred Francis, "Judge Won't Move Abu Ghraib Abuse Trial," *NBC News*, 23 August 2004.



diers, including Specialist Charles A. Graner Jr., one of the soldiers charged with the most serious abuses.<sup>48</sup> While this was progress toward accountability, the lack of real consequences for the upper-level leadership in the case signaled a hollow victory.

Although military intelligence analyst Specialist Israel Rivera was present for an incident of abuse on 25 October 2003, he was not charged, although he testified against other soldiers, including a fellow analyst, Specialist Armin J. Cruz.<sup>49</sup> Specialist Cruz was the next to come to trial, where he too pled guilty to abuse. He was charged with two counts of maltreatment and conspiring to maltreat detainees and was sentenced to eight months confinement, reduction to private, and a bad-conduct discharge. His testimony against others reduced his sentence from the potential maximum of one year in confinement.<sup>50</sup>

The ranking military police officer charged for abuse, Staff Sergeant Ivan L. Frederick II pled guilty at a general court-martial in October 2004 to conspiracy, dereliction of duty, maltreatment of detainees, assault, and committing an indecent act in exchange for other charges being dropped. With the abuses he committed, including punching a prisoner hard enough to necessitate resuscitating him and forcing three other prisoners to masturbate in a separate incident, Frederick was lucky to receive only an eight-year sentence on top of his reduction to private, forfeiture of pay, and dishonorable discharge.<sup>51</sup> Also in October, Specialist Megan M. Ambuhl, who later married fellow defendant Charles Graner, pled guilty to dereliction of duty and was sentenced to a reduction to private and loss of a half-month's pay.<sup>52</sup>

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<sup>48</sup> Christian Davenport, "Accused Soldier Details Prison Abuse," *Washington Post*, 14 May 2004; Philip Carter, "Jeremy Sivits: Fired and Demoted?," *Slate*, 19 May 2004; and "US Soldier Jailed for Iraq Abuse," *BBC News*, 19 May 2004.

<sup>49</sup> Greg Miller, "Abu Ghraib Intelligence Soldier Describes Iraq Abuse in Detail," *Los Angeles Times*, 4 June 2004.

<sup>50</sup> Norimitsu Onishi, "Military Specialist Pleads Guilty to Abuse and Is Jailed," *New York Times*, 12 September 2004.

<sup>51</sup> "Court-Martial Record, Case of Staff Sergeant Ivan L. Frederick, II," (PDF) 8 vols., Office of the Clerk of Court, U.S. Army Judiciary, 20–21 October 2004, [TheTortureDatabase.org](http://TheTortureDatabase.org), 2, 17–20.

<sup>52</sup> L. B. Edgar, "Harman Found Guilty for Abu Ghraib," *Army News Service*, 19 May 2005. Ambuhl's dereliction in part stems from her failure to report violations of their orders.



### Part Three: Iraq



U.S. Army Criminal Investigation Command

A hooded detainee stands on a box with wires attached to his left and right hand; the detainee was told that he would be electrocuted if he fell off the box, 4 November 2003. SSgt Ivan Frederick is shown at right.

Specialist Charles Graner, the supposed ringleader of the abuse, went to his general court-martial in January 2005. Unlike those before him, he did not submit a plea and sought to fight all 10 charges against him, which included assault, conspiracy, maltreatment of detainees, committing indecent acts, and dereliction of duty. After four and a half days of the trial, the jury of 10 found him guilty of all but one of the counts of assault, which was downgraded. They then deliberated for two hours before sentencing him to 10 years confinement, reduction to private, forfeiture of pay and allowances, and a dishonorable discharge.<sup>53</sup> Graner loaning two compact disks full of pictures to Joseph Darby had set in motion the investigations

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<sup>53</sup> Associated Press, "Graner Gets 10 Years for Abu Ghraib Abuse," *NBC News*, 6 January 2005.

that finally brought the abuses to light.<sup>54</sup> Graner's defense was among the most vociferous in asserting that the guards had been acting under orders while engaging in the abuse of prisoners, and while he did not testify in his own defense, Graner did make a three-hour unsworn statement elaborating on those claims prior to his sentencing. As noted earlier, the numerous assessments and reports ordered in the wake of the abuse allegations made it clear that more than two-thirds of the incidents were not linked to interrogations, and it is unclear if Graner's defense or statement in any way swayed the jury, as he could have been sentenced to a maximum of 15 years rather than the 10 years he received.

On 1 February 2005, Specialist Roman Krol, a member of the 325th Military Intelligence Battalion, pled guilty to charges of conspiracy and maltreatment of prisoners and chose to be sentenced by a military judge alone. His sentence was confinement for 10 months, reduction to private, and a bad-conduct discharge. The same day, Sergeant Javal S. Davis, a military police officer, began his trial with a defense motion to dismiss the charges due to unlawful command influence. After the judge heard and denied the motion, Davis pled guilty to three charges. When asked during the ensuing questioning from the judge the reason he had committed the abuse, Davis said, "I lost it. It didn't justify what I did." His defense during sentencing arguments focused on the deplorable conditions and environment of the prison rather than orders from others. He was sentenced to six months confinement, reduction to private, and a bad-conduct discharge.<sup>55</sup> In May 2005, Specialist Sabrina D. Harman, another Army Reserve military police officer, was sentenced to six months confinement, reduction to private, forfeiture of pay and allowances, and a bad-conduct discharge. The charges for which her panel found her guilty were conspiracy, maltreatment, and dereliction of duty.<sup>56</sup> While more soldiers were held accountable for Abu

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<sup>54</sup> Joshua E. S. Phillips, *None of Us Were Like This Before: American Soldiers and Torture* (London: Verso Books, 2010), 118–19. The first of the compact disks contained only photographs of various places the unit had been while deployed to Iraq, but the second disk had the images, now famous, that caused Darby to copy it and turn it in to authorities.

<sup>55</sup> Matthew Chlosta, "Two More Soldiers Sentenced for Abu Ghraib Abuse," *Army News Service*, 10 February 2005.

<sup>56</sup> Edgar, "Harman Found Guilty for Abu Ghraib."

Ghraib than for My Lai, the question of whether the Army was taking seriously enough the root causes of the incident remained unanswered due to the relatively junior ranks of the convicted.

Perhaps the best-known face of the abuses, Private First Class Lynn-die R. England appeared in some of the most infamous photographs—standing with a thumbs up in front of naked detainees or holding a leash affixed to a detainee’s neck. England originally went to trial and expected to enter a plea deal in April 2005; however, the military judge refused to accept the plea deal after comparing Graner’s testimony to England’s statements. After her subsequent trial in September, where her defense sought no confinement due to both the environment of the prison and the manipulation of her boyfriend and father of her child, Charles Graner, she was found guilty of six out of seven counts. This included conspiracy, maltreatment, and committing an indecent act. She was sentenced to three years out of the possible nine year maximum for the charges against her. Additionally, she was reduced to private, forfeiture of all pay and allowances, and a dishonorable discharge. She served less than half of her sentence before being released.<sup>57</sup>

The last two servicemembers who were tried in connection with Abu Ghraib were military working dog handlers. In March 2006, Sergeant Michael J. Smith was found guilty of using his dog to “illegally terrorize and frighten” a detainee. He was sentenced to reduction to private, 179 days confinement, forfeiture of \$750 per month for three months, and a bad-conduct discharge. The convening authority approved the sentence with the exception of the reduction in rank, which was restored to private first class.<sup>58</sup> In May 2006, Sergeant Santos A. Cardona was acquitted of all but one of the aggravated assault charges associated with using his working dog to frighten and intimidate detainees (the dog bit one detainee) and was also convicted of dereliction of duty. Despite testimony and records proving his claim that he was ordered to use his dog in that way by senior

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<sup>57</sup> Tony Gutierrez, “England Sentenced to 3 Years for Prison Abuse,” *NBC News*, 26 September 2005; and Liz Beavers, “England Back in Mineral County,” *Cumberland (MD) Times-News*, 25 March 2007.

<sup>58</sup> Paul Corson, “Dog Handler Appeals Conviction in Abu Ghraib Case,” *CNN*, 8 October 2009; and *U.S. v. Michael J. Smith*, Sergeant, Crim. App. No. 20060541, United States Court of Appeals for the Armed Forces, 4 February 2010, 2.

officers, he was sentenced to 90 days of hard labor without confinement, reduced to specialist, and received a pay forfeiture of \$600 a month for 12 months. He served his sentence of hard labor at Fort Bragg, North Carolina. Afterward, he rejoined his unit in Kuwait for a deployment into Iraq before the Army rescinded his deployment order. He was not allowed to reenlist at his contract's expiration and left the Army in 2007 with an honorable discharge. In 2009, he was killed by a roadside bomb in Afghanistan, where he was working as a contractor.<sup>59</sup>

While the Fay report named at least four contractors as bearing some responsibility for the torture or abuse of detainees, these individuals were not tried, although their parent companies became the targets of lawsuits. In 2013, Engility Holdings Incorporated paid out \$5.28 million for the actions of a former employee of its subsidiary, L3 Services Incorporated, at Abu Ghraib.<sup>60</sup> For more than 15 years, CACI, a contractor based in Virginia that supplied interrogators, has continued its fight against another lawsuit filed in 2008 that alleged its employees were complicit in torture.<sup>61</sup> In June 2024, a judge ordered a retrial after a jury could not come to a unanimous verdict following a six-day trial early in May that had been declared a mistrial.<sup>62</sup> Subsequently, in November 2024, CACI was found liable for the abuse of the detainees and was ordered to pay the three named plaintiffs \$3 million in compensation and \$11 million in punitive damages each, totaling \$42 million.<sup>63</sup>

While several of the 11 soldiers who were convicted appealed their sentences, there were no retrials or substantial changes to sentences. Former Staff Sergeant Frederick's appeal arguing that the denial of his request

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<sup>59</sup> Josh White, "Abu Ghraib MP Slain in Bid for Redemption," *Washington Post*, 6 March 2009; Andrea Siegel, "Convicted Reservist Testifies," *Baltimore (MD) Sun*, 27 July 2005; and Associated Press, "Soldiers Convicted in Abu Ghraib Scandal," *Baltimore (MD) Sun*, 16 October 2006.

<sup>60</sup> Pete Yost, "\$5M Paid to Iraqis over Abu Ghraib," Associated Press, 9 January 2013.

<sup>61</sup> Matthew Barakat, "Judge Unimpressed by Latest Argument in Abu Ghraib Case," *Seattle (WA) Times*, 10 September 2021.

<sup>62</sup> Matthew Barakat, "Judge Orders Retrial of Civil Case Against Contractor Accused of Abuse at Abu Ghraib," Associated Press, 17 June 2024; and Matthew Barakat, "Judge Declares Mistrial after Jury Deadlocks in Lawsuit Filed by Former Abu Ghraib Prisoners," Associated Press, 2 May 2024.

<sup>63</sup> Mattathias Schwartz, "U.S. Jury Awards \$42 Million to Iraqi Men Abused at Abu Ghraib," *New York Times*, 12 November 2024.

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to move sentencing hearings from Iraq violated his right to be able to compel witnesses to appear was denied.<sup>64</sup> The majority of the convicted served only slightly more than half of their sentences. For example, Graner served 6.5 years of his 10-year sentence, Frederick served 4 years of his 8-year sentence, England served a year and five months of her 3-year sentence, and Harman served about three months of her six-month sentence.<sup>65</sup>

The scandal at Abu Ghraib had several effects and, at least for a time, again brought the law of war—at least as it was associated with acceptable conduct in the Global War on Terrorism—into the everyday discussions and consciousness of Americans. Why was this such a revelation? After the decision to become an all-volunteer force following the Vietnam War, the military had retooled its recruiting and retention practices; over a fairly short time, it had become recognized for a higher level of professionalism and eventually enjoyed an increasing amount of respect from the public.<sup>66</sup> Throughout military actions in Grenada, Panama, and the First Gulf War, the short duration of the conflicts, lack of prolonged interaction with prisoners or noncombatants, and overall successful execution led the United States to move past its “Vietnam syndrome.”<sup>67</sup> Several conditions contributed to Americans’ surprise at the Abu Ghraib scandal, including the lack of attention span and national memory Kendrick Oliver discussed in *My*

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<sup>64</sup> U.S. v. Ivan L. Frederick Appeal, Crim. App. No. 20040937, United States Court of Appeals for the Armed Forces, 14 October 2004, 2.

<sup>65</sup> “Abu Ghraib Abuse Ringleader Released,” *Al Jazeera*, 6 August 2011; and Beavers, “England back in Mineral County.”

<sup>66</sup> According to Gallup polls, from 1975 to 2009, the confidence in the military as an American institution rose from 58 percent to 82 percent. There were dips in this confidence after the Tailhook scandal (from 85 percent immediately following the First Gulf War in February 1991 to 69 percent in October 1991) and Abu Ghraib (82 percent in summer 2003 to 75 percent after the revelation of Abu Ghraib, and the descent continued for two more years as the three cases described in the Iraq chapter came to light) before rebounding again. “Military and National Defense,” Gallup, 2022.

<sup>67</sup> Although mentioned in several other sources, former Presidents Ronald W. Reagan (in a speech to the Veterans of Foreign Wars in Chicago) and George H. W. Bush (in a speech following the First Gulf War) both spoke of moving past the Vietnam syndrome, the public aversion to overseas military involvements. George C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (New York: Oxford University Press, 2008), 912.

*Lai Massacre in American History and Memory*.<sup>68</sup> Added to this were the ability for Americans to remain disconnected from the wars in Iraq and Afghanistan due to the same all-volunteer force, which fails to represent all parts of American society, that had gained so much respect since the Vietnam War and the efforts of DOD to work closely with Hollywood to portray its soldiers in a positive light in movies from John Wayne's *The Green Berets* (even before the Vietnam War had ended) to Tom Cruise's *Top Gun*.<sup>69</sup>

As previously noted, despite the public outcry over the behavior of the Abu Ghraib perpetrators, the civil discourse quickly shifted from disgust at the conduct to disbelief that the abuses were in part made possible by a redefining of allowable treatment for detainees by the administration. As noted legal scholar Jeremy Waldron described, it caused a debate within America not only about "how to prevent torture by corrupt and tyrannical regimes elsewhere in the world, but a debate about whether torture is a legitimate means for our government to use." This debate had started after revelations of abuses at the U.S. prison at Guantánamo Bay came to public attention just two years earlier. He went on to state that the "world has watched with fascination and horror" as Americans debated whether or not they still subscribed to the internationally held position that torture is counter to human rights and beyond the pale.<sup>70</sup>

As seen with Lieutenant Calley in the My Lai trials, in editorials supporting the accused in the Son Thang incident, and again later during other cases in Iraq, there was some public support for the accused perpetrators. The support was normally predicated on the idea that the crimes were caused by either faulty military policy or the circumstances in which the soldiers or Marines found themselves. Whether in the heat of the mo-

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<sup>68</sup> Kendrick Oliver, *The My Lai Massacre in American History and Memory* (New York: Manchester University Press, 2007), 231–34. Oliver cited polls by the *Washington Post* and ABC News taken 5–6 May 2004 that showed while initially a large majority of respondents thought the perpetrators of Abu Ghraib should be convicted, their feelings about convictions for older atrocities declined as time went on, indicating that feelings of contempt toward the newly accused would decline with time.

<sup>69</sup> *The Green Berets*, directed by John Wayne and Ray Kellogg (Burbank, CA: Warner Brothers, 1968); and *Top Gun*, directed by Tony Scott (Los Angeles, CA: Paramount Pictures, 1986).

<sup>70</sup> Douglas V. Porpora et al., *Post-Ethical Society: The Iraq War, Abu Ghraib, and the Moral Failure of the Secular* (Chicago: University of Chicago Press, 2013), 100–1.

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ment or under stress, the conscious choice to disregard training and orders about the treatment of noncombatants or prisoners seemed to be excused. In the aftermath of Abu Ghraib, there was a predominant denouncement of the abuse, but the documented responses for and against the accused were rather split.<sup>71</sup> A larger conversation in the nation was of the legalization of the techniques used first at Guantánamo Bay and eventually encouraged by Major General Geoffrey Miller for use in exploiting interrogations for intelligence in Iraq.<sup>72</sup> While there were certainly public calls for Secretary of Defense Rumsfeld to resign over the revelations of abuse, including from Congressman Kendrick B. Meek (D-FL) during a House Armed Services Committee hearing, the level of complaint and frustration from the citizenry never reached a point that the administration asked for his resignation.<sup>73</sup> With the presidential election approaching in November of that year, the scandal could not have come at a worse time for the administration. By May 2004, a Pew Research Center poll showed that a majority of the country disapproved of the George W. Bush administration's performance after the Abu Ghraib scandal came to light.<sup>74</sup> Reactions by politicians ran down party lines, with Democrats indicting Bush and his administration for the torture and Republicans blaming "a few bad apples" for the torture of the prisoners in isolated incidents. A June poll conducted by ABC News and the *Washington Post* showed that most Americans, more than 60 percent, believed this to be the case and accepted administration explanations and

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<sup>71</sup> Examples of editorials and articles against the accused include "Editorial: Abuses at Abu Ghraib," *New York Times*, 1 May 2004; "Editorial: Abu Ghraib, Rewarded," *New York Times*, 22 June 2005; and "Findings on Abu Ghraib Prison: Sadism, 'Deviant Behavior' and a Failure of Leadership," *New York Times*, 25 August 2004. Editorials/articles for the accused include Ann Scott Tyson, "Key General Defends the 'Gitmo' Way; in an interview, General Miller Defends His Command and Addresses Abuses at Abu Ghraib," *Christian Science Monitor*, 28 June 2004, 1; and Alberto Gonzales, "The Rule of Law and the Rules of War," *New York Times*, 15 May 2004.

<sup>72</sup> Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 19–20. Maj-Gen Miller advocated that, as at Guantánamo Bay, a guard force should be dedicated and trained to "set conditions for successful interrogation and exploitation of internees/detainees" Taguba pointed out in his summary that there was a strong argument that the intelligence value of detainees at Abu Ghraib and across Iraq was much different than those at Guantánamo Bay.

<sup>73</sup> Hersh, "The General's Report," 8–9.

<sup>74</sup> "Iraq Prison Scandal Hits Home, but Most Reject Troop Pullout," Pew Research Center, 12 May 2004.



by July, most domestic media furor had largely subsided, leading to little effect on the elections four months later.<sup>75</sup>

As has been discussed, the military response to the Abu Ghraib prisoner abuse scandal included numerous investigations. These resulted in a measure of accountability at low levels, changes in both training and education and in manning, and confirmed the separation of prison security operations and detainee interrogation and exploitation responsibilities between military police and military intelligence soldiers. Counting the Miller and Ryder reports, which predated the uncovering of the Abu Ghraib abuses, during the course of 20 months there were 13 executive-level assessments and investigations encompassing not only Abu Ghraib but a top-to-bottom review of detainee operations throughout DOD.

The revelations from Abu Ghraib followed other separate incidents of abuse resulting in three Reserve soldiers being discharged in early January 2004 and a battalion commander being relieved of command, given nonjudicial punishment, and forced to retire after discharging their pistol near a detainee's head to coerce information from them.<sup>76</sup> So despite this perceived overwhelming response, it was slow to start and may not have reached the level of effort it did had it not been for Darby's actions. In fact, Pulitzer Prize-winning journalist Charles J. Hanley chronicled abuses at prisons in Iraq in several articles as early as November 2003. His interviews for an article with former detainees corroborated some charges that Amnesty International made even earlier during the summer of 2003.<sup>77</sup> The fact that the trials moved forward quickly and in Iraq was initially promising, although acknowledgment of command responsibility was limited, as evidenced by the lack of punishment past the trials of the soldiers, Colonel Pappas's relief and nonjudicial punishment, and Brigadier General Karpinski's relief.

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<sup>75</sup> Brian Drohan, "Abu Ghraib," *Election of 2004* (blog), Southern Methodist University, 2014; "Iraq," PollingReport.com, 2015; Andrew Kohut, "Why the Polls Don't Add Up," *New York Times*, 12 May 2004; Gonzales, "The Rule of Law and the Rules of War"; and Tyson, "Key General Defends the 'Gitmo' Way."

<sup>76</sup> Thom Shanker, "The Struggle for Iraq: The Military; 6 GI's in Iraq Are Charged with Abuse of Prisoners," *New York Times*, 21 March 2004.

<sup>77</sup> Hanley, "AP Enterprise: Former Iraqi Detainees Tell of Riots, Punishment in the Sun, Good Americans and Pitiless Ones"; and Amnesty International, "Iraq: Continuing Failure to Uphold Human Rights," press release, 22 July 2003.



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While the administration and armed forces may have hoped that the abuses would not be given widespread coverage before the *60 Minutes II* exposé, given the relatively minor early efforts at investigating or substantiating allegations, once exposed the military was forced to display more interest and to take deliberate action. The continued reliance on the action of morally upright individuals suggests that somewhere in the military hierarchy there were still those who did not take the treatment of noncombatants seriously or were worried more about other day-to-day operational concerns than that treatment. This focus on operational issues was in large measure a result of the undersized force due to Rumsfeld's demand for a small military footprint for the war. This caused counterproductive policies that greatly increased the number of detainees who would be cared for by soldiers not fully trained and exacerbated by shifting interrogation rules and murky command structures, which all affected the outcome.

As a result of the publicity, the U.S. military quickly instituted changes in handling detainees everywhere. At the beginning of the war, empty sandbags were used as field-expedient covers for detainees' heads when it was considered necessary to keep them from observing the entry protocols to installations or when keeping them guessing where they were taken. After the revelations about Abu Ghraib, spare sets of goggles were spray painted to ensure only the eyes of the detainees were covered, reducing the chance for them to have issues breathing.<sup>78</sup> Additional training for military police was mandated, both refresher training for those in Iraq and for units at Forts Dix in New Jersey, Bliss in Texas, and Lewis in Washington State preparing to deploy into the U.S. Central Command area of operations.<sup>79</sup>

Reorganization of units also happened quickly, for instance, the 372d Company to which most of the accused military police belonged was re-assigned to the 310th Military Police Battalion from the 320th Military Po-

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<sup>78</sup> This change in detainee handling procedures was implemented in both the Army and the Marine Corps and was experienced firsthand by the author during deployments to Iraq and Afghanistan.

<sup>79</sup> Maj Warren Ferdinandsen, USA, interview with author, 31 December 2021, 1, hereafter Ferdinandsen interview. Maj Ferdinandsen was a prior-enlisted Reserve officer mobilized for duty with the 800th Military Police Brigade in 2003 and 2004 and was in a position to observe the impact of the abuse revelations, investigations, and fallout on the unit. Additionally, he had firsthand experience with the training the unit received before and during deployment.

lice Battalion, to which it had been assigned after moving to Abu Ghraib.<sup>80</sup> This shuffling of units was a common theme in the theater, and the 372d Company had previously moved to Abu Ghraib and under the 320th Military Police Battalion after having several soldiers relieved of duties at Camp Bucca, Iraq, for issues pertaining to detainee treatment. With the 320th Military Police Battalion also already highlighted because of previous incidents, the integration of the 372d Company should have included significant emphasis on detainee treatment policies. The movement of units to different chains of command, severing familiar command relationships at a highly stressful time, may have contributed to the disorder and command climate found in the prison. Other contributing factors to the environment at the prison were the over-crowding (with the vast majority of detainees being merely common criminals or those guilty of minor violations of curfew and the like) and understaffing of the prison for those large numbers. According to Sergeant Major Fletcher Pearson, the senior enlisted member of a company-size element of Marines brought in to provide perimeter security in the summer of 2004, “In addition to us having security of the perimeter, the army providing the prisoners’ guards, there was also another (Marine) unit there from California that did patrols and that type of thing outside Abu Ghraib and back up to TQ [al-Taqaddum Air Base].”<sup>81</sup> After the abuses came to light, additional units were moved into Abu Ghraib to improve the security posture and staffing problems.<sup>82</sup> While Major General Miller had been advocating for prisons in Iraq to change procedures to allow units operating the prisons to “set conditions,” Taguba’s report highlighted how following Miller’s recommendations led to abuse and previous prohibitive policies remained.

Has the military done enough to curtail violations? While the violations, in the form of detainee or prisoner abuse and torture differ from many of the violations discussed elsewhere in this book, like harming non-combatants or enemy prisoners of war en route to detention centers, the

<sup>80</sup> Ferdinandsen interview, 2.

<sup>81</sup> SgtMaj Fletcher Pearson, interview with author, on 7 August 2022, 4, hereafter Pearson interview. SgtMaj Pearson was the first sergeant for an artillery battery, serving as provisional infantry, assigned to provide perimeter security at Abu Ghraib. His unit replaced a Marine Reserve unit brought in after the information about the abuses broke.

<sup>82</sup> Ferdinandsen interview, 2.

military had policies and training regimes in place due to past violations. In this case, the training protocols prescribed by the Army for its mobilization of military police units were not wholly applicable as the regimes were set up for enemy prisoners of war, which were a small fraction of the large population housed at Abu Ghraib. Both Taguba's report and the DOD inspector general's report noted that the 800th Military Police Brigade did not receive internment/resettlement training before or during the deployment, which would have been much more relevant.<sup>83</sup> According to the 800th Military Police Brigade's engineer officer, Major Warren Ferdinandsen, besides classes on the handling of enemy prisoners of war, its training consisted of "weapons qualifications, crowd control and riot formation, NBC training, and common military skills. . . . The fact an insurgency would spring up [during mobilization training] was not even a thought."<sup>84</sup> Additionally, with the exception of the prison at Guantánamo Bay, it was not standard practice for the Army military police to be involved in interrogations, whether present during or in "preparing" detainees who were to be interrogated.<sup>85</sup> Any efforts they did make after past issues were certainly overcome by events in Iraq when much larger numbers of detainees—of a much different type than expected or trained for—were confined.<sup>86</sup>

Additionally, much of the planning before the war was done based on assumptions that proved wrong. One assumption was that, as in the First Gulf War, Kuwait would allow the construction of large confinement facilities where detainees could be moved from the battlespace and placed in those facilities where units were solely focused on security within rath-

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<sup>83</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, 37; and Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 2, 37.

<sup>84</sup> Ferdinandsen interview, 1.

<sup>85</sup> Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 19–20.

<sup>86</sup> Keith Rohman, "Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study," *Penn State International Law Review* 28, no. 1 (2009): 6. The vast numbers of prisoners were partially due to the policies enacted in 2003 disbanding the Iraqi military, which led to civil unrest, rampant crime, and, eventually, a large insurgency. Many detained in centers like Abu Ghraib were guilty of petty crimes or breaking curfews rather than true prisoners of war.

er than inward and outward security to ensure safety from attack.<sup>87</sup> The speed of that war and ability to separate the detainees from the battlefield in a relatively safe area were key to maintaining positive, yet humane, control of the prisoners. The faulty planning assumptions would help undermine the efforts toward reducing violence against noncombatants (in this case prisoners) made since the Vietnam War, which were proven successful during the First Gulf War. As preparations were made during 2003 and later, personnel were not only drawn from detainee operations to perimeter security but also to help with improving facilities not built for their purpose. The expectation for the 800th Military Police Brigade, following word that Kuwait would not permit detainees, was that the brigade would build facilities and begin relieving forward corps of the responsibility for caring for detainees within two weeks of the start of the war. Abu Ghraib had been a notorious Saddam Hussein-era prison, but the sheer volume of detainees meant most were housed in tents in open yards surrounded by fences and razor wire. Prisoner riots were not uncommon until facilities were improved.<sup>88</sup>

In any efficiently functioning military unit, the chain of command is evident and engaged. That was not the case in the detention facilities being run in Iraq. Brigadier General Karpinski was hamstrung by having a command constituted of many units that were not organically her own and by being understaffed for the sheer numbers of detainees and facilities requiring personnel that stretched from Kuwait to Northern Iraq.<sup>89</sup> According to Major Ferdinandsen,

a key thing to remember is that the units arriving in theater and falling under the 800th Military Police Brigade except for the Headquarters and Headquarters Company (HHC), 310th Military Police Battalion were not organic units normally. . . . The only bat-

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<sup>87</sup> Although both Amnesty International and Human Rights Watch observed the situations in Kuwait and Iraq closely, publishing various reports during the Gulf War (Operation Desert Storm), no reports from either concerning prisoner of war abuse similar to Operation Iraqi Freedom were found.

<sup>88</sup> Ferdinandsen interview, 3.

<sup>89</sup> Karpinski had personnel in Kuwait managing logistics flows to her facilities and personnel in northern Iraq on a training mission and numerous detention facilities across Iraq.

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talion that trained and mobilized together was the 724th Military Police Battalion. The HHC, 223d, 267th, and 822d Military Police Companies all arrived at Fort Dix and trained at the same time and integrated well. The HHC and 822d were Army Reserve. The 223d and 267th were National Guard.<sup>90</sup>

Several of Karpinski's decisions, however, added friction to the environment in which the soldiers performed their duties. Among these was leaving the battalion commander of the 320th Military Police Battalion in place after several of his soldiers were found guilty and were discharged over incidents of abuse in May 2003. Already considered the weakest leader among Karpinski's subordinate unit commanders, the 320th MP Battalion's commander and his unit were moved to Abu Ghraib when the Army began operations there to run the facility with the most detainees under the 800th Military Police Brigade's purview.<sup>91</sup> Additionally, although *Fragmentary Order 1108* issued by the Combined Joint Task Force headquarters gave tactical control of the personnel assigned at Abu Ghraib to the military intelligence commander, it did not excuse the military police from disregarding their standard operating procedures.<sup>92</sup> The chain of command within the military police battalion should have reinforced those procedures and made clear how the command relationship functioned. As it happened, many soldiers interviewed by Major General Taguba and the Criminal Investigation Division spoke about confusion arising from the convoluted command relationships.<sup>93</sup>

The DOD inspector general review of DOD-directed investigations of abuse noted a total of 492 recommendations from the 13 reports and as late as March 2006, as Sergeant Smith was being tried, 71 of the recommendations remained open. Those recommendations ran the gamut of training, manning, supervision, and policy and while some fundamen-

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<sup>90</sup> Ferdinandsen interview, 1.

<sup>91</sup> Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 39–40.

<sup>92</sup> *Fragmentary Order 1108, Assigning Responsibility for Abu Ghraib to the Commander of the 205th MI Brigade, Effective Immediately* (Camp Victory, Iraq: Combined Joint Task Force 7, 19 November 2003).

<sup>93</sup> Ferdinandsen interview, 3; and Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 2–3.

tal changes were noted in the preceding paragraphs, when considering where accountability measures stopped in the chain of command, some of the root causes—such as planning factors—may not have been adequately addressed.<sup>94</sup> Part of the reason for accountability being assigned only at lower levels is due to potential flaws in the investigations during their assignment. Some have taken the position that these flaws could be intentional to control the results of the investigations by limiting their scope. For instance, Major General Taguba's investigation was limited in scope to the 800th Military Police Brigade, ensuring it would focus on the military police officers who actually committed the abuse, not on the cause or impetus for the abuse. Even in the cases where wide-enough scope was assigned to an investigation, the reliance on previous investigations produced relatively little new information that could be used to determine real culpability. Another flaw with most of the investigations was the reliance on primarily uniformed sources as witnesses without taking steps to ameliorate the pressure or fear those witnesses felt testifying against their own, or higher, levels of command.<sup>95</sup> Finally, the absence, again, of accountability higher up the chain of command displays an unfortunate lack of appetite for making an example that would resonate further through the ranks than that to which the prosecution of only the enlisted soldiers was liable.

The answer to the question of whether the military has done enough to curtail violations is mixed. While the Army maintains a command structure and policies and requires training that should ensure that any abuses that occur are exceptions perpetrated by individuals acting outside of norms, in practice, not enough supervision was applied to ensure compliance with expectations. A positive interpretation of the time allotted to training about the law of war and related subjects is that it was once again a soldier, Darby, stepping forward, as seen previously in the cases of Thompson and Ridenhour, to bring the matter to the attention of higher headquarters. While one could argue that these instances were the acts of individuals behaving in compliance with their personal moral code, the fact that in three of those cases the individuals took the matter to their

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<sup>94</sup> Young, *Review of DOD-directed Investigations of Detainee Abuse*, Report no. 6, i–iii.

<sup>95</sup> Rohman, “Diagnosing and Analyzing Flawed Investigations,” 11–22.

chain of command, rather than an outside agency, suggests that there is a conviction that the violations should not be condoned.

How have the U.S. efforts at humanely securing prisoners or detainees changed? Over time, the ways detainees are secured has changed, but many challenges have endured. For instance, during World War II, planners anticipated 60,000 prisoners in the 90 days following D-Day, however almost 200,000 prisoners were captured. Learning from the drain in manpower to secure prisoners in earlier conflicts, during the Vietnam War, the United States turned prisoners over to the South Vietnamese for internment to preserve manpower. This proved a mistake when the International Red Cross inspected South Vietnamese camps and reported that they were not in compliance with the Geneva Conventions and that the United States was ultimately responsible for the prisoners it had taken. Once again, though, massive numbers of prisoners far exceeded planning estimates and manning of detention centers.<sup>96</sup> In both Iraq and Afghanistan, the legal status of those detained—even combatants—meant that the situation was more confusing than in earlier conflicts. Adding to the complexity of the various types of detainees was their much-larger-than-anticipated number. In every conflict, lack of cultural understanding impeded operations.<sup>97</sup> If there is a common thread in the planning for prisoners of war and detainees in the past 80 years of conflict, it is the difficulty of correctly estimating the resources that would be required, often due to underestimating the numbers of detainees. No matter the intent of the military leadership before or at the start of a conflict, if adjustments are not made for the existing circumstances, no previous improvements in policy matter.

Earlier in what the United States called the Global War on Terrorism, those who were captured and deemed to have either credible intelligence or real culpability were transferred to sites like Guantánamo Bay. But during Operation Iraqi Freedom, the sheer volume slowed the processing and further transferring of detainees to these secure sites. The unantic-

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<sup>96</sup> Caldwell, *Fallgirls*, 52, 55–56.

<sup>97</sup> Megan Williams, “Detainee Operations: Units Face Dual Imperatives of Security and Sustainment,” Army.mil, 22 July 2020; and Cheryl Bernard, et al., *The Battle Behind the Wire: U.S. Prisoner and Detainee Operations from World War II to Iraq* (Santa Monica, CA: Rand, 2011), 33.

ipated volume of detainees combined with the lack of realistic planning to create a perfect storm of understaffed detention centers that lacked proper supervision with too many and varying kinds of detainees—who rightly should be treated differently—and command relationships that were unclear to those most responsible for detention operations. While it is too late for the Iraqis housed at Abu Ghraib and other facilities throughout Iraq in 2003 and 2004, the U.S. Army has refocused attention on humane treatment that follows international expectations for detainees. Additionally, training and education centered on what happened and how a soldier committed to the Service ideals can make a difference is offered by the institution. The Center for the Army Profession and Leadership offered a case study on Specialist Darby's actions as an example of the Army values of loyalty and duty, just as it would for the soldiers who helped bring the murders and rape at Mahmudiyah (to be examined later) to light.<sup>98</sup>

Answering the question of whether public or political pressures affected military efforts has several facets, including the efforts made to treat detainees properly or investigate allegations, efforts to determine culpability, and the effects those pressures had on the Army's ability to prosecute those charged. Since the Miller and, more specifically, the Ryder assessments began before knowledge of the abuses at Abu Ghraib prison came to the Army's attention, there is some evidence they were already responding to accumulating allegations and incidents proven to show abuse of detainees. The exponential growth in investigations and assessments after Abu Ghraib came to light suggests that the Army was sensitive to the potential outcry the revelations of abuse might cause. The reorganization of units and subsequent assignment of additional forces to help secure and operate Abu Ghraib in the wake of the allegations certainly adds to that perception of the Army's sensitivity. While there was evidence of interest from U.S. lawmakers to address culpability for the abuses, much of the reported conversations were quite partisan in nature until the results from reports became public. At that point, there was a plain bipartisan dissat-

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<sup>98</sup> "SPC Joe Darby" (PDF), Center for Army Leadership, accessed 13 September 2024. The Center for the Army Profession and Leadership was created by a merging of two separate centers in 2019, but it has since been dissolved and its mission is now mostly fulfilled by the Center for Army Leadership at Fort Leavenworth, KS.



isfaction with efforts at determining blame. Conservative senator Lindsey Graham (R-SC) stated: “This is not a few bad apples. This is a system failure, a massive failure.” And David R. Obey (D-WI), the ranking Democrat on the House of Representatives Appropriations Subcommittee, said: “This [abuse] could not have happened without people in the upper echelon of the Administration giving signals. I don’t see how this was not systemic.”<sup>99</sup> These sentiments have been reinforced and validated by research into the administration’s changes in definitions and authorities, such as the book *The Torture Papers: The Road to Abu Ghraib*, which laid out the legal memos and findings by the Department of Justice staff that sought to circumvent the ethical and legal questions surrounding “counter-resistance strategies.”<sup>100</sup> These new interpretations led directly to the military intelligence personnel at Abu Ghraib feeling comfortable encouraging/ordering military police personnel to “set conditions” for successful interrogations by using techniques recognizable as torture or abuse.<sup>101</sup>

Because of the increasing effect of contemporary media’s 24-hour news cycle and the prevalence of social media in the development of Americans’ opinions, an examination of how partisan-leaning newspapers described and reported on the abuse is instructive. While a holistic look at the potential scope of the problem, based on widespread allegations, was noted by Douglas V. Porpora et al., in 42 percent of secular Left offerings, it was covered in only 14 percent of secular Right platforms.<sup>102</sup> The idea of the abuses being the result of a few bad apples was not subscribed to in Left-leaning articles but was described in 22 percent of Right-leaning venues. Discussion of the role of the administration occurred in 55 percent of Left-leaning publications, but only 19 percent of Right-leaning offerings.<sup>103</sup> This illustrates a problem that only worsened with time. Americans, in the age of easy access to platforms that reinforce and cater to their religious or polit-

<sup>99</sup> Rohman, “Diagnosing and Analyzing Flawed Investigations,” 10–11.

<sup>100</sup> Greenberg and Dratel, *The Torture Papers*, xvii–xviii.

<sup>101</sup> Greenberg and Dratel, *The Torture Papers*, 1034–38.

<sup>102</sup> In this source, Porpora et al.’s *Post-Ethical Society*, the Left offerings are represented by news networks such as MSNBC, CNN, and others that were viewed by and framed stories in ways supporting U.S. Democratic Party positions, while Right offerings were more likely to offer stories framed in a way that supported the information delivered by the sitting Republican administration, such as Fox News.

<sup>103</sup> Porpora et al., *Post-Ethical Society*, 103–5.

ical leanings, can, and often do, turn to reporting that confirms their own beliefs.<sup>104</sup> The tendency for large numbers of citizens to dismiss personal accountability for the perpetrators of abuse at Abu Ghraib was previously noted. Disparate voices of pundits, researchers, and authors defended the perpetrators using various excuses including the environment of war, the specific circumstances of the prison, or even the larger institutions of the Army or Bush administration writ large. These included those who attempted to understand the sexual aspects of the torture at Abu Ghraib from a gender-oriented frame.

The prevailing attitude of the Army, seemingly validated by the findings of several—though not all—of the investigations, assessments, and reports, was that the abuse was the result of situational variables causing a few soldiers to act badly. Many subscribing to these findings saw the abuses at Abu Ghraib as similar to the Stanford Prison Experiment, conducted by Dr. Philip Zimbardo in 1971. Others saw larger forces at work or dissimilarities that made the comparison moot. Among those that argue against the Stanford comparison, Dr. Ryan Caldwell argues that several factors invalidate the analogy. Examining the use of sexualized situations, from the staged photographs with female soldiers to the use of nakedness against the cultural norms of the detainees, and using records of trial and sworn statements to validate her positions, she lays out several ways the events did not conform to the Stanford experiment. Further, Caldwell highlights how the junior soldiers were held accountable with less rigor applied to investigations higher up the chain of command or authority.<sup>105</sup> The gender framing of the situation cannot be dismissed, as much literature—including Joshua S. Goldstein's *War and Gender*—pertaining to the effects gender roles play in the decision-making and actions by individuals during combat is now available.<sup>106</sup> Prior to the opening of all jobs to women in the military, the Marine Corps' experiment with the efficiency of mixed-gender units showed evidence that lingering biases of different genders played a

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<sup>104</sup> Amy Mitchell et al., *Political Polarization and Media Habits* (Washington, DC: Pew Research Center, 2014).

<sup>105</sup> Caldwell, *Fallgirls*, 33–48, 70–73.

<sup>106</sup> Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (New York: Cambridge University Press, 2001).

large part in effective assignments of personnel and contributed to the use of female soldiers as dehumanizing agents in the photographs and “preparation” of prisoners for interrogation. These reflect society’s own biases and are hard to overcome.<sup>107</sup>

With Abu Ghraib the subject of much discussion throughout 2004, and with an election approaching at the time, the political impact of the story was not lost on journalists or campaign advisors. Early in the year, veteran attacks against candidate John F. Kerry’s military records favored the incumbent Bush administration, but as more information about the Abu Ghraib investigations became public knowledge, the president appeared to be anxious to show a measure of accountability for the abuses even while Democratic opponents sought to tie the administration closer to the abuses due to its support for redefining acceptable interrogation practices.<sup>108</sup> This led President Bush to say, among other things, “The acts are abhorrent. It’s a stain on our country’s honor and our country’s reputation.”<sup>109</sup> Bush later urged Rumsfeld to make sure any guilty soldiers were punished for the “shameful and appalling acts.”<sup>110</sup> Those remarks and others by high-level officials in the Pentagon and DOD were cited in a motion to dismiss the case against Charles Graner due to unlawful command influence. Although the judge in this case rejected the motion, it was not the last time public remarks from a sitting president would be labeled as undue command influence.<sup>111</sup> While the undue influence was cited by lawyers as being prejudicial to their defense in this case, less than 15 years later, President Donald J. Trump’s commentary on the case of a Navy SEAL accused of murder would be criticized for hurting the government case.

Political sensitivities also continued to affect soldiers even after their punishments were complete. In 2006, after serving 90 days of hard labor

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<sup>107</sup> *Ground Combat Element Integrated Task Force Experimental Assessment Report* (Quantico, VA: Marine Corps Operational Test and Evaluation Activity, 2015), N-3, N-72; and Paul Johnson and Jane Pinelis, *The Experiment of a Lifetime: Doing Science in the Wild for the United States Marine Corps* (Middletown, DE: Independently Published, 2019).

<sup>108</sup> Jill Lawrence, “Abu Ghraib Probes Shift Public Focus,” *USA Today*, 24 August 2004.

<sup>109</sup> “Bush ‘Sorry’ for Abuse of Iraqi Prisoners,” *CNN News*, 7 May 2004.

<sup>110</sup> “Graner Gets 10 Years for Abu Ghraib Abuse.”

<sup>111</sup> “Bush Comments Prejudice Abu Ghraib Trial, Soldier Claims,” *Irish Times*, 6 December 2004.

for his role at Abu Ghraib, military dog handler Sergeant Santos Cardona was on his way back to Iraq with his unit to train Iraqi police when a *Time* story and other media inquiries led the Pentagon to rescind his deployment orders.<sup>112</sup>

Despite the discussions of torture, law of war, human rights, and a stained national honor throughout the summer of 2004 and into 2005, did news of the violations matter to the public? Much widespread discussion about Abu Ghraib in the media waned by the summer of 2004 and virtually disappeared by mid-2006. An examination of high-profile publications between 2004 and 2006 show that despite the accountability confined to the soldiers who were tried, only about 5 percent of published pieces accepted the proffered frame of Abu Ghraib's abuse representing an isolated case perpetrated by a few bad apples. This, in contrast to polls that show the public acceptance of administration explanations. Many instead discussed the culpability of the administration in legalizing mistreatment and roughly one-half of those openly discussed whether the administration should be held accountable.<sup>113</sup> While moral emotions like outrage, disgust, horror, and shame were stirred by the scandal, efforts made to assign accountability to low-ranking soldiers may have, in fact, worked to keep Abu Ghraib from acting as the incendiary event that could act to reignite an antiwar movement that had dimmed since the invasion. While Samuel Moyn offered that the turning of widespread discussion to the legality of torture worked to lessen antipathy toward the war and, perhaps, to prolong it, it may be that when the abuse was linked to soldiers, the faces of the torturers made it harder to maintain the moral indignation for a society that still held a strong morally charged connection to American soldiers that harkened back to that described for World War II.<sup>114</sup> With support and opposition to the war seemingly running along party lines from very soon after the invasion of Iraq, a resounding cry had been "Support the Troops," regardless of personal feelings about the war. That morally charged connection and

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<sup>112</sup> Adam Zagorin, "Abu Ghraib Offender's Return to Iraq Is Stopped," *Time*, 2 November 2006.

<sup>113</sup> Porpora et al., *Post-Ethical Society*, 102–5.

<sup>114</sup> Walker Schneider, "Skull Questions: The Public Discussion of American Trophy Collection during World War II," *Penn History Review* 25, no. 2 (2018): 127.

deep-seated societal desire to support the troops, despite flagging support for the war, may be to blame for the lack of eventual moral action to follow the initial moral outrage Abu Ghraib engendered. If the public discourse and efforts for accountability had traveled a different course, the news of torture at Abu Ghraib may have mattered more than it did in hindsight.

So, to what extent is the military responsible for the law of war violations in this case? Although public outcry and reaction, or anticipation of the same, can and certainly do drive military responses to situations, and political actions legalizing certain interrogation techniques certainly contributed greatly to Abu Ghraib and other instances of torture, the extent of the military's responsibility in this case is considerable. At the highest levels of the DOD, planning for detainees and prisoners was inadequate—just as it had been in World War II and the Vietnam War. Additionally, failure to be clear in the expectation that non-DOD entities using military facilities for interrogation would be required to submit to military constraints led to confusion and illegal actions by military police.

After the abuse became known, the DOD and Army shared the fault for multiple investigations with too narrow a scope and for not accounting for the negative influence on witness testimony that possibly having to implicate the chain of command would have. At the Service level, the Army's system of consolidating disparate units under a single functional headquarters, and in this case one that was stretched thin, worked against mission success by failing to provide familiarity among varying levels of the chain of command and failing to provide internment training when it became clear predeployment training was no longer relevant. At many of those levels of the chain of command, there existed confusion about supported and supporting relationships within the facilities, lack of proper supervision, and lack of enforcement of standard policies and discipline.<sup>115</sup>

At the unit level, an understaffed unit ignored training and operating procedures and, arguably at the behest of military intelligence or other individuals, acted well outside the scope of their official duties and responsibilities. At the level of the individual soldier, there was a lack of personal

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<sup>115</sup> The concept of supported and supporting units are used by the U.S. Army and Marine Corps to designate which units have authority for decisions or priority for resources or support in specific cases.

## Abu Ghraib Prison

discipline for their actions and loyalty to peers within the group rather than to their professional obligations. While there is much fault to be assigned to the policymakers and a residual influence of societal biases, the military bears more fault in this case for the failures to learn from past mistakes and abide by policies it had prescribed. Abu Ghraib provides an example of what can happen when no attention is paid to cultures and practices to small units or subgroups within specialties that may deviate from the prescribed procedures. As at My Lai and Son Thang, command climate or culture of an organization or occupational specialty mattered at Abu Ghraib.

## CHAPTER 8

### Haditha

On the morning of 19 November 2005, Sergeant Frank D. Wuterich, the squad leader for 1st Squad, 3d Platoon, 3d Battalion, 1st Marines' Company K (Kilo), and his Marines were ordered to conduct a routine resupply mission at a traffic control point some eight kilometers away. They were near the town of Haditha, one of the major cities west of Baghdad that clings to the Euphrates River as it ran its west-to-east course through the country. The river was dammed just north of the city, a feature considered key terrain by the military. By the time 3d Battalion, 1st Marines, arrived in Haditha in September 2005, the Marine Corps had been given overall control of the restive al-Anbar Province. At the time, the battalion was staffed by almost two-thirds veterans of the heavy fighting in nearby Fallujah from their previous deployment less than a year earlier. That deployment was marked by engagements that were considered the worst urban fighting since the Vietnam War when the Corps wrested the city of Hue back from the North Vietnamese and Viet Cong at the end of the Tet Offensive.<sup>1</sup> In Fallujah, as in Vietnam's Hue City, Marines fought a stubborn enemy from house to house, clearing the city slowly and incurring heavy losses. In that kind of fight, the rules of engagement were slightly less restrictive to provide some semblance of force protection to assault elements.<sup>2</sup>

As the squad leader, Sergeant Wuterich's duties included picking the route and informing and plotting it in the operations center, checking for any recent intelligence updates, and briefing his Marines. There had been

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<sup>1</sup> Francesca Landis, "Marine Captain Awarded Purple Heart for Actions in Fallujah, 16 Years Later," *Leatherneck* 104, no. 5 (2021): 42–43.

<sup>2</sup> Urban combat is generally recognized as the most dangerous situation a fighter can engage in. With threats coming from within buildings, hidden among the population, from rooftops, and even from subterranean quarters, the general rule of thumb says that the more aggressive the action, the safer for the assaulting troops.

warnings several days earlier that new insurgents from Syria had been infiltrating the area with indications that the new insurgents were traveling in a white sedan, the most common type of car in Iraq. The battalion's intelligence cell, specifically its leader Captain Jeffrey Dinsmore, viewed the arrival of the Syrian insurgents as a sign that there would soon be an attack of some sort, probably after a distraction such as an improvised explosive device (IED) strike or small ancillary attack.<sup>3</sup> Wuterich briefed his Marines to remain alert and reminded them of immediate actions in the event of enemy contact, then the squad loaded onto the vehicles and left the base just after 0630.<sup>4</sup>

After successfully making a delivery of food and the day's secure radio encryption key to the remotely located Marines, the four high-mobility multipurpose wheeled vehicles (HMMWVs), each carrying three Marines, began their return trip to base just after 0700 by a different route. As the last vehicle in the convoy turned onto well-traveled road just minutes from the outpost, an IED was detonated by remote control. The blast threw the last vehicle into the air, cutting the driver in half and ejecting another of the Marines. The squad's subsequent actions began as a proper reaction to an IED strike—secure the site, render aid to the injured, and attempt to locate the responsible parties—but ended as an hours-long series of actions resulting in the killing of innocent civilians.

Immediately following the explosion, a Marine in Wuterich's HMMWV radioed for the quick reaction force (QRF) to be sent, and simultaneously the corpsman, also in the squad leader's vehicle, jumped out and raced toward the crippled vehicle. The vehicle's driver, Lance Corporal Miguel Terrazas, a popular Marine of the company and veteran of the company's previous deployment, was killed by the explosion. The gunner, Private First Class Salvador Guzman, riding in the back of the high-backed HMMWV was seen pulling himself out of the smoke toward the side of the road with a broken ankle, and the other passenger, Lance Corporal James Crossan,

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<sup>3</sup> Kenneth F. Englade, *Meltdown in Haditha: The Killing of 24 Iraqi Civilians by U.S. Marines and the Failure of Military Justice* (Jefferson, NC: McFarland, 2015), 26.

<sup>4</sup> Immediate action drills are set responses rehearsed repeatedly by units to ingrain in the members a sort of muscle memory enabling them to respond without hesitation in the aftermath of some sort of ambush, attack, or other enemy contact.



was lying in the street, pinned under one of the armored doors.<sup>5</sup> The Marines, scrambling to form a perimeter around the explosion site, noticed a white sedan approaching them from the west. The vehicle stopped, started to back away, and then inched forward again before stopping. Once stopped, the driver—an older man—and four younger males got out and stood around the car. At this point, Sergeant Wuterich dropped to a knee and engaged all five men with rifle fire, and another Marine, Corporal Sannick P. Dela Cruz, rushed toward them, also firing as they fell and then performing what were called “dead checks” before urinating on one of the bodies.<sup>6</sup>

As Wuterich and the other Marine searched the vehicle and bodies for weapons, detonator, or identification, the QRF’s lead HMMWV arrived. Some Marines reported receiving fire from the south near a house some 200 meters away and returned fire. The platoon commander of 3d Platoon, Second Lieutenant William Kallop, was—like Wuterich—on his first combat deployment. He requested an update, and after receiving one from Wuterich and Corporal Hector Salinas about an individual engaging them from the south—and at Wuterich’s urging—gave the order to “clear south.” To another group, led by Dela Cruz, he gave orders to check the houses to the north of the road the convoy had been traveling when the IED detonated.

On the way to the building to the south identified as the source of fire, Wuterich told the Marines in his group to treat the house as hostile and

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<sup>5</sup> A high-backed HMMWV was equipped with a cargo area, much like a pick-up truck, but with sides extending three to four feet high for protection, rather than the back seat and turret with which most HMMWV were equipped. These vehicles were routinely used as logistics or casualty evacuation platforms. Without most of the same armor protection for those in the cargo area, they were generally placed in the center or rear of convoys.

<sup>6</sup> While not recognized doctrinally, after the experiences of wounded insurgents feigning death and rising to shoot troops from behind, “dead checks” became a way to ensure security when moving quickly through an area where a firefight had occurred. Essentially, downed fighters were shot again to ensure they were not playing dead rather than putting a troop at risk approaching a downed fighter who could have a grenade or firearm.

“shoot first and ask questions later.”<sup>7</sup> As the group arrived at the first dwelling, referred to as House 1 in the subsequent investigation, without receiving fire, they gathered near the entrance and executed a dynamic entry.<sup>8</sup> While the lieutenant’s command to clear could be interpreted in a number of ways, Wuterich’s order to treat the house as hostile meant that maximum force would be applied, and done so quickly, as they moved in. As the group entered the building, an elderly man faced them in a wheelchair who was immediately shot in the chest. The old woman at his side attempted to flee but was similarly shot down. The group then spread out and cleared each room with rifle fire, sometimes preceded by a fragmentation grenade to disable anyone inside. They found an open door at the back of the house, which they interpreted as an indication that someone had escaped out the back to the next building (House 2 in the ensuing investigation), to which the group quickly moved.

They paused at this building and knocked—hard—on the door. No one answered, but when they saw through the door’s glass upper panel a man look around the door frame on the other side of the room, they shot through the glass, killing him.<sup>9</sup> They cleared the rest of the building, again using grenades and rifle fire before entering the rooms, and then returned to the site of the IED blast, arriving shortly after the group led by Dela Cruz, which cleared the northern buildings without incident. The immediate aftermath was horrific. In the 30 or so minutes since the IED had detonated, Wuterich and his Marines had killed 20 Iraqis: 5 from the unmarked taxi that had approached right after the blast, and another 15 in the two houses (7 in the first and 8 in the second). Among the dead were six children between 5 and 14 years old and four women. The first elderly man shot would later be identified as 76-year-old Abdul-Hamid Hassan. One wom-

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<sup>7</sup> Paul J. Ware, “Investigating Officer’s Report of Charges under Article 32, SSGT Frank Wuterich,” Marine Forces Central Command, 2 October 2007, as posted on *War Chronicle* (blog), 1. This document no longer exists on the blog platform, but was accessed via the Internet Archive’s Wayback Machine.

<sup>8</sup> *Dynamic entry* refers to when the door is either forced in with a kick, a ram, or explosives to facilitate a fast entry with weapons ready for the unit entering.

<sup>9</sup> Ware, “Investigating Officer’s Report of Charges under Article 32, SSGT Frank Wuterich,” 2.

an and her months-old baby escaped through the back door of House 1, and three children who were wounded during the assault also survived.

Once the group returned to the blast site, Lieutenant Kallop immediately left to inspect the houses to report what had happened. As he surveyed the carnage, he rhetorically asked the Marine with him, "Where are the bad guys?"<sup>10</sup> Unfortunately, as Kallop returned to the site of the blast, he was immediately ordered to take his force about 1.6 kilometers to the east to an area called the Palm Groves, where a drone, launched immediately after the report of the IED strike, observed armed men gathering and unearthing caches and loading them into a car. This combination of IED strike and massing of insurgents seemed to fit Captain Dinsmore's prediction for an attack.<sup>11</sup> The Kilo Company commander arrived just after the QRF departed, inspected the slain men around the taxi, and was about to investigate the houses when the battalion watch officer radioed and ordered him to the Palm Groves as well, effectively surrendering the opportunity for a senior officer to observe the scene in the immediate aftermath.<sup>12</sup>

While the events near the Palm Grove stretched over the next six hours, Kallop was sent back to the blast site in anticipation of a possible follow-on attack. During this time, the company commander and his Marines found several IEDs at Palm Grove and engaged in a firefight with the insurgents before pinning them down into a building that was later leveled with two bombs from support aircraft and tanks. Eight hours after the initial IED blast (sometime after 1500), Wuterich spotted several men taking turns "turkey peeking" from atop a building to the northwest, in the area Dela Cruz had earlier cleared. Kallop authorized Wuterich to take a couple of Marines to investigate. The first house they entered was occupied by only women and children and when asked where the men were, they signaled to the building close behind theirs. Wuterich left one Marine in the first building and proceeded into the next one. They entered an empty room, but as the other Marine, Lance Corporal Justin L. Sharratt, glanced into the

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<sup>10</sup> Tony Perry, "Details Emerge of a Deadly Day in Haditha," *Los Angeles (CA) Times*, 2 July 2007. Depending on the account read, the Marine accompanying Kallop was either a member of the QRF who was equally surprised at the scene or Cpl Salinas, one of the Marines who had cleared the house with Wuterich.

<sup>11</sup> Englade, *Meltdown in Haditha*, 26.

<sup>12</sup> Englade, *Meltdown in Haditha*, 25.

next room, he observed a man with an AK-47 automatic rifle. He attempted to fire his light machine gun, but it jammed, so he pulled his pistol and shot the man in the head. To his surprise, a second man, also armed with an AK-47, quickly appeared and Sharratt began shooting at him as well until he ran out of ammunition. He then called out to Wuterich, who raced past him and began firing his M16 rifle at two other men in the room. After searching the building, they found a suitcase with Jordanian passports as well as a wad of Jordanian and Syrian currency, which they placed, along with the two rifles, into an explosive ordnance disposal vehicle that had brought a team to inspect the blast site.<sup>13</sup>

Two hours after the engagement at the Palm Grove ended, the battalion's commander and senior enlisted Marine, Lieutenant Colonel Jeffrey R. Chessani and Sergeant Major Edward Sax, left their combat operations center to inspect the Palm Grove site. They stayed for nearly three hours, leaving well after 1900. Chessani and Sax then drove to Fire Base Sparta, Kilo Company's headquarters, where Chessani received a quick brief about the IED strike and follow-on incident before returning to his headquarters and reporting the day's events to the Regimental Combat Team-2 commander. Although he passed the intersection where the IED exploded, he did not visit the spot until the next afternoon and then for less than 30 minutes, inspecting only the damaged HMMWV.<sup>14</sup> Around midnight that day, the first mention of civilian casualties was included in reports to the battalion's higher headquarters, erroneously attributing some fatalities to the initial blast and others to follow-on fighting.<sup>15</sup>

As the battalion commander was finishing his inspection at the Palm Grove, a squad assigned to gather the bodies and transport them to the morgue at Haditha was also finishing its task—nearly 12 hours after some of the civilians had been killed. Without enough body bags, the squad resorted to transporting the bodies in large trash bags. The report from the

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<sup>13</sup> "Lt. William T. Kallop Statement to Investigator Colonel Gregory A. Watt, Haditha Dam, February 21, 2006," *War Chronicle* (blog), accessed 23 October 2024. This document no longer exists on the blog platform, but was accessed via the Internet Archive's Wayback Machine.

<sup>14</sup> Englade, *Meltdown in Haditha*, 27–30.

<sup>15</sup> MajGen Eldon A. Bargewell, USA, *Bargewell Discovery* (Baghdad: Headquarters Multinational Corps-Iraq, 15 June 2006), 6.

lieutenant in charge of the detail when they arrived back at base and cataloged the number of men, women, and children was the first accurate count of the casualties for the day. Even so, there had already been reports to headquarters that included erroneous numbers of insurgents and civilians killed.<sup>16</sup> The reporting processes that led to these false reports, as well as the battalion's command climate and training received on rules of engagement and laws of war, were later investigated for any evidence of an intentional cover-up on behalf of the Marines by an Army major general.<sup>17</sup>

In a parallel to Son Thang, the day after the incident two residents of Haditha went to the unit's base to complain about the assaults and were met by the battalion's intelligence officer, Dinsmore, who believed the complainants to be motivated by sympathy for the insurgents and dismissed it. A week later, Chessani met with the Haditha City Council, which formally requested orally and in writing, that the incident be investigated, angering Chessani.<sup>18</sup> Nonetheless, two days later, he sent his civil affairs officer to determine if there were grounds for reparation payments. Payments of \$41,000 were eventually made.<sup>19</sup> This was an unusually high amount and prompted questions from a higher headquarters comptroller, but the same information in the original false reports were sent to the comptroller, and the payments were made—an early missed opportunity for accountability and further investigation despite the faulty reporting.<sup>20</sup> Another missed opportunity occurred on 22 November, when the Marines' division commander, Major General Richard A. Huck visited the blast site but after receiving a briefing, using the same faulty early reported information, left without inspecting the scene.<sup>21</sup>

While working on a broad story concerning the total numbers of civilians killed in Iraq by U.S. troops, *Time* reporter Tim McGirk received a video taken by an Iraqi with a human rights group who had been visiting

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<sup>16</sup> Bargewell, *Bargewell Discovery*, 31–32.

<sup>17</sup> Bargewell, *Bargewell Discovery*, iii.

<sup>18</sup> As at Son Thang, the battalion commander exhibited the belief that his Marines were not capable of the type of behavior they were being accused of, despite the lack of investigation at that time.

<sup>19</sup> Bargewell, *Bargewell Discovery*, 4.

<sup>20</sup> Bargewell, *Bargewell Discovery*, 8.

<sup>21</sup> Englade, *Meltdown in Haditha*, 35.

relatives in Haditha the morning of 19 November and had subsequently recorded the bodies at the morgue and the house. McGirk interviewed the man and then contacted the public affairs officer at Marine Corps' top command in Iraq, the Multinational Force-West (MNF-W). Although the officer dismissed both McGirk and another *Time* reporter's concerns and questions, he forwarded the information down the chain of command. Chessani eventually replied again with details from the original faulty report. McGirk intended to travel to Haditha to interview the Marines, but his *Time* editor did not allow him to travel there. In lieu of a visit, he emailed questions, which were answered by a panel of officers from 3d Battalion, 1st Marines. This panel was comprised of Chessani, the battalion's commanding officer; his executive officer, Major Kevin M. Gonzalez; and Captain Lucas M. McConnell and First Lieutenant Adam P. Mathes, the commanders of the company and platoon under which Wuterich's squad was assigned.<sup>22</sup> Notes from a meeting of the panel as they decided how to answer the questions were introduced into evidence during hearings on the killings and showed the disdain for the investigation into the matter, which they considered closed.<sup>23</sup> Examples of the memorandum's tone show the panel's general feelings.

McGirk: How many marines were killed and wounded in the I.E.D. attack that morning?

Memo: If it bleeds, it leads. This question is McGirk's attempt to get good bloody gouge on the situation. He will most likely use the information he gains from this answer as an attention gainer.

And:

McGirk: How many marines were involved in the killings?

Memo: First off, we don't know what you're talking about when you say "killings." One of our squads reinforced by a squad of Iraqi Army soldiers were engaged by an enemy initiated ambush on the 19th that killed one American marine and seriously injured two

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<sup>22</sup> Paul von Zielbauer, "A Marine Tutorial on Media 'Spin,'" *New York Times*, 24 June 2007.

<sup>23</sup> John McChesney, "Marine Officers Strategized Their Haditha Responses," *Morning Edition*, NPR, 12 June 2007.

others. We will not justify that question with a response. Theme: Legitimate engagement: we will not acknowledge this reporter's attempt to stain the engagement with the misnomer "killings."<sup>24</sup>

McGirk, unsatisfied by the assistance he was receiving through the chain of command from the Marine division down, sent a copy of the video to the public affairs officer for the Multinational Corps-Iraq, whose commander, Army lieutenant general Peter W. Chiarelli, had responsibility for the Marines among his other forces.<sup>25</sup> Chiarelli queried his senior Marine commander, Major General Richard C. Zilmer, at MNF-W who had only been in Iraq 10 days at that point, about whether there had been an investigation. Zilmer requested information from Huck at the division headquarters and was sent the official releases from the faulty report and told there had not been an investigation because one had not been warranted. At this point, Chiarelli initiated an Army Regulation 15-6 (AR 15-6) inquiry, led by Colonel Gregory A. Watt from his staff, to investigate whether a more thorough investigation should have been undertaken by Chessani. As in Abu Ghraib with its multitude of investigations of varying scopes and jurisdictions, Chiarelli initiated separate investigations into the matter; the second was Major General Eldon Bargewell's investigation into the reporting, training, and command climate.<sup>26</sup>

Around the same time Major General Bargewell started his investigation, MNF-W's commander, Major General Zilmer, announced on 12 March 2007 that he had requested the Naval Criminal Investigative Service (NCIS) to also conduct a criminal probe. Both Colonel Watt and Major General Bargewell's efforts were noncriminal, fact-finding inquiries and brought the individuals responsible for carrying out the inquiries no real support for their effort, but NCIS fielded the largest contingent of its force to investigate an incident since the 1987 spying-for-the-Soviets scandal by Marine Corps Sergeant Clayton J. Lonetree. Due to the strict parameters of his AR 15-6 inquiry and NCIS's desire to keep witness testimony from being

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<sup>24</sup> Zielbauer, "A Marine Tutorial on Media 'Spin.'"

<sup>25</sup> Tim McGirk and Aparisim Ghosh, "One Morning in Haditha," *Time* 167, no. 13 (2006): 34.

<sup>26</sup> Englade, *Meltdown in Haditha*, 40-45.

influenced by other sources as they investigated, Bargewell and his aides would have access to the information NCIS developed to aid their effort. During the next week, both *Time* and CNN began covering the emerging story, and by the end of May, the Marine Corps' credibility would take another blow as allegations of the assassination of an Iraqi man by a squad of Marines began to be reported (Hamdania).<sup>27</sup>

During the next several months, as members of both bodies of Congress wrangled over whether to hold hearings and special investigations into the incident, details of the day continued to slowly emerge. The casualty count, which had been listed as 15 civilians in the early and oft-quoted faulty reports, was raised to 24 Iraqis. Almost as soon as Bargewell completed and turned in his inquiry for review by Chiarelli, anonymous sources leaked details about the report's condemnation for failures by Marine leaders to investigate the events that day.<sup>28</sup> Bargewell's report was a fraction of the length of NCIS's 3,500-page investigation. At barely more than 100 pages, it was blunt in its assessments that, despite no indication that a large-scale cover-up had occurred, with regard to the reporting requirement and lack of investigation, "there were several obvious indicators from 19 November 2005 to 12 February 2006 that, at a minimum, should have triggered the professional curiosity and duty to pursue an investigation by the officers and senior enlisted leadership." These indicators included the number of casualties, the battalion operations section's suspicion that the platoon had made some erroneous reports, the multiple sets of photographs that had subsequently circulated within the company and raised awareness of the civilian deaths, and the *Time* reporter's allegations of wrongful killings of noncombatants.<sup>29</sup>

Equally damning to the Corps was Bargewell's assessment that the command climate within 3d Battalion, 1st Marines, and higher headquarters may well have contributed to the lack of interest in pursuing an investigation, if not the reckless application of rules of engagement, which he had

<sup>27</sup> Englade, *Meltdown in Haditha*, 45–46.

<sup>28</sup> Eric Schmitt and David Cloud, "General Faults Marine Response to Iraq Killings," *New York Times*, 8 July 2006.

<sup>29</sup> Bargewell, *Bargewell Discovery*, 17–18.



found were taught properly before the deployment.<sup>30</sup> Although Bargewell's AR-15 inquiry had no criminal jurisdiction, he asserted that an investigation into whether the negligence was willful and deliberate enough to warrant criminal charges was warranted.<sup>31</sup> NCIS released its preliminary report six weeks after Bargewell forwarded his to Chiarelli in mid-June 2006. Finally, on 21 December 2007, the Marine Corps announced charges being preferred against eight Marines (four officers and four enlisted), which would require Article 32 hearings.<sup>32</sup> The officers included the battalion commander, Lieutenant Colonel Chessani; the company commander, Captain Lucas McConnell; the battalion staff judge advocate, Captain Randy W. Stone; and the commander of the human exploitation team assigned to Kilo Company, First Lieutenant Andrew Grayson. The enlisted Marines included the squad leader, Staff Sergeant Wuterich, who was promoted in January 2006 before the incident received any real notice; and three of his Marines, Sergeant Dela Cruz and Lance Corporals Justin Sharratt and Stephen Tatum. Absent from the list of charged Marines were Lieutenant Kallop, who had ordered Wuterich to clear Houses 1 and 2, and Corporal Salinas and Private First Class Humberto M. Mendoza, who had both been involved in the clearing of those houses.<sup>33</sup> All three—Kallop, Salinas, and Mendoza—would receive immunity and testify during the hearings and trials.

The first Article 32 hearing to be conducted in May 2007 was for Captain Stone, the battalion's lawyer during its deployment, for failing to follow a lawful order—failing to call for an investigation—and dereliction of duty. The maximum sentences could result in more than two and a half years of imprisonment.<sup>34</sup> Most witnesses throughout his hearing offered testimony that supported Stone's inaction in initiating an investigation, based mainly on the reports from the squad about what had happened and the situation within the town during the previous month's concerning insur-

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<sup>30</sup> Bargewell, *Bargewell Discovery*, 19–21.

<sup>31</sup> Englade, *Meltdown in Haditha*, 77, 83; and Bargewell, *Bargewell Discovery*, 66.

<sup>32</sup> An Article 32 hearing is the military law equivalent of a grand jury where the charges' validity and whether a court-martial is warranted are both determined.

<sup>33</sup> Englade, *Meltdown in Haditha*, 62–64.

<sup>34</sup> Rick Rogers, "Hearing Will Determine Whether a Captain Is Tried," *San Diego (CA) Union Tribune*, 10 May 2007.

gent activity. However, the company's senior enlisted Marine, First Sergeant Albert Espinosa, testified that he inquired why no investigation had yet been undertaken and was told the battalion was taking care of it. He left the country for emergency leave and on returning he assumed an investigation had been completed.<sup>35</sup> After the hearing was complete, the investigating officer recommended to the convening authority that although Captain Stone could have argued for an investigation more forcefully, the lack of action was not criminal, and recommended dispensing with the incident with nonjudicial punishment.<sup>36</sup> The convening authority dismissed the charges and stated in a press release, "It is clear to me that any error of omission or commission by Captain Stone does not warrant action under the Uniform Code of Military Justice."<sup>37</sup>

Starting three weeks after Captain Stone's hearing, the next Article 32 hearing was that of Lieutenant Colonel Chessani, the battalion commander of 3d Battalion, 1st Marines, on 30 May. Chessani had been one of the many commanders within the MNF-W that Major General Bargewell had condemned for their lack of interest and action after the incident. He, along with the company commander, Captain Lucas McConnell, were relieved just after the battalion returned from deployment.<sup>38</sup> Chessani was charged with two counts of dereliction of duty that together could bring a maximum of 12 months in prison.<sup>39</sup> Many of the witnesses called by the defense actually helped the prosecution's case more than Chessani's. Military law does not require the investigating officers of an Article 32 hearing to be lawyers, only that they outrank the accused. Thirty-one days after the end of the hearing, the investigating officer for Chessani's hearing (not a lawyer but a seasoned infantry officer and former commander) turned in a recommendation that was critical of Chessani's choices and judgment, calling for a

<sup>35</sup> Englade, *Meltdown in Haditha*, 38.

<sup>36</sup> Martha Neil, "Marine Lawyer Cleared in Haditha Case," *ABA Journal*, 9 August 2007. Nonjudicial punishment is an administrative punishment that, although not carrying a lifelong record with it outside of the Service, can effectively end a career nonetheless by rendering the awardee less competitive for future promotion or assignment.

<sup>37</sup> Tim Sumner, "Two Haditha Marines Cleared; Still No Apology from John Murtha," 9/11 Families for a Strong America, 10 August 2007."

<sup>38</sup> Adam Tanner, "Two Marines Face Haditha Courts Martial," Reuters, 20 October 2007.

<sup>39</sup> Englade, *Meltdown in Haditha*, 63.

court-martial for dereliction of duty. The fact that the criticism came from a former commander would carry considerable weight with any convening authority. Most damning in the investigating officer's report was the revelation that in Chessani's journal entries to higher headquarters, he claimed to have visited the site of the incident, which the investigating officer said translated to giving the facts in the report a "gold standard" stamp.<sup>40</sup> Despite a blistering, 22-page rebuttal of the investigating officer's report to the convening authority and a second hearing, the convening authority referred two counts of dereliction of duty to court-martial in October 2007.

The third officer accused, Captain Lucas McConnell, received word on 18 September 2007 that the convening authority, Lieutenant General James N. Mattis, had dismissed the charges for failing to ensure proper reporting to higher headquarters and instead issued a grant of immunity and issued an order to cooperate with all parties of the investigations into the incident.<sup>41</sup>

The hearing for the final officer in the case, First Lieutenant Grayson, the leader of the human exploitation cell for Kilo Company, did not occur until after hearings for Lance Corporals Sharratt and Tatum and Staff Sergeant Wuterich in November 2007. Accused of three counts of false official statements, obstructing justice, and trying to get discharged from the Marine Corps illegally, he faced at maximum a 30-year sentence if convicted. Grayson had turned down an offer to accept a nonjudicial punishment—a plea deal for which he would be required to admit trying to cover up the killings—to avoid a potential court-martial, but had resolutely stuck to his claim of innocence.<sup>42</sup> In this particular case, the investigating officer was evaluating charges that were totally unrelated to each other, the destruction of photographs, which brought the charges of obstruction and false official statements and seeking a discharge for which he was not eligible. Like the other three officers, he had retained civilian counsel. Un-

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<sup>40</sup> Englade, *Meltdown in Haditha*, 110–11.

<sup>41</sup> Englade, *Meltdown in Haditha*, 115.

<sup>42</sup> In the military, often nonjudicial punishment will be offered to an accused in a low-level case to guarantee a guilty plea and punishment rather than saddle the government with the expense and time that a court-martial inevitably draws. It is a servicemember's right to refuse this type of punishment and instead request a trial by their peers—a court-martial.

like the others, he chose not to speak on his own behalf. By far one of the briefest hearings, and with the shortest investigating officer report—delivered 3 December 2007 to the convening authority, now Lieutenant General Samuel T. Helland (who had replaced Mattis)—his charges were referred to court-martial on 1 January 2008.<sup>43</sup> Two of the four officers originally charged went to trial.

For the enlisted Marines who had charges preferred, results were mixed. Those of Sergeant Dela Cruz's, totaling five separate counts of unpremeditated murder and carrying the possibility of life in prison without the possibility of parole, were dropped before the start of the Article 32 hearings. According to a statement by the Marine Corps, "Charges against him were dismissed on April 2nd after the government balanced his low level of culpability in the alleged crime against the potential value of his testimony."<sup>44</sup> This was despite his admissions during the NCIS investigation that he and Wuterich had discussed lying about events to investigators four times.

Lance Corporal Sharratt, like Dela Cruz and the also-charged Tatum, was a combat veteran and had experienced remarkably violent urban combat in the previous deployment. He accompanied Wuterich when they searched House 3 and 4 in the afternoon and was charged with three counts of unpremeditated murder for the men he shot in House 4.<sup>45</sup> The charges against him would be difficult to prove. They were based on the witness testimony of the widow and son of one of the men who had been in House 3 and kept under guard as Sharratt and Wuterich entered House 4. Despite not seeing the shooting, their allegation was that Sharratt and Wuterich had moved the four men into an isolated area and executed them. The two rifles that were reported to have been recovered could not be found for the trial. Working against the prosecution was the fact the men were buried quickly as their religion dictated, and without any forensic pathology conducted. The hearing, beginning on 11 June, concluded at the end of the week, and three weeks later the investigating officer

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<sup>43</sup> Englade, *Meltdown in Haditha*, 148–53.

<sup>44</sup> Marty Graham, "Haditha Killing Charges Dropped against Marine," Reuters, 17 April 2007.

<sup>45</sup> Englade, *Meltdown in Haditha*, 64, 118.

submitted their report. While offering that making the offenses noncapital could be an option, they recommended to the convening authority that the charges be dismissed, mainly due to the lack of evidence to support the government's version of the events. This occurred in August during the same briefing in which the charges against Captain Stone were dropped.<sup>46</sup>

Lance Corporal Tatum's hearing began 10 days after the investigating officer in Sharratt's case delivered their report on 16 July. Just as Tatum shared a history of fighting in the same platoon during its previous two deployments, he shared the same investigating officer for his hearing. While the prosecution would certainly have studied the report for clues to the investigating officer's legal reasoning, the cases were different in circumstances and charges. While Sharratt accompanied Wuterich into Houses 3 and 4, Tatum was a part of the initial assaults on Houses 1 and 2. His charges included eight counts each of assault and aggravated assault, a count of reckless endangerment, two counts of unpremeditated murder, four counts of negligent homicide, and he faced life sentences for the murders or up to 30 years for the other charges.<sup>47</sup> Like Sharratt, much of the witness testimony against him came from NCIS agents who had investigated too long after the incident to collect useful or clearly damning evidence against him. Two witnesses who did testify and offered evidence were Mendoza and Dela Cruz. Mendoza offered testimony that Tatum had ignored his warning that there were only women and children in a room he subsequently "cleared," killing all inside, in House 2. Dela Cruz offered testimony that called into question Tatum's attitudes toward noncombatants.<sup>48</sup>

In his statement on his own behalf, Tatum described the inside of the house as dark, dusty, noisy, and confusing. He described his actions as following training—he heard others engaging targets, leading him to believe there were threats present—justifying his aggressive clearing tactics.<sup>49</sup> The investigating officer's report, delivered 23 August, again included two op-

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<sup>46</sup> Dan Whitcomb, "Charges Dropped against 2 Marines in Haditha Case," Reuters, 9 August 2007.

<sup>47</sup> Englade, *Meltdown in Haditha*, 64, 129.

<sup>48</sup> Englade, *Meltdown in Haditha*, 129–32.

<sup>49</sup> Englade, *Meltdown in Haditha*, 132.

tions for the convening authority. The primary recommendation was to dismiss the charges because, while Tatum had definitely killed the people in both House 1 and 2, there was a lack of evidence to conclusively determine that he did so in violation of the rules of engagement.<sup>50</sup> The other option the investigating officer presented was to consolidate some of the charges to incorporate events at both of the houses, which could reduce the burden of evidence required to a degree. In October, following this second option, Mattis referred charges to court-martial for two counts of involuntary manslaughter, and one count each of reckless endangerment and aggravated assault.<sup>51</sup>

The most visible and recognizable of all the Haditha defendants, partly self-made, was Staff Sergeant Wuterich. As the squad leader who encouraged Lieutenant Kallop to allow them to clear the buildings, who gave the order to treat said buildings as hostile as they closed on them, who led the afternoon assault on Houses 3 and 4, and who, according to the NCIS investigation, solicited Sergeant Dela Cruz to lie to investigators, Wuterich was clearly deemed most responsible for the carnage that day. But before he had his Article 32 hearing, he granted an interview to the cable news program *60 Minutes* on 18 March 2007—a month before the Bargewell report was released to the public. During the interview, Wuterich admitted to shooting the men at the blast site and admitted that he did not see muzzle flashes from House 1 before entering, but still largely left the interview as a sympathetic image to many of the viewers. In the aftermath, the Marine Corps was embarrassed that the news crew and Wuterich's lawyer had been able to pull off the interview at a time when the Corps was not making the Marines available to the media. After reviewing the aired interview though, the prosecutors mused that he may have made damning admis-

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<sup>50</sup> A large part of the rules of engagement are the questions of positive identification or of hostile intent. The descriptions of the circumstances in the houses while being cleared lent enough doubt about whether hostile intent was lacking, as several Marines had reported being fired on from the vicinity and the others testified to the sound of an AK-47 being prepared to fire as they entered.

<sup>51</sup> Engle, *Meltdown in Haditha*, 133–35.

sions in the unused footage, thus beginning long procedures to acquire access to that footage and delaying his trial for years.<sup>52</sup>

On the day Wuterich's hearing began, 30 August 2007, Dela Cruz (immunized) and Sharratt's charges had been dropped along with Captain Stone's. Tatum's hearing report had been delivered to the convening authority the week before, but it would be months before decisions on his, Chessani, or Grayson's fates. Since Sharratt's charges had been dismissed, Wuterich's prosecutors dropped the charge against him for murder in the case of the fourth man in House 4.<sup>53</sup> Called again to testify against Wuterich were Mendoza and Dela Cruz, members of his squad, and those present at the attacks. Additionally, several other witnesses were called to clarify training regimes and protocols on the rules of engagement as they were taught during the predeployment training. The hearing lasted only three days and ended 6 September. The report from the investigating officer, the same one who investigated Sharratt and Tatum, was delivered less than a month later. Again, the investigating officer believed the government failed to provide enough evidence to prove the capital charges of murder and recommended that lesser charges be referred to court-martial. The convening authority, by this time Lieutenant General Helland, eventually forwarded up nine counts of voluntary manslaughter, two counts of aggravated assault, three counts of willful dereliction of duty, and one count of obstruction of justice some 25 months after the incident occurred.<sup>54</sup>

The dismissal of charges against two of the officers, Dela Cruz and Sharratt, all demonstrate the difficulties that often exist in utilizing the UCMJ to prosecute violations of the law of war. Despite the knowledge that two of the individuals had, in fact, killed noncombatants, because the incidents did not meet all the technical elements of the articles they were under, the cases were deemed too weak to take to a trial. Additionally, in Dela Cruz's case, the grant of immunity showed a lack of confidence by the prosecution in proceeding with other trials without testimony from a member

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<sup>52</sup> Rick Rogers, "Corps Subpoenas Outtakes from '60 Minutes' Interviews," *San Diego (CA) Union-Tribune*, 1 February 2008.

<sup>53</sup> Englade, *Meltdown in Haditha*, 137; and Michelle Singer, "The Killings in Haditha," *60 Minutes*, CBS News, 15 March 2007.

<sup>54</sup> Englade, *Meltdown in Haditha*, 136–41, 145–47.

of the squad, otherwise his collateral admissions of guilt would have seen him punished for at least two other UCMJ violations. While there are many details to hearings and trials presented throughout the case studies examined here, they are crucial to understanding the limitations of the UCMJ in prosecuting these types of crimes. Lastly, despite Mattis's dismissal of charges in a few of the cases, his decision to proceed in Tatum's trial suggests that he wished to achieve accountability. All of this bears consideration as we examine the outcomes of the trials that followed.

In early 2008, the team of prosecutors appointed by the convening authority released its proposed trial calendar, which began with Staff Sergeant Wuterich's trial to be held on 28 February and was followed by the trials of Lance Corporal Tatum (28 March), Lieutenant Colonel Chessani (28 April), and Lieutenant Grayson (28 May). Like many plans in combat, this one did not survive long. Prosecutors subpoenaed the unused footage from Wuterich's *60 Minutes* video in mid-January, but CBS asked the military judge to quash the subpoena, citing protected First Amendment rights. This began a series of rulings, appeals, and cross-appeals that delayed the trial for more than two and a half years.<sup>55</sup>

Lance Corporal Tatum appeared on 28 March only to have the charges dismissed and immunity granted in exchange for testifying in the remaining trials.<sup>56</sup> He was not considered a very cooperative witness for the prosecution, as he had to be ordered to speak to the prosecutors.<sup>57</sup> This sort of mistake from prosecutors was seen before during the Son Thang trials and can be attributed to the general lack of experience in trials for military prosecutors where it was necessary to grant immunity to witnesses in exchange for their testimony.<sup>58</sup>

From the start, Lieutenant Colonel Chessani's trial was an up-hill battle. Early in the proceeding, the prosecution had to respond to allegations

<sup>55</sup> Englade, *Meltdown in Haditha*, 155–57.

<sup>56</sup> Tony Perry, "Charges Against Third Marine Dropped in Massacre of Civilians," *Los Angeles (CA) Times*, 29 March 2008.

<sup>57</sup> Englade, *Meltdown in Haditha*, 205.

<sup>58</sup> The author had several conversations with Gary Solis, a former military prosecutor, and author of one of the premier sources on Son Thang, about the general lack of trial experience many military lawyers accrue due to the inclination of commanders to settle cases through nonjudicial punishment when possible.



of unlawful command influence, which can destroy cases during military courts-martial.<sup>59</sup> After several witnesses, including the surprising inclusion of then-general Mattis, and a rather lengthy break to consider the testimony he had heard, the staff judge advocate hearing the case decided to find in favor of the defense, that the “appearance” of unlawful command influence was present and enough to throw out the case as it had been brought forward by the command (which had been under Mattis’s direction for a time).<sup>60</sup> The crux of the matter was that Mattis, duell-hatted as the commander of the Marine component of Central Command (MARCENT) and the I Marine Expeditionary Force (I MEF) had allowed his lawyer from I MEF, who had been an investigator for Bargewell, to sit in on meetings of the Haditha case—a MARCENT legal proceeding. The judge did not dismiss the charges with prejudice, which allowed the prosecution to reprefer the charges under a different command free of the alleged command influence.

After spending months attempting an appeal on this point failed, in June 2009 the prosecution decided to move the case to the purview of the three-star general in charge of the Marine Corps Combat Development Command at Quantico, Virginia, which oversaw everything from training and education for the Marine Corps to force requirements development and validation. After three months of deliberation, the new convening authority determined there would be little chance of a successful prosecution—starting over from the beginning and even longer after the incident—and dismissed the criminal charges. Despite the reprieve from a criminal trial, Chessani went before a board of inquiry to determine whether he would be allowed to retire as a lieutenant colonel or would be demoted to major for the failings during his command. During this proceeding, he was much more vociferous in his own defense and questioned

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<sup>59</sup> The interest or actions taken to intervene or influence a case by a commander has been deemed unlawful and upheld repeatedly by the highest appeals courts available to servicemembers. Every commander is educated about the effects of unlawful command influence on a case and all who have lawyers assigned to their units are reminded often how not only actions but appearances of unlawful command influence can be grounds to have a case thrown out.

<sup>60</sup> Four-star general officers are rarely called to give testimony, so Mattis’s testimony and the aggressive way the defense challenged his decisions was quite extraordinary.

the Marine Corps' lack of charges against his seniors, especially Davis and Huck, who were both given letters of censure by the secretary of the Navy rather than being charged. In the end, the board of inquiry found that while his performance had been substandard, it had not constituted misconduct and ruled in favor of Chessani. He retired a year and a half later in July 2011 as a lieutenant colonel.<sup>61</sup>

Wuterich came to court to schedule his trial following the back and forth between the Corps, the courts, and CBS in March 2010. Unsurprisingly, since Chessani's case had been dismissed due to unlawful command influence, Wuterich's lawyers moved to have his case likewise dismissed. After a nearly identical parade of witnesses, including General Mattis, Wuterich's lawyer (who had also presided over two of the eight Hamdania trials) found any existing influence had not and would not affect the proceedings and scheduled trial to resume in September.<sup>62</sup> Before they could get to Wuterich's trial, though, a ruling in another case—that of the squad leader in an incident at Hamdania, would cause his lawyer to change tactics. In the Hamdania case, the squad leader's conviction was overturned—temporarily, as the appeals court would reinstate the conviction—because his military lawyer had separated during the course of the long charging-to-prosecution period. This prompted Wuterich's lawyer to attempt a similar tack in August, as one of his originally assigned military lawyers separated, and although he initially took the case as a civilian, he did not realize his firm already represented one of the immunized Marines who would serve as a witness against him, which prompted his resignation. It took months to get a decision and then, more than a year's worth of appeals later, Wuterich's defense was told it needed to be ready for trial.<sup>63</sup>

Finally, on 5 January 2012—four years after he had been charged—Wuterich's court-martial began. Although the prosecution called many witnesses in the first 10 days, including Tatum, Dela Cruz, and other immunized members of 3d Battalion, 1st Marines, plus NCIS agents who had investigated the event, the case seemed to be in trouble. Following an un-

<sup>61</sup> Englade, *Meltdown in Haditha*, 186–91.

<sup>62</sup> Mark Walker, "Haditha's Last Defendant," *North County Times* (San Diego, CA), 20 February 2010; and Englade, *Meltdown in Haditha*, 193–94.

<sup>63</sup> Englade, *Meltdown in Haditha*, 195–99.

announced recess on 19 January, there was reason to believe that a plea deal was being made. Court resumed the next day, however, and heading into that weekend it looked like the prosecution may be staying the course. On the following Monday, the courtroom was shocked by the judge's announcement that a deal had been reached between Wuterich's lawyers and Lieutenant General Thomas D. Waldhauser, the convening authority. Wuterich pled guilty to the negligent dereliction of duty charge in exchange for dismissal of the other charges, and no jail time (the maximum carried by that lesser offense would have been a mere 90 days). The military judge came close to losing his mandated dispassion when during sentencing he told the court, "It's difficult for me to fathom negligent dereliction of duty worse than the facts of this case." Because Wuterich was a single father of three young girls, the judge eschewed the fine, leaving Wuterich's only punishment a reduction to private.<sup>64</sup> The Corps would dismiss him with a "general under honorable conditions" discharge, one level below its best "honorable" characterization a month later.<sup>65</sup>

In all six Article 32 hearings and the four trials that followed, the defense teams for the accused were buttressed by civilian lawyers. Most of these were lawyers with prior military or military law experience in addition to their accumulated civilian legal defense experience. This meant that often the defense was operating from a position of relative strength regarding the proficiency of their legal experience. For the Corps' part, the last time that it had to mobilize a sizeable contingent of lawyers to prosecute the murder of multiple noncombatants was in 1970 following the events at Son Thang. From that incident's occurrence to the final trial's verdict, a mere 6 months occurred, as opposed to the 25 months from incident to referral of all charges to courts-martial following the Article 32 hearing for the Haditha case. Another murder case committed by Marines against an

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<sup>64</sup> A sergeant (E-5, or the Corps' fifth-senior of nine enlisted pay grades) at the time of the incident, he had been promoted to staff sergeant (E-6) while deployed before the investigation into the incident started. The reduction to private (E-1) would mean little other than to employers who would view his discharge paperwork and have suspicions about why a Marine with 12 years of service exited the Corps at its junior-most grade.

<sup>65</sup> The actual discharge was a general under honorable conditions, which only reduces benefits from the Veterans Administration in limited ways.

Iraqi in Hamdania in April 2006 saw prosecution of seven Marines and one Navy corpsman begin 5 months after the incident and conclude with eight convictions less than 10 months later.<sup>66</sup> To be fair, in the Haditha case, the time from crime to discovery was longer and real investigation into the incident did not occur until the unit had rotated back to the United States, complicating many processes.

When the real details emerged about the Haditha incident, it was a March 2006 *Time* article that provided the public with the news that the Marine Corps' press release back in November 2005 was patently incorrect. It told of the video taken in the immediate aftermath once the bodies were removed and described the demographics of those killed, which included a disproportionate number of women and children.<sup>67</sup> A conservative news watchdog organization published results of a study in June that compared the 99 stories on cable network news shows regarding new charges and allegations against the Marines with the relatively paltry coverage of the squad members' explanations for what had happened following the *Washington Post's* coverage of an interview with Wuterich.<sup>68</sup> Much of the coverage came in fits and starts after the initial spate of coverage until representative John P. Murtha (D-PA), a former Marine who had been calling for the removal of troops from Iraq since November 2005, began to make charges of a cover-up despite the findings of the Bargewell report.<sup>69</sup> During these months until the following year, public opinion was mainly characterized by shock and disappointment in the conduct of the Marines.<sup>70</sup> In March 2007, just months before the Article 32 hearings were set to begin, *60 Minutes* aired its interview with Wuterich. This interview put his face and "boy next door" personality into the public's consciousness, and it delivered better results than the defense could have hoped. It shift-

<sup>66</sup> Paul von Zielbauer, "Marine Is Guilty of Unpremeditated Murder of an Iraqi Man," *New York Times*, 3 August 2007.

<sup>67</sup> McGirk and Ghosh, "One Morning in Haditha," 34.

<sup>68</sup> "Hyped Haditha 'Massacre' but Little Interest in Marine's Version," *NewsBusters* (blog), Media Research Center, 13 June 2006.

<sup>69</sup> Englade, *Meltdown in Haditha*, 48–65.

<sup>70</sup> NBC News/*Wall Street Journal* polling data in study no. 6063 from 9–12 June 2006 showed that a majority of Americans thought the incident would cause a setback in the U.S. relationship with the Muslim world and those involved should be reprimanded or held criminally responsible.

ed the public opinion to see the squad as merely “trying to do their job,” and victims of an aggressive, liberal media trying to label them as cold-blooded killers while ignoring their version of what happened. Donations for their court costs from viewers impressed by Wuterich’s unflustered performance in the face of the investigator’s questions and a more pronounced defense of the squad members in the public sphere followed.<sup>71</sup>

In addition to the hearings and trials that followed, their guilt and innocence were being argued in editorial sections in print and cable television shows across the country. This occurred in the halls of Congress as well, where lawmakers haggled over why and how to investigate further as they used the incident to indict each other’s positions on support for or opposition to the war. This parallels much of the same ebb and flow of feelings that occurred after My Lai came to light, showing an initial revulsion at the loss of discipline or actions of the servicemembers involved but then a rush to dismiss the actions as a product of training or circumstance. As with My Lai and Son Thang, the Marine Corps had concerns about the public perception effects of the Haditha incident on its recruiting efforts, but equally concerning was the possible impact to support due to the loss of prestige within the halls of Congress.

While civilian lawyers had joined a majority of the defense teams in previous case studies explored here, by the time of the Iraq law of war violation cases it became even more prevalent. Every member of the Haditha accused had some form of civilian representation, often with military law experience, in addition to government-appointed counsel. This provided a two-fold advantage to the defenses—both a deeper reservoir of experience in dealing with the types of crimes (they viewed them simply as murder cases rather than law of war cases) and familiarity with the military legal system’s many additional constraints and levers to provide options for a defense. This includes using allegations of unlawful command influence to seek dismissal or delay for more time. Time was also a weapon wielded by the defense. Lawyers in the military, like every other profession, execute orders to new duty stations and are subject to limits on their service. While a change of assignment locale may be waived due to participation

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<sup>71</sup> Englade, *Meltdown in Haditha*, 74.

in a high-profile case, service limits often cannot be avoided, which, in the Haditha cases, was shown by Wuterich's original judge retiring and members of his defense team moving on to civilian life.<sup>72</sup> Additionally, three different convening authorities held responsibility for Wuterich's trial during the years it took to conduct.

Although the investigations after My Lai showed that while an education regime was in place for units during Vietnam, as well as refresher training and reminder cards for the troops to carry, they also showed that Calley's unit did not receive some of the required predeployment training and that what they did receive was probably less than effective. Additionally, the in-country classes and cards were both less formalized than they should have been. Bargewell's report on 3d Battalion, 1st Marines, following Haditha, on the other hand, found that there were effective classes given and the Marines understood the implications of noncombatant status. That said, the command climate did little to reinforce the classes and probably undermined efforts by lower-level leaders to keep their Marines within the legal boundaries. One of Bargewell's recommendations was taken for immediate action with all future units that were undergoing training to deploy to Iraq: using operational contingency funding, extra-budgetary funds the Services received from Congress to address shortfalls pertaining to Operations Iraqi Freedom and Enduring Freedom, role players that spoke Arabic and portrayed noncombatants were added to all pre-deployment exercises.<sup>73</sup>

The charges levied against Captain Stone, the lawyer attached to 3d Battalion, 1st Marines, as part of the program ensuring commanders had

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<sup>72</sup> One member of Wuterich's legal team remained attached to his defense after separating from the military as a partner to his primary attorney, although the other was forced to quit due to conflict of interest and added to the delays before trial when the defense sought to use the same motion Sgt Hutchins tried in the Hamdania case.

<sup>73</sup> Prior to deployment, Marines were given class seats for a percentage of each unit to go through language and culture training developed by the now-shuttered Marine Corps Center for Advanced Operational Culture Learning. Additionally, Marines attending the required Mohave Viper training package at the Marine Corps Air Ground Combat Center in Twentynine Palms, CA, and in small unit training at their home stations were tested in scenarios with Arabic-speaking role players representing both combatants and noncombatants to prepare the Marines for quickly evolving situations in urban terrain.

access to legal advice in the often-fluid battlefield of an insurgency, also identified another change that the Marine Corps would affect. Bargewell identified Stone's deficiency in persuading Chessani in many matters as a result of his late arrival to the battalion's staff. He was thought of as an extra staff officer rather than a key member of the commander's inner circle of advisors. Henceforth, the Marine Corps made efforts to assign lawyers to deploying combat units much earlier in their predeployment training. This gave the lawyer a chance to develop relationships with the unit's leadership, giving the required law of war classes, offering legal interpretations and opinions on training scenario results, and gaining credibility among the commanders and rest of the staff.

There were several circumstances from the incident at Haditha that mirrored earlier cases discussed from World War II and the Vietnam War. Among these was the inexperience of several key leaders whose decisions in the critical moments were ultimately consequential to the outcome. Then-sergeant Wuterich, who ordered his men to treat the houses as hostile in the wake of an IED blast, had not deployed to combat before this tour, and his assignment to a unit like 3d Battalion, 1st Marines, whose reputation after the fighting in Fallujah was well-known across the Corps, would have come with a moderate degree of pressure as the leader of many highly experienced Marines. This resembled the soldiers who, in their first action in Sicily, committed war crimes at Biscari as well as Lieutenant William Calley's relative inexperience in the operation during which the My Lai massacre occurred. Additionally, Lieutenant Kallop, senior to Wuterich in rank, and who gave the fairly ambiguous order of "Clear South" was also new to combat and seemed staggered by the sight of Terrazas's torn body and the demolished HMMWV as he arrived on the scene.<sup>74</sup> Terrazas had been a highly popular member not only of the squad but the whole company. A veteran of the previous deployment to Fallujah and a survivor of the most notorious fighting in a building that came to be known as the "Hell House," which gave the Corps one of its most iconic photographic images since Vietnam, his loss profoundly affected members of the squad who

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<sup>74</sup> Englade, *Meltdown in Haditha*, 21.

had deployed to Fallujah together and, according to the prosecution, was responsible for the over-aggressive response from the squad.

The Bargewell report was highly critical of the several aspects of the unit on that day and its command climate—in particular its attitudes toward civilian casualties. Although Bargewell found the unit had sufficient predeployment training in both the law of war and in acting within the rules of engagement, he felt the command climate may have discouraged the disciplined application of rules of engagement and contributed to poor execution of their standard operating procedures in response to enemy contact.<sup>75</sup> The command climate of a unit is affected by many factors. It normally starts with the philosophy of its leader but is an aggregate of the experiences of its members, their training and education, unit esprit de corps, proficiency, and how evenly and the level at which discipline is regulated and applied. With a large number of Marines having deployed to Fallujah the previous deployment, their experiences in urban combat deeply affected the command's climate in both positive and negative ways. Unit pride and proficiency in combat were high, but attitudes toward non-combatants were ambivalent and almost negative. Views of noncombatant casualties as the cost of doing business or the result of the type of warfare the insurgents chose were noted in members throughout the command during Bargewell's investigation.<sup>76</sup> This specific aspect of the command climate is similar to the attitudes of the Marines and soldiers in the Son Thang and My Lai cases, who both viewed the population as indifferent if not outright hostile presences. Just as Vietnam veterans refer to a "mere gook rule," belying an attitude of ambivalence toward the fate of the population they were supposed to be protecting, the lack of interest in Haditha's high number of civilian casualties showed similar apathy.

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<sup>75</sup> Bargewell, *Bargewell Discovery*, 18, 21.

<sup>76</sup> Englade, *Meltdown in Haditha*, 18, 22.



## CHAPTER 9

### Mahmudiyah<sup>1</sup>

Arriving in Iraq at nearly the same time as the Marines of 3d Battalion, 1st Marine Regiment, the soldiers of the Army's 1st Battalion, 502d Infantry Regiment, took over an area of operations to the south of Baghdad in an area known as the Triangle of Death.<sup>2</sup> Part of the 2d Brigade Combat Team of the 101st Airborne Division, they were assigned to a roughly 12-month deployment and replaced the 48th Infantry Brigade of the Georgia National Guard who had assumed that territory in June 2005. Newly arriving units almost always, rightfully or not, feel either that their predecessors could have done more or that their plan will succeed where their predecessors had failed, and this case was no different. The 48th Infantry Brigade

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<sup>1</sup> Like My Lai and Son Thang, the Mahmudiyah Massacre, as it is known in most print and online forums, is misnamed. While the headquarters of the battalion of which the soldiers responsible were members were billeted in a forward operating base near Mahmudiyah, the battalion's area of operations was large, and the brutal rape of 14-year-old Abeer al-Janabi and the murder of her and her family actually took place in a slightly more rural section of the battalion's area, in al-Yusufiyah, 9.6 kilometers to the west. The name Mahmudiyah is retained in this book to facilitate any additional research a reader may undertake in the future. Freedom of Information Act requests were submitted in March 2021 to the Army's Judge Advocate General (JAG) Corps for court transcripts and to Army Criminal Investigation Division (CID) for a copy of its investigation, and as of the final edits, only a heavily redacted copy of the investigation's summary from CID and an email from the JAG Corps to say the request is still in process has been received. The horrific details of the atrocity were well documented in Jim Frederick, *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* (New York: Crown Publishing, 2010) in much more graphic detail than in this case study. His book used copies of the AR-15 reports, interviews with the subjects, and court transcripts and is used here in large measure along with newspaper reports until the official Army transcripts are received. As Frederick is deceased, a request was sent to his wife to access any notes and transcripts he left behind but was not answered.

<sup>2</sup> The majority of the 502d Infantry Regiment left Fort Campbell, KY, in late September and arrived in Iraq in early October 2005.

had endured more than two dozen casualties in the three short months it was responsible for the area before it was relocated to the south near an-Nasiriyah, a much quieter area.<sup>3</sup> During the transfer of authority between the units, as members of each conducted ride-along convoys and patrols together to raise the 502d Infantry Regiment's situational awareness and understanding of the battlespace, the soldiers of the 502d Infantry Regiment quickly gained the perception that after taking a large number of casualties early on in their fight, the 48th Infantry Brigade had ceded terrain to the enemy's initiative. An example of this was the quick determination to label roads "black"—closed to friendly forces traffic—after improvised explosive devices (IEDs) exploded and killed a number of "48th men" on those roads.<sup>4</sup>

While the 502d Infantry Regiment knew it was going to deploy to Iraq for its entire predeployment cycle of training, the specific area was changed just two months before deployment. Rather than the convoy security mission its soldiers trained for, the brigade was assigned to relieve the much-battered guard unit. As with most units in the Army and Marine Corps at this point in the war, the brigade included many combat veterans. Despite some misgivings on the parts of the company leaders about their battalion commander, the unit arrived in Iraq with plenty of confidence and swagger. The veterans, while not wholly sold on a hearts-and-minds approach, included enough who believed in current population-centric counterinsurgency principles to lead the way.<sup>5</sup> Each of the battalion's companies familiarized themselves to the individual areas of responsibility. Company B (Bravo), considered well-led during the predeployment training, received an especially restive area, and its 1st Platoon eventually suffered a near-total breakdown in its psyche and discipline during the sustained operations. This was aided by a horrid command climate, despite the best efforts of its junior and midlevel leaders.

Among the leaders in 1st Platoon who embraced their interaction with the population as essential to success was Sergeant Kenith Casica,

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<sup>3</sup> Monte Morin, "48th Nears End of Tough Tour in Iraq," *Stars and Stripes*, 26 March 2006.

<sup>4</sup> Frederick, *Black Hearts*, 55, 64.

<sup>5</sup> Frederick, *Black Hearts*, 28–38.

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a 32-year-old team leader on his second Iraq tour who was genuinely affable and well-liked by the entire company. He had joined the Army for a better life for his family and offered his home to many of the young, unmarried soldiers as a place of respite from the base in their off-time. His friendliness extended to the Iraqis, and he was often heard to say that “if the point of being here was to help people, then let’s help them.”<sup>6</sup> He spent his time reinforcing to his squad the importance of developing good relations with the Iraqi people. There were, however, others within the platoon who would have been described as “not suitable for service in the military” only a few years earlier.

Two such men within the platoon were Specialist James Barker, who had a history that included gangs, drugs, and allegations of the abuse of his son, and Private Steven D. Green, who had joined the Army with a “moral waiver” due to his previous brushes with the law. Barker was generally viewed as a good soldier to be beside in combat but immature and not very dependable otherwise. Green was described as “never not talking,” and often that steady vocal stream included hate-filled diatribes about race or religion or proclaiming his willingness to kill anyone his superiors ordered him to kill.<sup>7</sup> By 2006, the Army granted waivers to one out of five new recruits because of criminal records, which, combined with an exodus of midlevel enlisted and officers, meant that once in the Army, these inexperienced and often less-than-ideal soldiers could move up the ranks quickly and exercise influence over others.<sup>8</sup> Helping to push the Army toward granting these waivers was the George W. Bush administration’s decision to go to war with less force strength than desired by the military leadership and its reluctance to use large numbers of Reserves—limiting the effects of the war felt by the American public. As the deployment wore on, the effects of casualties, stress, and uncertainty would stress the moral foundation of this platoon past its limit.

Two months into the deployment, the company had already taken a high number of casualties and killed, including two platoon command-

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<sup>6</sup> Frederick, *Black Hearts*, 67–68.

<sup>7</sup> Frederick, *Black Hearts*, 71.

<sup>8</sup> Andrew Tilghman, “The Army’s Other Crisis,” *Washington Monthly*, 1 December 2007.

ers and the company's senior enlisted soldier. In December, though, Casica and another soldier were killed at a vehicle checkpoint by an Iraqi man who had walked up to the position and been greeted amiably by Casica before pulling out a pistol and shooting Casica point-blank. This incident was cited by many members of the platoon as a tipping point, after which it became nearly impossible for them to view the noncombatants in any sort of sympathetic light. As in the Vietnam and Haditha case studies, an apathy regarding the fate of noncombatants became overwhelming within the platoon.

After showing severe reactions to Casica's death, Green visited the combat stress detachment on Forward Operating Base Mahmudiyah and was evaluated by a psychiatrist. The doctor's notes included observations of abnormal eye contact and anger and that Green expressed homicidal ideations, especially thoughts about killing Iraqi civilians. Although the doctor reported back to his chain of command that he "needed a little bit more counseling," he would not be seen again until after the incident this case study examines.<sup>9</sup> During the next several months, the platoon experienced several other incidents that resulted in casualties, further decimating the company and platoon reserve of experienced leadership. Compounding this problem was the length of Army deployments and its policy to send soldiers for two weeks of leave in the middle of their combat tours, at times leaving frontline units already lacking leaders further undersupervised.

In March 2006, this particular problem caused the dysfunction and criminal intent of a few to go unchecked until it boiled over into violent deed. The third squad leader, Staff Sergeant Eric Lauzier, had departed for his midtour leave with the platoon distributed among several traffic control points (TCPs) spread out within Bravo Company's area. The bare minimum of six soldiers were left to support TCP 2. Leading this group was Specialist Paul E. Cortez, a soldier who was eligible to be promoted to sergeant soon, but who had a relatively poor reputation among the unit. He had succumbed to an anxiety attack and been excused from a patrol just weeks earlier before Lauzier left. Now, he was alone and in charge of

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<sup>9</sup> Frederick, *Black Hearts*, 157–58.

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Barker and Green—both of whom were a handful even for experienced and confident leaders—Privates First Class Jesse V. Spielman, Bryan L. Howard, and Private Seth Scheller. Both Howard and Scheller were new to the unit, arriving after the deployment began, and Spielman was a 21-year-old who had been with the unit from the beginning of the deployment but was still relatively new to the Army.<sup>10</sup> During the previous few months, drinking alcohol procured and sold by the Iraqi Army that operated with them had become almost commonplace among members of the platoon—contrary to General Order no. 1's prohibition of any consumption of alcohol for all forces deployed to Iraq.<sup>11</sup> A few days into their group's rotation at TCP 2, Cortez, Barker, and Green had been drinking in the morning while the others were on watch when their talk turned dark.<sup>12</sup> Green had been blustering about killing some Iraqis at the control point and saying they were trying to run through the TCP. At this point, Barker suggested instead they go to a nearby house he knew and rape a girl he had seen while on patrol. Unbelievably, the three started to talk about how to do it throughout the morning while playing cards and drinking, and by afternoon were drunk enough that they decided to execute their plan. They grabbed Spielman and told him they were leaving and that he must come along and stand guard as they took the girl and murdered the family. Howard and Scheller were left behind at the TCP with a radio in case anyone

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<sup>10</sup> Spielman was one of the frequent guests of Sgt Casica's house before deployment and viewed Casica as a role model. Frederick, *Black Hearts*.

<sup>11</sup> General Order Number 1 was issued by Gen Norman Schwarzkopf during the Gulf War with the intent to ensure U.S. military personnel were respectful of the local culture; and it prohibited all soldiers from possessing, making, selling, or consuming alcoholic beverages.

<sup>12</sup> The squads of whichever platoon was assigned to man traffic control points in the area would rotate through a series of six points throughout their assigned time. Each point would be guarded by a group for a period of days, up to a week, before rotating. While proper manning would be more than a squad at each point to allow proper rest, security, and quick reaction force for the TCP, the casualties and leave left Bravo Company able only to staff a bare minimum of soldiers who effectively were on watch and then in a state or ready reserve constantly—both physically and mentally draining. The group led by Cortez was so short of a squad that it could hardly be called such and had been left in place for more than two weeks.

approached their position, and while they tried to call the group back several times, they were unsuccessful.<sup>13</sup>

As they left the TCP, wearing all black to conceal their identities (except Green who only removed his uniform patches), they moved quickly to the house several hundred meters away. From previous patrols, Barker had seen that this house was occupied only by a man, his wife, and two younger girls during the day while the sons were at school. He did not know the age of the oldest girl, just that she seemed tall enough to be in her teens or early twenties. After cutting through a chain link fence close to the house, they split up and performed the actions they had planned back at the TCP. Green and Spielman located the father, Qassim Hamzah Rashid al-Janabi, and his 6-year-old daughter Hadeel and began moving them to a room in the house after Cortez and Barker cleared it and gained control of the mother, Fakhriah, and 14-year-old Abeer. After corralling the rest of the family into a bedroom with Green, who was given the family's AK-47, Barker and Cortez forced Abeer to the living room.<sup>14</sup>

While Cortez and Barker prepared to rape Abeer, Green was losing control of the rest of the family in the bedroom. As their screaming and protestations grew louder, Fakhriah made a break for the door and Green shot her in the back with the AK-47. Qassim immediately leapt into action and Green attempted to shoot him too, but the rifle jammed. He switched to his shotgun and shot Qassim once in the head and twice in the body before turning on the little girl running toward a corner. He unjammed the AK-47 and shot her in the head. Spielman, who had been standing watch outside came in at the commotion and, seeing the carnage, berated Green but helped him pick up the spent shotgun shells they could find. As Spielman finished cleaning up the shells, Green then joined Barker and Cortez, who had both raped Abeer by this time, pronounced, "They're all dead. I killed them all," and then raped Abeer as well. Spielman, rejoining the group, lifted her dress and touched her before Barker, returning with a kerosene lamp he had found, doused her legs and torso with accelerant and

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<sup>13</sup> Frederick, *Black Hearts*, 258–62.

<sup>14</sup> Frederick, *Black Hearts*, 254–65.

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lit her on fire. Green, hoping to burn down the house, opened a propane tank valve in the kitchen before the group left, running back to the TCP.<sup>15</sup>

An hour or so later, there was a knock on the door of Fakriah's cousin, Abu Muhammad, who lived about a kilometer away, and her neighbor alerted him to something amiss, telling him, "You must come." Qassim's two sons had come home and were outside the house wailing when he arrived at the smoking house. Cautiously moving around the house to verify it was safe to enter, he saw three bodies in a bedroom and another body—on fire—in the living room. Telling the boys to stay outside, he ran in to check for any survivors and finding none, attempted to put out Abeer's smoldering body by making repeated trips to a nearby canal and filling a teapot he found to dump over her remains. With no witnesses and having little evidence, he went to a nearby Iraqi Army outpost to report the murders. They, in turn, went to the Americans nearby to alert them to what they believed was insurgent-perpetrated violence. The soldiers that were called out included members of 1st Platoon—and Cortez and Spielman—who conducted a cursory investigation, taking photographs for higher headquarters and documenting what they found. Leading these soldiers was Sergeant Anthony Yribe, who, on his second deployment to Iraq, was now calloused to the violence but found a shotgun shell that he thought was curious.

Later that evening, while returning Cortez and Spielman to their position, he encountered Green, who told Yribe he had done it. Yribe, who thought Green was merely acting out as he was prone to do, dismissed it until later before confronting him again and did not report the encounter. Yribe went back to Green later, although Green then said he would not say more because he would leave Iraq free or dead. After forcing him to talk and hearing enough to confirm Green had not learned the details by listening to radio transmissions, Yribe told Green if he did not find his way out of the Army, he would kill him. Green went back to the combat stress detachment for the first time since December and, after his eval-

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<sup>15</sup> "Soldier Weeps Describing Role in Rape and Killings in Iraq," *New York Times*, 22 February 2007.

uation, was deemed to have a preexisting social disorder and separated from the Army.<sup>16</sup>

Due to the unprecedented levels of violence, especially sectarian violence between Sunni and Shia, across Iraq during this period, when the al-Janabis were found there were no immediate suspicions of who had perpetrated the horrific crime. It was investigated by the Americans and Iraqi police, and there were just as many who believed it to be sectarian violence as inflicted by soldiers or by some common criminal element.<sup>17</sup> Not until months later, on 16 June, when three members of the company were killed, and two of their bodies taken by insurgents, did the mystery begin to unravel. Word reached the platoon that one of the soldiers killed was an especially well-liked soldier who had been due to leave the Service but was stopped due to manpower shortage policies. Hearing this, Sergeant Yribe had remarked in a conversation to a young soldier, Private First Class Justin Watt, it was just like Iraq that the good men were killed while murderers got away. Watt asked what he meant, and after Yribe recounted Green's admission, Watt stated that he did not understand how one soldier could sneak away and control an entire family and perpetrate that crime. He then investigated on his own during the following days. Feigning that he knew more than he did, he engaged Howard in a conversation on 19 June about all the terrible things they had seen in Iraq and learned of the involvement of the others. On 23 June, he tried to get assistance from outside the chain of command by talking to a staff sergeant from the combat stress detachment but revealed what he knew to a sergeant he trusted in his unit who in turn relayed it to platoon and company leadership. At that point, it was elevated to the battalion commander who, though dubious of the claim, initiated an investigation on 24 June.<sup>18</sup>

<sup>16</sup> Brett Barrouquere, "Ex-soldier Trial for Rape, Murder in Iraq Opens," *San Diego (CA) Union-Tribune*, 27 April 2009; and Frederick, *Black Hearts*, 279–81.

<sup>17</sup> "Pentagon: Violence in Iraq Rising," *CBS News*, 3 September 2006. Due to the amount of violence in the vicinity at the time and initial belief, even by Iraqis, that the rape and murders were committed by insurgents, there was no contemporary Western coverage of the crime. In his book, Frederick used interviews with the company commander and senior enlisted leader to describe the meeting with local officials where they inquired about the Iraqi knowledge or theories about the perpetrators. Frederick, *Black Hearts*, 272.

<sup>18</sup> Frederick, *Black Hearts*, 317–21.



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By early July, a second AR-15 investigation into how several soldiers could leave a post and commit such a heinous crime was underway, and simultaneously Army authorities had notified federal law enforcement in the United States that a soldier who had been discharged, Green, was now believed to be involved in a rape and multiple homicide, setting in motion the FBI's efforts to track him down and detain him. Charges for the soldiers still active in the Army extended beyond the four perpetrators of the crime. Specialists Cortez and Barker and Privates First Class Spielman and Howard were all charged with counts of rape and murder.<sup>19</sup> Sergeant Yrube was charged with dereliction of duty for failing to report the crime. Private Scheller maintained he knew nothing of the plan before or after the attack due to being on guard in the vehicle away from everyone else. The other defendants' testimonies supported that, and he was not charged. The platoon commander, who had been on leave, as well as the company commander were both relieved on 16 August and given letters of reprimand.

Despite a lack of forensic evidence due to the length of time from the crime until the start of the investigation and the refusal of the extended al-Janabi family to allow the victims to be exhumed for examination, there were strong cases against several of the platoon members, including Cortez, Barker, and Green. In August, at the Article 32 hearing on the cases against Cortez, Barker, Spielman, and Howard, the investigating officer agreed with the prosecutors that "reasonable grounds exist to believe that each accused committed the offense for which he is charged" and recommended proceeding to court-martial. Those charges could include the death penalty.<sup>20</sup> Major General Thomas R. Turner II, commanding general of the 101st Airborne Division, made the decision to refer the charges to court-martial following the investigation and recommendation by the investigating officer and his staff judge advocate.<sup>21</sup> Sergeant Yrube was offered immunity from prosecution for the dereliction of duty charge in exchange for his testimony against Barker and others. His plea included being sep-

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<sup>19</sup> "Iraq Rape Soldier Given Life Sentence," *Guardian*, 17 November 2006.

<sup>20</sup> Paul von Zielbauer, "Investigator Recommends Courts-Martial for 4 Soldiers," *New York Times*, 24 June 2007.

<sup>21</sup> "Four U.S. Soldiers Charged with Rape and Murder," CNN, 18 October 2006.

arated from the Army with an “other than honorable” characterization of service in lieu of prosecution.<sup>22</sup>

In November 2006, Barker pled guilty to rape and premeditated murder to avoid the death penalty and was given a 90-year sentence. He was confined in the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas.<sup>23</sup> Barker’s civilian attorney was quoted on the day of his guilty plea as saying, “Given the state of the evidence, it was certainly likely that Specialist Barker could have received the death penalty or life without parole. He who gets to the courthouse fastest often is the smartest.”<sup>24</sup>

In February 2007, as part of a plea agreement, Cortez pled guilty to four counts of felony murder, rape, and conspiracy to rape and was sentenced to life in prison without parole. He was found not guilty of the more serious charges of premeditated murder and conspiracy to commit premeditated murder. Because of the plea, his sentence changed to 100 years with possibility of parole in 10 years and a dishonorable discharge.<sup>25</sup>

In March 2007, Howard also made a plea deal under which he was awarded a dishonorable discharge and a sentence of 27 months for his plea of guilty to obstruction of justice and accessory after the fact. He would be released after 17 months for good behavior and time already served in pretrial confinement.<sup>26</sup> While Howard was originally charged with more serious crimes, testimony by the others who pled guilty to murder and rape reassured prosecutors that he did not have previous knowledge of

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<sup>22</sup> Frederick, *Black Hearts*, 369. An *other than honorable discharge* refers to the lowest of two general characterization discharges and although not punitive, its award fails to qualify the servicemember for many of the benefits normally given to veterans, including the GI Bill for college and access to affordable home loans.

<sup>23</sup> “‘Black Hearts’ Case Study: The Yusufiyah Crimes, Iraq, March 12, 2006,” Center for the Army Profession and Leadership, 4 March 2021, 7. “Disciplinary barracks” is a euphemism for prison; the U.S. Disciplinary Barracks is the U.S. military’s only maximum-security prison. The term *awarded in conjunction with punishments* in the military’s justice system stems from the fact they are decided on and issued by the commander or appointee.

<sup>24</sup> Paul von Zielbauer, “Soldier to Plead Guilty in Iraq Rape and Killings,” *New York Times*, 15 November 2006.

<sup>25</sup> Associated Press, “Soldier Gets 100 Years in Prison in Rape, 4 Slayings,” *Los Angeles (CA) Times*, 23 February 2007. A dishonorable discharge is one of two punitive discharges and the lowest discharge characterization given by the Army.

<sup>26</sup> “‘Black Hearts’ Case Study,” 8.

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the group's intent to rape and murder when they left him and Scheller at the traffic control point.<sup>27</sup>

Originally due to be court-martialed in April, Spielman—who was believed to have been present and watching outside for anyone passing by but not a participant in either the rape or murders—was finally tried in August. There were many inconsistencies between the confessions of the other soldiers and his own, and he maintained he did not know where the patrol was going when they departed or for what purpose it was leaving, and that he was too surprised and scared to act when the crime occurred.<sup>28</sup> Although he and his lawyers contested almost all of the charges, including all felony charges, the panel of military members failed to believe his innocence and he was sentenced to 110 years in prison after being found guilty of rape, conspiracy to rape, housebreaking with the intent to rape, and four counts of felony murder.<sup>29</sup>

Of all the accused, the soldier most responsible for the crime that day was not tried by a military court. Green had been discharged in May 2006 before the incident was investigated for its involvement by U.S. servicemembers. Once the military contacted the FBI, the agency tracked down Green and arrested him at his grandmother's property in North Carolina. They returned him to the Federal District Court of Western Kentucky, the closest district to his last permanent address in Fort Campbell as a soldier. Due to his discharge, the Justice Department announced they would prosecute him under the Military Extraterritorial Jurisdiction Act (MEJA), legislation originally designed to close loopholes that prevented contractors and family members of servicemembers stationed overseas from being

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<sup>27</sup> Cindy Horswell, "Iraq War Rape Trial Has Soldier's Fate on Hold," *Houston (TX) Chronicle*, 19 March 2007.

<sup>28</sup> Frederick, *Black Hearts*, 358–59.

<sup>29</sup> Horswell, "Iraq War Rape Trial Has Soldier's Fate on Hold"; and " 'Black Hearts' Case Study," 7. Like Barker and Cortez, he was eligible for parole after 10 years.

prosecuted.<sup>30</sup> He was only the second former servicemember to be tried under this jurisdiction and the first in which the death penalty would be an option.<sup>31</sup>

In addition to the public defenders assigned to the case, a former Marine lawyer joined Green's defense, which started with a flurry of motions. The use of the MEJA was at the heart of their first motion. They argued that it was not designed for cases like his and should therefore not be allowed as the basis for prosecution. They also requested a gag order on the case, citing the negative publicity's harmful effect on their ability to defend Green, all the way up to President Bush. In the weeks preceding that motion, the Chairman of the Joint Chiefs of Staff had called the crime "totally unacceptable," and President Bush had said it was a "despicable crime . . . staining the image, the honorable image of the United States Military."<sup>32</sup> The defense twice offered for Green to plead guilty to remove the possibility of the death penalty, but the Justice Department declined both offers. The defense also made multiple attempts to get the Army to reinstate Green and put him to trial by court-martial. Finally, after ruling out an insanity defense, they tried to put the Army on trial in the court of public opinion for the failings of leadership that missed the red flags in Green's behaviors throughout his deployment. These included his sessions with the combat stress psychologists, the conversations with company and battalion commanders during which he admitted his hatred of and desire to kill Iraqis, and other incidents picked to underscore a disregard for Green's mental state.<sup>33</sup> After several weeks of trial, the jury found Green guilty of every count of conspiracy, rape, and murder. The jury, however, could not come

<sup>30</sup> The Military Extraterritorial Jurisdiction Act (MEJA), enacted in 2005, was the long-awaited correction to the initial omission by lawmakers of a means to prosecute grave breaches to the Geneva Conventions. It had been sought by the military to close a loophole in which servicemembers who had finished their contractual obligations and civilians employed by DOD, would be released from service and jurisdiction for any crimes committed therein since the 1957 case of *Reid v. Covert*. An appeals case in 2000 in which an apparently guilty individual was freed due to lack of jurisdiction finally spurred action by Congress to pass MEJA. Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 89–90, <https://doi.org/10.1017/9781108917797>.

<sup>31</sup> Frederick, *Black Hearts*, 359.

<sup>32</sup> "Gag Requested in Iraq Rape-Murder Case," CNN, 11 July 2006.

<sup>33</sup> Frederick, *Black Hearts*, 359–61.

to a unanimous decision regarding sentencing him to death, splitting on the decision six against six. Members of the al-Janabi family in attendance were incensed that he would live the remainder of his natural life. Nonetheless, he would do so serving five consecutive life sentences with no possibility for parole.<sup>34</sup> Green eventually died by his own hand, after hanging himself in his Arizona prison cell in February 2014.<sup>35</sup>

Civilian reaction to this event was somewhat muted by the fact that it came after the revelation of the Haditha incident and two weeks after the announcement of the ambush of several soldiers, resulting in the death of one immediately, and the capture, torture, and killing of the others several days later. These soldiers were from the same platoon. Additionally, the violence in Iraq during this period was at an exceptionally high point, with casualties coming from military action, sectarian violence, and from common crime. Although the initial outcry was weaker than in comparable cases, the brutality and apparent premeditation sparked immediate conversation about the prevalence of mental illness or personality disorders in the armed forces.<sup>36</sup> The events in Haditha were fresh in the minds of all concerned in the chain of command. Indeed, as the platoon sergeant, who was first alerted in the company, sought to encourage the company commander to travel to his position to report what he knew, he resorted to announcing, "Let me say one word . . . Haditha," to communicate the serious need for an expedited meeting.<sup>37</sup> Though the battalion commander resisted the idea that their soldiers were culpable, it appears that in Iraq, the Army benefitted from having watched the Marines struggle through allegations of a cover-up following a law of war violation.

Although the Army did not initially widely publicize the events or highlight the lessons to be learned from the atrocity, following the publication of Jim Frederick's *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death*, broad efforts were made to incorporate the

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<sup>34</sup> Frederick, *Black Hearts*, 361–63.

<sup>35</sup> Steve Almasy, "Former Soldier at Center of Murder of Iraqi Family Dies after Suicide Attempt," CNN, 18 February 2014.

<sup>36</sup> Benedict Carey, "When the Personality Disorder Wears Camouflage," *New York Times*, 9 July 2006.

<sup>37</sup> Frederick, *Black Hearts*, 320, from interviews with SFC Jeff Fenlason and Capt John Goodwin.

findings in several facets of their training and education continuum. As early as 9 September 2011, the Center for Army Leadership used the killings as a case study to highlight the positive ethics that drove Private First Class Watt and Sergeant John Diem, to whom Watt confided, to report their peers when the information came to light.<sup>38</sup> At the U.S. Military Academy at West Point, young men and women earning their degrees and commissions were introduced to a case study submitted to the Center for the Army Profession and Ethic with special emphasis placed on the failings of several levels of command and supervision that led to the events.<sup>39</sup> Even the Marine Corps began using it as a case study for the negative effects of toxic leadership in one of its nonresident seminar programs for senior enlisted leaders. Although specific reviews of the manpower of the 502d Infantry Regiment were done to determine causes for casualties among soldiers as a part of the AR-15 investigations, the crimes inflicted on the al-Janabis were less the impetus for later manpower changes in the region than the tactical failures and casualty rates of the 502d Infantry Regiment.<sup>40</sup>

Just as the murder of the al-Janabis prompted a broader media conversation about the prevalence of personality disorders in the military, it prompted the Army to assess the quality of treatment offered to its deployed forces.<sup>41</sup> The success in prosecuting those involved in the murder of the al-Janabis even after a notable delay between the crimes and their investigation was due in large measure to the guilt of the accused and the successful collection of one perpetrator's testimony and cooperation into testimony from others in exchange for deals that took the death penalty off

<sup>38</sup> " 'Black Hearts' Case Study," 6.

<sup>39</sup> LtGen John H. Cushman, "Chain of Command Performance of Duty, 2d Brigade Combat Team, 101st Airborne Division, 2005-06: A Case Study Offered to the Center for the Army Professional Ethic," West-Point.org, 2 June 2011. The Army merged the Center for the Army Profession and Ethic, at West Point, NY, and the Center for Army Leadership, at Fort Leavenworth, KS, into the Center for Army Profession and Leadership (CAPL) on 1 October 2019. In 2023, CAPL was folded in with the Army's Command Assessment Program Directorate and was renamed the Center for Army Leadership. The " 'Black Hearts' Case Study" currently resides on CAL's website in its resource library.

<sup>40</sup> John M. McCarthy, "AR 15-6 Investigation: Concerning Leadership Actions," U.S. Army, 10 July 2006.

<sup>41</sup> Marc Cooper, "AR-15 Investigation: Quality of Mental Health Care Provided in Iraq Theater of Operations," U.S. Army, 26 July 2006.

the table. While the death penalty was removed from the case, the prosecutors were able to obtain sentences that were longer than the average when compared to Marine Corps trials during the Vietnam War for which there are existing numbers or to the eventual results of the Haditha and Hamdania trials.<sup>42</sup> The use of plea bargains in this case showed a more deliberate approach to prosecution than the multiple immunity deals handed out in the Haditha case and contributed to at least a measure of accountability for the crimes.

The massacre of the al-Janabi family, although conceived in a drunken state, was premeditated murder, not an overzealous or out-of-control reaction to mounting combat stressors released in an instant of rage and grief. Despite this, there are parallels with the previous cases and additional indicators of trouble within units that may help predict or prevent similar events in the future. The degradation of discipline, from drinking on duty to low situational awareness and minimal security being posted began, again, with an absence of combat-experienced leadership at a critical juncture. This absence caused an immature leader, Cortez, to be persuaded during the course of a morning spent drinking—against regulations—to commit rape and murder. As the senior soldier present, the fact that the group was drinking and in a low state of alertness in the face of possible threats was his failure. That he did not at once shut down any talk of the kind Barker initiated speaks to his immaturity, ethics, and weakness as a noncommissioned officer. He should not have been in a leadership position. Had his squad leader and platoon commander not both been away on midtour leave, he would not have been in such a position. Cortez's unwarranted position would have equally not mattered had the platoon sergeant, also in a combat leadership position for the first time, made regular visits to the platoon's disparate positions, as would be expected.<sup>43</sup> This recalls the Hamdania platoon member's statement in the introduction to part three

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<sup>42</sup> Gary D. Solis, "Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam," *Transnational Law and Contemporary Problems* 59, no. 1 (Spring 2000): 12.

<sup>43</sup> Frederick, *Black Hearts*, 232.

about the effect of leadership presence: “There is something that could easily have prevented it. Command climate is something we create.”<sup>44</sup>

Compounding a lack of experience, the lack of mental resilience—some would label it resignation at times—that comes from successfully overcoming previous periods of hardship and deprivation also played a role. This lack of resilience was caused by several factors. There were high numbers of casualties in leadership positions, with platoon-level officers and senior noncommissioned officers who were responsible for discipline in the ranks being lost early in the deployment at an alarmingly high rate, and among close friends of the perpetrators—a circumstance that again recalls conditions in previous cases. Sergeant Casica’s loss just a few months into the deployment was pointed to by several of the perpetrators as the real trigger for the decline in their mental states.<sup>45</sup>

An additional cause for this particular small group to suffer from a breakdown in discipline due to lack of resilience was that it suffered from the systemic weakening in the recruiting standards of the Army several years into a war that was losing its support.<sup>46</sup> Because the war’s duration was longer than originally planned, and the administration was not eager to use even more of the existing Reserve capacity—which would signal greater impact to daily American life—even more than it had to date, all Services found themselves in a position that required bringing in more recruits. As the all-volunteer force had been in effect for more than 25 years, the Services had reached a state where their standards ensured that they could meet their prewar steady-state recruiting goals while taking the best available applicants only. The sudden need to increase troop end-strength meant lowering some of the previous standards—or waiving requirements that were not technically lowered—in order to meet higher recruiting goals. As with the cases of Lieutenant Thomas Calley at My Lai and Private Michael Schwarz at Son Thang, had the Service’s prewar stan-

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<sup>44</sup> Member of Pendleton 8 Hamdania platoon (anonymous), interview with author, 13 December 2022.

<sup>45</sup> Frederick, *Black Hearts*, 143, 265.

<sup>46</sup> Tilghman, “The Army’s Other Crisis.”



### Part Three: Iraq

dards been observed, it is probable that neither Green nor Barker would have been in the Army.<sup>47</sup>

Some of the command's failings were out of its control due to factors such as the lack of preparation for the area of operations it would occupy—the nature of the assignment changed just weeks before deployment—and the imbalance between unit size and the large area of operations in a particularly restive area.<sup>48</sup> The lack of preparation for the area and fight it would face mirrored My Lai and Haditha for different reasons, and the lack of personnel was an unfortunate by-product of the DOD's early efforts to fight the war with as small a manpower footprint as possible.<sup>49</sup> Other failings rested squarely on the command. Even when the loosening moral restraints became evident to frontline leaders and admitted by Green when he sought help from the deployed psychiatric professionals, the command did not mandate continued counseling and reevaluation for Green and later disregarded the medical opinion of the combat stress doctors to temporarily remove some personnel from the fight.<sup>50</sup> Also, the lack of trust by the soldiers at the platoon and company levels for superiors in higher head-

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<sup>47</sup> Frederick, *Black Hearts*, 71. Both soldiers had a combination of instances of gang affiliation, drug use, and brushes with the law in their pasts, which would have been disqualifying in most cases, and Green received a "moral waiver" to join.

<sup>48</sup> The area made up the western edge of the Triangle of Death, so named by the media due to the high number of both civilian and military deaths that occurred by military actions, sectarian fighting, and tribal strife. The unit that replaced the 101st Airborne Division, the 10th Mountain Division, flooded the area with twice as many soldiers as were available to the units within the 502d Infantry Regiment. Normal preparation would have included visits to the area by leadership, in-depth analysis of pattern of life (civilian) and enemy activity in the area, and correspondence with the unit they would relieve about which techniques, tactics, and procedures were effective in the area.

<sup>49</sup> "Powell: I Wanted More Troops in Iraq," *CBS News*, 30 April 2006. Despite a recommendation for more troops during the invasion by Secretary of State Colin L. Powell, a former Chairman of the Joint Chiefs of Staff, Secretary of Defense Donald Rumsfeld and the Army general in charge of planning the invasion, Tommy Ray Franks, decided the smaller footprint was adequate. This was due to some poor planning assumptions and a different aftermath in the initial fall of Baghdad. The soldiers at Mahmudiyah had their mission changed just before deploying, much as the soldiers at My Lai had. The Marines of Haditha had more training in ground operations and recent experience in urban combat than they did in the type of convoy operations they were conducting at the time of the IED attack that killed their squad mate.

<sup>50</sup> Josh White, "Death Sought for Ex-GI in Slayings, Rape in Iraq," *Washington Post*, 4 July 2007.

quarters, or anyone outside their immediate circles or not sharing their experiences, were classic examples of the shrinkage of moral horizons that make the commission of war crimes more likely.<sup>51</sup> This distrust derived from their lack of faith in the tactics the leaders were forcing them to use despite the lack of results and high casualty rates when executing them.

Finally, the constant refusal of senior commanders to take the reports and recommendations of the subordinate units into consideration when planning operations or mandating tactics created feelings of *menis* that Jonathan Shay described in *Achilles in Vietnam*. This feeling is described as a rage stemming from the belief that risk and suffering is not fairly distributed.<sup>52</sup> One reason for the intensity of this feeling is the fatigue and stress from constant combat conditions. During World War II and prior, the average soldier spent from a few days to at most a month or two in direct front-line combat before a break, and American policy during that war was to leave them engaged no longer than 80 days. During the past few decades, however, soldiers and Marines during the Vietnam War and later conflicts could expect to spend considerably longer on the front line thanks to improvements in combat logistics. The capacity to support combat operations finally outstripped the emotional and physical capacity of soldiers to endure it.<sup>53</sup>

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<sup>51</sup> Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character* (New York: Scribner, 1994), 12–13, 23–25.

<sup>52</sup> Shay, *Achilles in Vietnam*, 12.

<sup>53</sup> Frank Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Back Bay Books, 1995), 44.

# CHAPTER 10

## Hamdania

The crime in the last case this book discusses differs from both Haditha (with its origin in the chaos after an improvised explosive device [IED] detonation) and Mahmudiyah (conceived in a drunken state) in its sober premeditation. On the night of 26 April 2006, a frustrated squad of Marines abducted an Iraqi from his home and took specific measures to stage his killing as a justified engagement with an insurgent emplacing an IED. That the man they killed was not their originally intended victim was revealed during the investigation that followed.

Arriving in Iraq in late December 2005 and early January 2006, the 3d Battalion, 5th Marines' Company K (Kilo Company) operated in an area near Abu Ghraib to the west of Baghdad.<sup>1</sup> As discussed in previous case studies, this period of the war was marked by escalating insurgent attacks against Coalition forces—U.S. and Iraqi Army and police. These incidents manifested in a high number of IED attacks that caused many casualties. In the weeks before 26 April, 3d Battalion, 5th Marines' units had been conducting aggressive operations to counter the IED activity in the area, particularly targeting operations to identify and detain individuals known to emplace IEDs. During this time, the 1st Squad, the focus of this case study, was also engaged in a patrol on 10 April that violated orders pertaining to interactions with noncombatants. According to Corporal Trent D. Thomas's later testimony to Naval Criminal Investigative Service (NCIS), the understanding was that the squad was going to the house of one of the Iraqi civilians in the area known as a "fake sheik" (someone without real tribal authority but who exercised influence with the area's population) and

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<sup>1</sup> 3d Battalion, 5th Marines, Command Chronology (ComdC), 1 July–31 December 2005 (Quantico, VA: Marine Corps History Division Archives).

rough him up for speaking ill of and failing to cooperate with U.S. forces.<sup>2</sup> Despite the encounter on 10 April, the unit had maintained good relations with the majority of the population, and it was the Iraqis who brought the fake sheik's negative influence to the Marines' attention.<sup>3</sup>

During the trials that followed the investigations into the 26 April murder, enough evidence was uncovered to also seek charges against a lieutenant with 3d Battalion, 5th Marines, for their knowledge and actions when interrogating the individual for intelligence about insurgent activity in the area.<sup>4</sup> While the charges were withdrawn in favor of nonjudicial punishment, the lieutenant was still held accountable for the violations against proper handling of detainees or civilians under their unit's control.<sup>5</sup> Among the Marines present during the assaults on the Iraqis detained during this mission were Sergeant Lawrence G. Hutchins III, Corporal Thomas, and Lance Corporal Jerry E. Shumate.<sup>6</sup> All three were charged with assault as this incident came to light during the investigation.<sup>7</sup> As was evident in several other of the cases examined previously, the gradual relaxation of discipline or outright ignoring of standing lawful orders here presaged one of the ultimate violations of the law of war.

On the evening of 25 April 2006, Sergeant Hutchins led his squad out to conduct an ambush patrol along Route Penguins. The night's mission was to conduct a deliberate ambush aimed at interdicting insurgent emplacement of IEDs.<sup>8</sup> Kilo Company's 2d Platoon prepared for the night's

<sup>2</sup> Thomas NCIS interview, 16 May 2006, 1.

<sup>3</sup> Member of Pendleton 8 Hamdania platoon (anonymous), interview with author, 13 December 2022, hereafter anonymous Pendleton 8 interview.

<sup>4</sup> Mark Walker, "Officer Charged in Hamdania Assault Case," *San Diego (CA) Union-Tribune*, 17 August 2006.

<sup>5</sup> Mark Walker, "Criminal Charges Dropped Against Officer in Hamdania Case," *San Diego (CA) Union-Tribune*, 2 May 2007. The use of nonjudicial punishment means that although his career would be effectively finished—with little to no chance for competitive promotion in the future—he would not have a legal conviction associated with his civilian record. Not requiring the legal evidentiary standard of courts-martial or the civilian judicial system, nonjudicial punishments were a surer means to punishment than trial and the potential of a jury's finding of not guilty.

<sup>6</sup> Thomas NCIS interview, 16 May 2006, 1.

<sup>7</sup> Daniel Strumpf, "Officer Could Be Tied to Camp Pendleton War Crimes Case," *Voice of San Diego*, 10 August 2006.

<sup>8</sup> *United States of America v. Lawrence G. Hutchins III Case # 200800393* (United States Navy-Marine Corps Court of Criminal Appeals, 29 January 2018), 3.

patrol like every other, performing the planning, gear preparation and inspections, and mental rehearsals that typified the battle rhythm to which many infantry units operating in Iraq three years after the start of the war had become accustomed. This night, though, would be different.

After being inserted by vehicles, Hutchins stopped the patrol and gave orders for an unauthorized alternate mission for the evening: to capture and kill a known insurgent, Saleh Khaleb Gowad al-Zobai, responsible for planting IEDs with one associate and known to recruit suicide bombers with another associate. The squad had arrested him three times previously within a 45-day span and was frustrated that he was always subsequently released.<sup>9</sup> Al-Zobai was known to live in the area, and Hutchins assigned tasks throughout the squad, including obtaining a shovel and AK-47 rifle to plant at the scene to give the appearance that an armed insurgent was emplacing an IED.<sup>10</sup> In the event that al-Zobai was not home, they would seek out another man in the area. As it happened, they were seen nearing al-Zobai's house by a neighbor and instead selected a random man from a nearby house, who they kidnapped and murdered.<sup>11</sup> Although their victim was later shown to be a family member of al-Zobai, the investigation failed to uncover evidence that the squad members knew this to be the case. To them, he was "just another Iraqi" who lived near their primary target.<sup>12</sup>

After sitting in the ambush position for several hours, at around 0200 on 26 April, four members of the squad—Thomas, Corporal Marshall Magincalda, Lance Corporal Robert Pennington, and Navy corpsman Petty Officer Third Class Melson J. Bacos—set out from the position to obtain a rifle and shovel. While Thomas and Magincalda entered a house they picked at random to get an AK-47, one of the two others who were providing securi-

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<sup>9</sup> Mark Walker, "Jodka Sentenced to 18 Months for His Role in Hamdania Killing," *San Diego (CA) Union-Tribune*, 16 November 2006.

<sup>10</sup> United States of America v. Lawrence G. Hutchins III Case # 200800393, 3–4.

<sup>11</sup> Trent Thomas written statement to NCIS on 16 May 2006, 4, hereafter Thomas NCIS interview, 16 May 2006. This was the second of two statements initially obtained by NCIS from the members of the squad during their investigation immediately following the incident and was taken after Thomas was detained for his alleged role in the killing on 26 April. The differences between the two interviews are marked and believed to be caused by the subject's resignation at the second interview that the investigation was going to uncover the truth.

<sup>12</sup> Thomas NCIS interview, 16 May 2006, 3.

ty grabbed a shovel from the yard.<sup>13</sup> As they approached al-Zobai's house, they believed they had been seen by a female neighbor, so instead they picked a random house in the neighborhood from which to grab a military-age male. Finding the door open, Thomas and Magincalda walked into the house, finding 52-year-old Hashim Ibrahim Awad asleep in one of the two downstairs rooms. They quickly woke him up, forced him outside, and walked him to two previously dug IED holes the squad had been watching over from their ambush site. Once there, they bound his hands and feet with zip ties before placing him into one of the holes and waiting for the rest of the squad to assemble.<sup>14</sup>

At that point, Hutchins sent various members of the squad to separate locations to fulfill their assignments for the mission. The corpsman, Petty Officer Third Class Bacos, would fire the stolen rifle into the air to give the impression the Marines were under fire, holding a backpack to collect the spent brass casings; most of the rest of the squad would move to a line near their ambush site approximately 70 meters away. Hutchins radioed to headquarters that they observed an armed insurgent digging to emplace an IED near their ambush site and requested permission to engage.<sup>15</sup> Once Hutchins fired the first shot and the rest of the squad began firing, he ordered them to move forward, staying in line. As they neared Awad, Hutchins ordered the squad to cease firing and then moved in close to check on him. Hutchins found that Awad was still alive and only wounded once—whether this was due to poor marksmanship or intentionally misplaced shots from the squad is unknown—and shot him multiple times in the head and chest. After this, two Marines cut the zip ties binding his hands and feet. When Hutchins told Bacos to shoot Awad again in the face with his pistol to obscure Awad's identity, Bacos refused.<sup>16</sup> Bacos did bring the casings he had caught in his backpack and poured them into the hole

<sup>13</sup> Thomas NCIS interview, 16 May 2006, 3; and "Report of Investigation. Identifier: 08MAY06-MEBJ-0357-7HMA-C," Naval Criminal Investigative Service, 17 October 2007, 2. This copy of the Hamdania investigation, obtained by a FOIA request, was heavily redacted, but using juror notes from Cpl Thomas's court-martial and records from the Armed Forces Court of Appeals, much of the information was readily interpreted.

<sup>14</sup> Thomas NCIS interview, 16 May 2006, 3–4.

<sup>15</sup> United States of America v. Lawrence G. Hutchins III Case # 200800393, 4.

<sup>16</sup> Thomas NCIS interview, 16 May 2006, 4–5.

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where they dumped Awad's body and rifle.<sup>17</sup> The quick reaction force that responded to their contact arrived and took photographs of the scene for routine after-action reports to higher headquarters, and Hutchins completed a post-contact story board for submission that outlined their contact, describing it as a wholly justified shooting.<sup>18</sup>

On 1 May, the battalion received a complaint from a local sheik that on 26 April, Marines kidnapped Awad from his house and subsequently shot and killed him. He also alleged that the rifle and shovel turned over to the Iraqi authorities were not Awad's but instead belonged to a neighbor. After a cursory investigation, the battalion's parent command, Regimental Combat Team 5, contacted NCIS on 4 May to request investigative support.<sup>19</sup> By 8 May, NCIS interviewed many of the members of 1st Squad. In his initial written statement, like many of his coperpetrators, Corporal Thomas repeated the script Sergeant Hutchins had laid out, going so far as to say Hutchins was one of three members of the patrol on 25–26 April who had not fired their weapons at Awad.<sup>20</sup>

NCIS investigators quickly moved to preserve as much evidence as possible, sending requests to have digital communications on servers preserved, seizing the weapons of the squad and all personal computers, cameras, phones, and other storage devices. Iraqi and chain of command witnesses were interviewed along with the members of the squad. Awad's body was exhumed and sent to Dover Air Force Base's mortuary in Delaware, where an autopsy was performed by a member of the Office of the Armed Forces Medical Examiner staff. The autopsy cataloged a total of 11

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<sup>17</sup> SgtMaj Justin D. LeHew (Ret), interview with author, 17 March 2021, 36:30, hereafter LeHew second interview.

<sup>18</sup> Thomas NCIS interview, 16 May 2006, 4; and Lawrence Hutchins III, "Story Board of Shooting on the Morning of the 26th," Company K, 3d Battalion, 5th Marines, 28 April 2006, entered into evidence during Thomas court-martial as enclosure A to exhibit 9.

<sup>19</sup> "Report of Investigation Identifier: 08MAY06-MEBJ-0357-7HMA-C," 2–3.

<sup>20</sup> Trent Thomas, written statement to NCIS, 8 May 2006, 2, hereafter Thomas NCIS statement, 8 May 2006. This was the first of two statements initially obtained by NCIS from the members of the squad during the investigation immediately following the incident. Due to the false statements in this initial interview, Cpl Thomas would be charged with UCMJ Article 107, False Official Statements.

gunshot wounds, although signs of his wrists and ankles being bound were no longer present due to the degree of decomposition.<sup>21</sup>

After comparing the 8 May statements of the accused with collected logs, information from witnesses, and physical evidence, the investigators found inconsistencies that led them to question the squad. In the statements taken on 16 May, the initial story that Hutchins had convinced the squad to offer was replaced by descriptions of how the incident unfolded from a routine ambush patrol to a plan to capture and “rough up” a high-value insurgent target to the kidnapping and murder of an innocent noncombatant.<sup>22</sup> Following these subsequent interviews, the members of the squad were returned to the United States, where they were confined in the brig at Marine Corps Base Camp Pendleton, California, on 24 May 2006.<sup>23</sup> In Iraq and at various laboratories around the world, the investigation and examination of evidence continued. On 21 June, all seven Marines and the corpsman of the squad were charged with, among other things, the murder of Awad.<sup>24</sup>

The Article 32 hearings for the Marines began on 30 August, starting with Corporal Marshall Magincalda and Private First Class John J. Jodka III.<sup>25</sup> As in other case studies, each of the accused had civilian representation, either in lieu of or supplementing their government-appointed counsel. In Jodka’s case, his civilian attorney’s strategy was to waive the right to an Article 32 hearing since she believed the case would go to trial regardless and did not want the testimony read during the hearing, fearing it could prejudice potential jurors in the eventual court-martial. The government denied the request to waive the hearing, prompting the lawyer to speak out in the press about the government’s disregard for the impact on potential jurors. Yet another concern for the accused was that during these

<sup>21</sup> Cdr Scott A. Luzi, USNR, “Autopsy Examination Report #06-0476, Awad, Hashim Ibrahim,” Armed Forces Institute of Pathology, 6 July 2006, 15.

<sup>22</sup> Thomas NCIS interview, 16 May 2006, 3.

<sup>23</sup> “Report of Investigation. Identifier: 08MAY06-MEBJ-0357-7HMA-C,” 3; and Teri Figueroa and Mark Walker, “The ‘Pendleton 8’: A Look at the 7 Marines and Navy Corpsman Charged in Hamdania Incident,” *San Diego (CA) Union-Tribune*, 23 July 2006.

<sup>24</sup> “Timeline: Investigating Hamdania,” NPR, 30 August 2006.

<sup>25</sup> John McChesney and Melissa Block, “Hamdania Hearings Begin for Two Marines,” *All Things Considered*, NPR, 30 August 2006.



hearings, Representative John P. Murtha (D-PA) was vociferously speaking in the news about the case in Haditha, Iraq, where several Marines killed 24 civilians, as he called for an end to the war. Many of the accused's lawyers had concerns about how publicity from the other case would affect their own.<sup>26</sup> Indeed, while this was a valid concern, the trials for the Marines implicated in the Hamdania murder would, in fact, impact one of the Haditha accused, as legal motions eventually used to temporarily overturn Sergeant Lawrence Hutchins's conviction at his first court-martial was previously used by those defending Staff Sergeant Frank Wuterich. That attempt would be unsuccessful for Wuterich's team, but it contributed to the much-delayed trial process.<sup>27</sup>

Compared to the other two similar case studies previously discussed, the accused of Hamdania were brought to trial in a relatively speedy manner. By the end of 2006, four of the eight accused had been sentenced, the process made quicker by pleas from defendants who knew they would be convicted regardless, with the remaining four trials complete by August 2007. Sergeant Hutchins's legal status would continue to change for years as his lawyers were successful in having him retried another three times before he finally rested all appeals.

The first of the accused scheduled to be brought to trial was Corpsman Bacos. Just before his proceeding, the prosecution announced that they had made a deal with Bacos to secure his testimony against the seven accused Marines of the squad. In exchange, he would not face murder charges, and he would only serve 1 year of the 10-year sentence handed down in his October 2006 sentencing hearing. During his testimony, he was asked why he went along with it if he had urged them to let Awad go at one point, to which he answered, "I wanted to be part of the team."<sup>28</sup> The effects of peer pressure and small group cohesion is strong within many military communities and especially so within the infantry squad, where sure knowledge that one's life depends on the actions of one's peers strength-

<sup>26</sup> Rick Amato, "Inside the Camp Pendleton8," *Townhall*, 31 August 2006.

<sup>27</sup> "Marine's Defense to Seek Dismissal of Haditha Killings Case Because of Loss of Military Lawyer," Associated Press, 8 January 2015.

<sup>28</sup> John McChesney and Melissa Block, "Navy Medic Describes Civilian's Death in Iraq," *All Things Considered*, NPR, 6 October 2006; and John McChesney, "Navy Medic Testifies About Hamdania Killing," *Weekend Edition Saturday*, NPR, 7 October 2006.

en the bonds. This effect of cohesion was just as prevalent at My Lai, Son Thang, and Abu Ghraib, as examined earlier. Also, evident in this case was the effect of command climate, just as at My Lai where Captain Ernest Medina and others added to the already tense climate in the unit by promising an opportunity of revenge for comrades lost the day before that operation. In the case of 3d Battalion, 5th Marines, during Hamdania, a member of the platoon said frustration at the pressure for results regardless of the means influenced the actions of the platoon, changing them for the worse over time.

My platoon was very professional. We did what was expected to do but were met with disrespect from leadership (higher headquarters). We were called “soft,” “ineffective,” “untrustworthy,” and there was little confidence in our platoon because we were doing the right things and results were not coming. This seemed to be a tipping point for Lt [Nathan] Phan and Sgt [Lawrence] Hutchins. I tried to bring some of this up at the Thomas court martial but was stopped from saying anything further. This made me question why the Marine Corps didn’t want to know about toxic leaders. It was eye-opening and heart breaking.<sup>29</sup>

Also in October, Private First Class Jodka and Lance Corporals Tyler Jackson and Jerry Shumate Jr. entered plea agreements to reduce the severity of the charges for which they were to be tried. The three were each sentenced within a week of each other for their roles and gave testimony regarding the crime.<sup>30</sup> On 15 November, Jodka was sentenced to 18 months (including 6 months of time already served) for his guilty plea to aggravated assault and conspiracy to obstruct justice. This was reduced from the five years initially sentenced along with his dishonorable discharge. While prosecutors urged a stiffer sentence, the defense maintained, in a parallel to Private First Class Samuel G. Green’s case at Son Thang, that Jodka was a new Marine who was failed by his leadership, specifically the squad leader, Hutchins.<sup>31</sup> On 16 November, Jackson attended his sentencing hearing for

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<sup>29</sup> Anonymous Pendleton 8 interview.

<sup>30</sup> Walker, “Jodka Sentenced to 18 Months for His Role in Hamdania Killing.”

<sup>31</sup> Walker, “Jodka Sentenced to 18 Months for His Role in Hamdania Killing.”

his guilty pleas to the same charges. Although sentenced to nine years, his sentence was also reduced through a plea deal, in this case to 21 months (including time served). Once again, while the prosecution urged a more severe punishment due to the time he had to reflect on the action—while waiting for the members of the squad who were tasked with kidnapping Awad, and failing to even attempt to stop it—the defense laid much of the responsibility at Hutchins's feet.<sup>32</sup> The following week, on 21 November, Lance Corporal Shumate also pled guilty to aggravated assault and conspiracy to obstruct justice as part of his deal and, instead of the adjudged eight-year sentence with dishonorable discharge, he received an identical 21-month sentence with credit for the 6 already served in confinement since returning from Iraq, which would be followed by a general discharge. Foreshadowing legal moves in the future, as Shumate was sentenced, a hearing to determine whether a statement made by Lance Corporal Pennington, according to him without a requested lawyer, was suppressed and wrapped up the same day.<sup>33</sup> In each of these cases, the pleas served to secure shorter sentences in exchange for giving the prosecution more leverage in the coming trials.

The following year, the final four accused learned their fates. The first would be Lance Corporal Pennington, whom evidence showed took a lead in planting evidence near Awad's body. Although finally agreeing to a plea deal in which he pled guilty in exchange for the murder charge to be dismissed, he was awarded the most severe sentence yet plus a dishonorable discharge. Prosecutors had sought a 20-year sentence, but due to the plea agreement he served only 8 of the 14-year sentence the judge awarded him. The incident had occurred during the 22-year-old's third deployment to Iraq, and his family had testified that his deployment to Fallujah, a par-

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<sup>32</sup> Associated Press, "Another Marine Sentenced to 21 Months in Prison for Iraqi Slaying in Hamdania," *Fox News*, 17 November 2006.

<sup>33</sup> Mark Walker, "Shumate Sentenced to 21 months in Hamdania killing," *San Diego (CA) Union-Tribune*, 22 November 2006.

ticularly tough urban fight during the previous deployment, had changed him.<sup>34</sup>

Although Corporal Trent Thomas had originally also agreed to plead guilty, he withdrew his guilty plea, was reissued charges the same day Pennington was sentenced, and instead went to a court-martial.<sup>35</sup> His was the first case to go through a full court-martial, and the panel included a number of combat veterans. According to panel member Sergeant Major Justin D. LeHew, during the panel-selection phase, the Marines sought by the convening authority, Lieutenant General James N. Mattis, were “well respected, highly kinetic combat leaders, and also people who had a stable, non-judgmental head on their shoulders.”<sup>36</sup> These individuals would normally be expected to understand the pressures of combat, which, while ensuring the fairest hearing of circumstances for the accused, could also be expected to hamstring the prosecution, as they are usually unlikely to question combat decisions unless clearly egregious.<sup>37</sup>

As was his right, Thomas had requested enlisted representation during his trial, and the convening documents show 7 of the 14 members eligible for the panel were in the enlisted pay grades of E-6 to E-8 (master sergeant).<sup>38</sup> Thomas was on his third deployment to Iraq, having been injured on his second, and intended to reenlist before the accusations following this incident. He was tried for helping kidnap Awad, murder for his role in shooting Awad, larceny, housebreaking, making false official statements,

<sup>34</sup> Mark Walker, “Pennington Gets 8 Years in Hamdania Killing,” *San Diego (CA) Union-Tribune*, 18 February 2007; Tony Perry, “Mukilteo Marine Gets 8 Years in Brig,” *Seattle (WA) Times*, 18 February 2007; and “Fifth Marine Pleads Guilty in Hamdania Killing,” Reuters, 13 February 2007.

<sup>35</sup> “Fifth Marine Pleads Guilty in Hamdania Killing.”

<sup>36</sup> LeHew second interview, 1:18.

<sup>37</sup> Associated Press, “Marine to Serve No Time in Iraqi Killings Case,” *Fox News*, 20 November 2015.

<sup>38</sup> James N. Mattis, General Court-Martial Convening Order Serial Number MCC1-07A, U.S. Marine Forces Central Command, 6 July 2007; copy obtained from SgtMaj LeHew. Pay grades E-6–E-8 represent the ranks staff sergeant (E-6), gunnery sergeant (E-7), master sergeant or first sergeant (E-8), staff noncommissioned officers who are experienced and expected to lead combat units, but not the most senior, who may have been considered removed from the fight. During courts-martial, enlisted Marines may request that a portion of their panel be made up of other enlisted Marines, rather than an all-officer panel.

and conspiracy to commit all the aforementioned crimes.<sup>39</sup> While his defense lawyers did not dispute any of the testimony heard in other cases to date or that Thomas took part, they did argue that he was compelled to do so because of the orders of his squad leader during a combat operation and that he had experienced more than 20 explosions during three deployments to Iraq, which may have contributed to his judgment being clouded.<sup>40</sup> This strategy harkens back to the first case examined in this book, Sergeant Horace T. West's at Biscari, Sicily, and was no more successful than any of the other attempts using this defense since the changes to the Articles of War during World War II.

In the end, after an eight-day trial, Thomas was convicted of kidnapping and conspiracy charges but acquitted of the murder charge, removing the death penalty from consideration but leaving a life sentence a possibility. At his sentencing hearing, prosecutors requested a 15-year sentence, but he was instead sentenced to reduction to private and a bad conduct discharge. Due to the lack of confinement in his sentence, the convening authority, General Mattis, cut short the sentences of Jackson and Shumate in the interest of fairness a few weeks after Thomas's sentence was announced. These two were junior in rank to Thomas and were both sentenced to 21 months of confinement for their roles in the crime, so Mattis did not feel allowing them to remain confined when a senior Marine was free after his trial was equitable.<sup>41</sup>

Corporal Marshall Magincalda's trial began in late September, and he also sought to use his post-traumatic stress diagnosis following three tours in Iraq as part of his defense. His panel, like Thomas's, consisted of several enlisted Marines in addition to officers. He was convicted of larceny, housebreaking, and conspiracy to commit the same litany of offenses as

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<sup>39</sup> Figueroa and Walker, "The 'Pendleton 8.'"

<sup>40</sup> Marty Graham, "Court-martial Opens for Marine in Haditha Case," Reuters, 9 July 2007; and Allison Hoffman, "Marine Convicted of Conspiracy (Corporal Trent Thomas)," Associated Press, 18 July 2007.

<sup>41</sup> Rick Rogers, "General Cuts Sentences of Two Imprisoned Marines (Hamdania)," *San Diego (CA) Union-Tribune*, 7 August 2007.

Thomas. During sentencing, he was sentenced to time already served (448 days confinement) and reduction to private, but no punitive discharge.<sup>42</sup>

Sergeant Lawrence Hutchins, the squad's leader and mastermind of the crime, according to the testimony and statements of the other members of the squad, went to trial the same week as Corporal Magincalda. His trial lasted one day longer but ended considerably differently. Although Sergeant Hutchins's lawyers argued that their client's actions were the result of poor leadership within the command and that he had tacit approval from his leadership to use violence in capturing and interrogating suspected insurgents, the testimony and statements to date presented a damning picture that could not be mitigated. He was convicted of unpremeditated murder, although in this case, Awad's name was dropped from the charge due to assertions by Hutchins's lawyers that the identification of the victim was suspect. Additionally, he was convicted of larceny and making false official statements, although he was found not guilty of charges of kidnapping, housebreaking, assault, and obstruction of justice.<sup>43</sup> He was sentenced to a dishonorable discharge, reduction to private, reprimand, and confinement of 15 years in prison instead of the possibility of life; that was later reduced to 11 years and the reprimand withheld by the convening authority.

The guilty ruling and sentence was later set aside by the Navy-Marine Corps Court of Criminal Appeals (NMCCCA) in April 2010 due to an improper severance of his attorney-client relationship after one of his government-appointed military lawyers left the Service.<sup>44</sup> After the judge advocate general of the Navy certified to the U.S. Court of Appeals for the Armed Forces (CAAF)—the next and most senior court dealing with military law—that the attorney-client relationship had been severed properly and with assent from the accused, the court reviewed the findings of the NMCCCA in January 2011. The CAAF found the lower court's decision to be incorrect and remanded the case to the NMCCCA to correct its ruling,

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<sup>42</sup> Tony Perry, "Marines Sentenced in Plot to Kidnap, Kill an Iraqi Man," *Los Angeles (CA) Times*, 4 August 2007.

<sup>43</sup> Paul von Zielbauer, "Marine Is Guilty of Unpremeditated Murder of an Iraqi Man," *New York Times*, 3 August 2007.

<sup>44</sup> *United States of America v. Lawrence G. Hutchins III* Case # 200800393, 13.

which it did by March 2012, sending Hutchins back to prison to complete his original sentence—minus a 251-day deduction that was granted due to a clemency request through the office of the secretary of the Navy. In 2013, he was again freed, this time due to the CAAF reviewing an appeal on the merits of the case that found Hutchins had requested a lawyer during his initial interrogations and was never granted representation prior to his further questioning by NCIS. Because of this, the CAAF set aside the conviction and sentence but authorized a retrial.<sup>45</sup> In 2014, after multiple appeals by the government, it was decided to try the case once again and, in 2015, Hutchins was retried for the crimes he was originally convicted of in 2007 and reconvicted and returned to confinement to serve the remaining four-plus years from his original sentence.<sup>46</sup>

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<sup>45</sup> United States of America v. Lawrence G. Hutchins III Case # 18-0234 (United States Court of Appeals for the Armed Forces, 29 January 2019), 2–7.

<sup>46</sup> United States of America v. Lawrence G. Hutchins III Case # 18-0234, 7; and Gretel Kovach, “Marine on Trial Again in Slaying in Iraq,” *San Diego (CA) Union-Tribune*, 9 June 2015.

# CHAPTER 11

## Discussion Three

The Iraq War, like the Vietnam War, was lower on the range of military operations than World War II and was subject to even tighter controls over the use of military force during its operations. From 2004 to 2006, when the cases discussed in the last four chapters occurred, there were on average 130,000–140,000 total U.S. troops in Iraq. On average, the Army supplied 61 percent and the Marines 12 percent of the troops.<sup>1</sup> While only a fraction was in positions that put them in interactions with the civilian population during fighting, the relative numbers of soldiers and Marines still dwarfed the incidence of the types of violence this work has investigated.

When news of the Hamdania murder broke in early June 2006, the Marine Corps was already reeling from the effects of the Haditha case's poor handling and moved quickly to dispel the notion that it did not care about noncombatant casualties or victims in this case.<sup>2</sup> During that summer, articles concerning Hamdania and Haditha repeatedly referenced each other or Mahmudiyah.<sup>3</sup> Throughout the summer of 2006 and into 2007, public opinion was still recovering from the emergence of the news on Haditha and Mahmudiya when that of Hamdania came to light. While there were many sites online that openly supported the accused as merely scapegoats, many letters sent to editors and opinion pieces condemned the actions of the accused in all three cases. Others, however, gave backhanded

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<sup>1</sup> Amy Belasco, *Troop Levels in the Afghan and Iraq Wars, FY2001–FY2012: Cost and Other Potential Issues* (Washington, DC: Congressional Research Service, 2009), 34, 41.

<sup>2</sup> Tony Perry, "Murder Charges Likely for Marines in Iraq Death," *Los Angeles (CA) Times*, 2 June 2006.

<sup>3</sup> Alfonso Serrano, "U.S. Marine Convicted in Iraqi Man's Death," *CBS News*, 18 July 2007; and Julian Barnes, "U.S. Sees Possible Links between Incidents in Iraq," *Los Angeles (CA) Times*, 5 July 2006. These are just two examples of how reporting on each new allegation of violation referenced the others.



excuses for the accused while using the cases to condemn the wars in Iraq and Afghanistan. A 9–12 June 2006 poll by NBC News and the *Wall Street Journal* showed that, while 57 percent of those polled believed incidents like Haditha to be isolated, 32 percent thought they may be common. The same poll showed that only 33 percent of respondents thought such incidents should be handled as criminal activity, with another 8 percent unsure.<sup>4</sup> This seems to reinforce the idea that a “palpable morally charged connection” to American servicemembers was not limited to World War II and persists through current conflicts.<sup>5</sup> It may also reflect the effects of a steady increase in esteem and trust in the military by the American people after the rise of the all-volunteer force, as demonstrated by polls conducted by Gallup and others.

While civilian responses condemned the behaviors of the individuals, the rapid initiation of the investigation during the Hamdania case seemed to forestall any additional demonization in the press of the Marine Corps or assertion that it continued to take violations involving noncombatants lightly. While the public release of the damning General Eldon A. Bargewell report concerning Haditha occurred later in the summer, Marine commanders in Iraq knew Bargewell’s AR-15 investigation was ongoing and not going well when news of Hamdania was reported to Marine officials at a routine meeting on 1 May.<sup>6</sup> Whether the speed of initiating the investigation merely indicates that a better opportunity to address violations existed due to the quick reporting by Awad’s family and delivery of information from the Iraqi police to the Marines, or that the Corps’ hyperawareness of the previous damage to its reputation by Haditha and the looming Bargewell report fueled actions to undo the damage is unclear. What is clear, however, is that as early as 7 June 2006, the Commandant of the Marine Corps felt compelled to address both Haditha and Hamdania during a press pool at the Pentagon, stressing the failure of the Marines in both cases to uphold Marine standards, and the seriousness with

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<sup>4</sup> “Study #6063,” NBC News/*Wall Street Journal* Survey, 9–12 June 2006, 24–25.

<sup>5</sup> Walker Schneider, “Skull Questions: The Public Discussion of American Trophy Collection during World War II,” *Penn History Review* 25, no. 2 (2018): 128.

<sup>6</sup> Gayle S. Putrich, “Massacre Fallout,” *Marine Corps Times*, 5 June 2006.

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which the Corps was taking both investigations.<sup>7</sup> If the results of the poll mentioned above are representative of the general population's beliefs, it appears that the military's efforts to communicate that these events were isolated and did not reflect the military profession were believed.

By the time Hamdania occurred, processes were already in place to increase the number of staff judge advocates being deployed with units in Iraq and Afghanistan, which had been recommended in the Bargewell report. Although when released, Bargewell's report found predeployment training in the law of war to be adequate, more money was spent on including civilian roleplayers in training on the Marine Corps bases where the combat units were stationed. This meant additional training opportunities to instruct Marines on how to perform their missions among civilians under the eyes of evaluators and senior officers and noncommissioned officers. While training of this kind had already been instituted at the Corps' central predeployment training site at Twentynine Palms, California, the additional funds allocated meant training at home bases also increased in realism and effectiveness.<sup>8</sup>

The initiation of the investigation so quickly after the incident proved crucial to allowing investigators to accumulate evidence and quickly begin to collect statements, which, when compared to communications logs and other documentation, helped to fray the story enough to cause several of the accused to confess. Additionally, unlike the earlier cases, the families and civilians were much more forthcoming during this investigation, helping to identify the victim with DNA samples and information concerning from where the rifle and shovel had, in fact, been stolen. It was their reports, the day after the incident took place, that prompted the investigation by Iraqi police and prompt referral to Marine authorities, who began investigating quickly lest they encourage the appearance of a cover-up after the events of Haditha.

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<sup>7</sup> Gen Michael W. Hagee, "Situation in Iraq," C-Span, 7 June 2006, video interview 03:17-04:55.

<sup>8</sup> The author of this book was a beneficiary of this additional funding when his infantry company was afforded extra training opportunities at Marine Corps Base Camp Lejeune, NC, with Arabic-speaking role players and special effects companies to enhance training realism prior to deploying to Iraq in September 2006.

Interestingly, only the three senior members of the squad took their chances with a trial without making plea deals. It is unclear whether this showed a belief that they could win an acquittal in front of a sympathetic jury—both Corporals Trent Thomas and Marshal Magincalda may have believed that their multiple deployments and previous combat injuries might earn them some measure of reprieve—or whether their defense lawyers persuaded them that passing responsibility to higher command could work. Indeed, each used the idea that they were only acting in accordance with orders or expectations from higher headquarters as a part of their defense. Both Thomas and Magincalda pointed toward Sergeant Lawrence Hutchins, and in his case, Hutchins pointed further up the chain of command. The rest of the squad members all pled guilty in exchange for lesser charges or reduced sentencing guarantees. The government offered plea deals to the other five and, unlike in the Haditha and Son Thang cases, received testimony that strengthened the government's case.

Like Son Thang during Vietnam, the short timespan between the Hamdania crime and the beginning of the investigation enabled a successful investigation that yielded convictions for members of the accused squad. While this was a marked improvement from Haditha, the total accountability paid by the accused seems light in comparison to the actual crimes of kidnapping and murder. This held true for a number of reasons, including plea deals and sympathetic panels (juries). The panels and differing sitting judge advocates for the cases of plea sentencing would account for a large discrepancy between the three cases studied here. In Mahmudiyah, most of the accused received sentences for 90–100 years, although much less time was actually served. All but one of the Haditha cases missed the opportunity for accountability, and that one conviction was for the lesser offense of dereliction of duty, again partially due to immunity deals and pleas. The Hamdania convictions garnered sentences that were all for 15 years or fewer—much less in some cases, with time served as low as a year.

As in many cases examined thus far, prosecutors opted to leverage plea deals to gain testimony from among the accused. A total of five of the Hamdania cases pled out before the first case (Thomas) went to trial, and his only saw a courtroom after he had rescinded his original guilty plea for a deal. According to Gary Solis, the number of plea deals in cases like Had-

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itha and Hamdania did not necessarily mean that the defendants thought they had a weak case, but that “they wanted to have it bulletproof. And they didn’t want to do the work.”<sup>9</sup> According to the book *The Chickenshit Club* by Jesse Eisinger, about the failure of the Department of Justice and the U.S. Securities and Exchange Commission to prosecute cases against financial institutions and their leaders, this reflects a broader trend in the U.S. legal system.<sup>10</sup> About Haditha specifically, Solis added, “They gave away the case, that is they looked to grants of immunity to provide the evidence that they could have gotten through interrogations and cross examinations.”<sup>11</sup> Effective preparation of prosecutorial evidence involves questioning and requestioning witnesses multiple times. This is done to verify, or discredit, parts of their testimony or that of their fellow witnesses or accused. To those with little experience in complex cases, getting witness testimony in exchange for plea deals or immunity may appear inviting when compared to the required investment of time and effort necessary to completely lock down testimony and information from witnesses of varying degrees of willing cooperation. The relatively inexperienced military prosecutors chose the easy route.

Owing primarily to the plea deals, sentences in the convictions from the case studies within the preceding four chapters were significantly less than what the members of the court-martial panels had recommended. While plea deals cut many sentences short, sympathetic panels composed of other combat veterans and the convening authority’s prerogative to approve shorter sentences also factored into the light accountability. The consequence of light sentences or—worse—no accountability for these crimes is that the military’s main tool to maintain good order and discipline and ensure compliance to the law of war, the UCMJ, becomes a less effective deterrent. In Hamdania, as in the Haditha cases and Randall D. Herrod’s Son Thang case, the defenses sought to include as many combat veterans as possible in the hopes that their familiarity with the chaotic na-

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<sup>9</sup> Gary D. Solis, interview with author, 26 May 2021, hereafter Solis second interview, 00:49.

<sup>10</sup> Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (New York: Simon and Schuster, 2017).

<sup>11</sup> Solis second interview, 02:30–02:50.

ture of combat might lead to sympathetic rulings or sentencing. Reviewing the results of the Hamdania cases, Lieutenant General Mattis approved several sentences shorter than the trial- or plea-awarded punishments and released several of the convicted members earlier than their full confinement periods. This was because more-senior Marines received shorter sentences. In Mattis's words, he did this out of fairness to the junior Marines, considering the disparity between the sentences. He was also the convening authority who dismissed the charges against some of the most junior of the accused from Haditha, although he did press forward with Tatum's prosecution.<sup>12</sup>

The idea of pursuing equity in sentencing was not new. At Biscari, it caused General Dwight D. Eisenhower to remit Sergeant Horace West's unexecuted portion of his sentence, partially due to the disparity in outcomes between his and Captain John Compton's trials. In the Son Thang case, the idea caused the convening authority to reduce the sentences of Private Michael Schwarz and Private First Class Samuel Green after two others, including the group's leader, were acquitted. Explaining his actions in a profile piece in the *New Yorker*, following his selection as President Donald J. Trump's secretary of defense, Mattis said, "You can't criminalize every mistake. Bad things happen in war. Don't get me wrong—discipline is discipline. . . . I sent two generals home over it. I ended a lieutenant colonel's career over it. And, as it went down lower, I was not as harsh."<sup>13</sup>

Unfortunately, in lessening the effects further down the rank structure, while commendably holding commanders accountable, the wrong conclusion concerning the seriousness of the crimes and desire for accountability could be easily reached both within and outside the military. Secretary of the Navy Ray E. Mabus, learning of both Sergeants Sanick Dela Cruz and Humberto Mendoza's continued service in 2010 due to Mattis's actions agreed, saying, "I was stunned to learn these guys were still in the

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<sup>12</sup> James Mattis and Bing West, *Call Sign Chaos* (New York: Random House, 2019), 166–67.

<sup>13</sup> Dexter Filkins, "James Mattis: A Warrior in Washington," *New Yorker*, 22 May 2017.

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Marines. . . . They had taken part in the murder, and nothing had been done.” Mabus ordered them discharged.<sup>14</sup>

Hamdania differed from the other two cases in this section in a couple of ways: the speed with which it progressed from investigation to trial (except the repeated attempts to finalize Hutchins’s initial conviction) and the clearly premeditated nature of the crime. While Hutchins’s drama played out over almost a decade, in which he was incarcerated and released multiple times before his final appeal failed, the period from the crime until the last of the initial trials was a mere 16 months and netted convictions in all eight cases. The first trial for Haditha, the investigation for which began two months prior to the crime in Hamdania, did not occur until after all eight initial trials for Hamdania were complete. Staff Sergeant Frank Wuterich, the accused at the very center of that case, was not tried for six years after the Haditha Massacre occurred. While the Army’s trials for Mahmudiyah started out quickly, it was two and a half years before Private David D. Green was convicted and sentenced due to the need to try him in federal court because of his release from the Army.

A reason for both the higher conviction rate in the Hamdania cases over the Haditha cases and a speedier process was the more efficient use of plea agreements than the high number of immunity grants issued during Haditha trials. Despite the prosecution’s liberal use of immunity in the Haditha cases to obtain testimony against those who were tried, at best the witnesses amounted to little help and at worst were damaging on some counts. A possible reason for the little benefit from the pleas and grants was the inexperience of the prosecution in these types of cases, especially when compared with the experience brought to the court by the civilian defense counterparts.<sup>15</sup>

The Hamdania case also differed from Haditha (partially explained by the chaos after an IED attack) and Mahmudiyah (alcohol-impaired perpetrators) in that it was soberly premeditated and deliberately carried out. Despite the frustration felt at seeing the primary target of Hutchins’s plan (the fake sheik) released multiple times, those Marines knew better and could have refused to participate in the kidnapping and murder of an un-

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<sup>14</sup> Filkins, “James Mattis.”

<sup>15</sup> Solis second interview, 17:25–28:21.

involved third party. While it is nearly impossible to determine what exact factors drove each of the members of the squad to remain silent and participate, and while poor leadership and command climate certainly contributed, it is evident that group dynamics overcame training and both institutional and personal values.<sup>16</sup>

What can explain the relatively low-grade public reaction, when compared with violations such as those at Abu Ghraib or My Lai, to the cases outlined in part three? One possible reason for the lack of outrage is an extension of the same societal attitudes prevalent during World War II, at least for the Pacific theater of war, and during the Vietnam War. Whether it is the portrayal of the enemy as a savage in popular media as seen during World War II, the acceptance of the “mere gook rule” during testimony during courts-martial during Vietnam, or in Islamophobic crimes or messaging after 9/11, public culture and transcripts of the trial proceedings reveal the probability of a racial component.<sup>17</sup> The same sense described by Simon Harrison that enemies (and by extension their societies) who do not look similar are distant enemies and not worthy of the same level of respect can explain the lack of outcry.<sup>18</sup> In the wake of the attacks of 9/11, recruiters found lines of applicants who felt compelled to serve and avenge the attacks. The fact that the perpetrators were from another culture only exacerbated this desire.

Other contributing factors to the lack of public outrage may be the volume of information inherent in the 24-hour news cycle and a distancing from the actual effects of the war. Although the American people may feel the connection to the military mentioned earlier, Samuel Moyn points out

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<sup>16</sup> The Bargewell report identified predeployment law of war training, including treatment of noncombatants, as adequate, and several of the members of the squad expressed remorse and guilt about their actions during their hearings and trials.

<sup>17</sup> Curt Anderson, “FBI: Hate Crimes vs. Muslims Rise,” Associated Press, 25 November 2002; and FBI National Press Office, “FBI Releases Crime Statistics for 2003,” press release, 25 October 2004. World War II and Vietnam War case studies previously covered referenced statistics by John Dower and records of trials for the accused of Son Thang and My Lai. For the crimes in Iraq, FBI statistics on hate crimes show increases in anti-Muslim crimes after 9/11.

<sup>18</sup> Simon Harrison, “Skull Trophies of the Pacific War: Transgressive Objects of Remembrance,” *Journal of the Royal Anthropological Institute* (2006): 818–19, <https://doi.org/10.1111/j.1467-9655.2006.00365.x>.

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aply that since the start of the all-volunteer force, wars have been fought increasingly by those in lower-income brackets who are less likely to have their voices heard.<sup>19</sup> Add to that the relatively small percentage of Americans who actually serve in uniform. A public with a high regard for but little firsthand exposure to the military is not as likely to offer much opinion about it in the way of public discourse. Circling back to the beginning of part three, the connection felt by the public to its military may also have been amplified by a societal desire for revenge against the perpetrators of the 9/11 attacks, leading to even less public criticism and in some cases support for soldiers after acts clearly not aligned with professional military standards or the American ideal of fair play.<sup>20</sup>

Despite more focused training than during Vietnam, additional scrutiny of the actions of individual units owing to better battlefield situational awareness and the ubiquitous presence of drones and overhead surveillance, and a higher-caliber basic soldier or Marine with the implementation of the all-volunteer force, law of war violations still occurred during Operation Iraqi Freedom.<sup>21</sup> During the predeployment period, mandatory training included shoot/no-shoot scenarios, escalation of force drills, scenarios involving civilian crowd control, detainee and enemy prisoner of war handling, and reaction drills where Arabic-speaking noncombatant civilians are present in addition to enemy forces. This indicates that the

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<sup>19</sup> Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Strauss, and Giroux, 2021), 207–8.

<sup>20</sup> *Americans Open to Dissenting Views on the War on Terrorism* (Washington, DC: Pew Research Center, 2001). This poll by Pew Research Center three weeks after 9/11 showed 87 percent of polled individuals felt anger over the attacks. *Two Decades Later, the Enduring Legacy of 9/11* (Washington, DC: Pew Research Center, 2021). The 2001 poll showed Americans were worried that the administration would not initiate action against the perpetrators fast enough. Polling data from 2008 showed that at that point, 61 percent of Americans still felt troops should remain in Afghanistan (the initial military target following 9/11) until the situation was stabilized. Section 2, “Views of Iraq and Afghanistan,” in *Declining Public Support for Global Engagement* (Washington, DC: Pew Research Center, 2008).

<sup>21</sup> The training received for the soldier or Marine during the Iraq War occurred throughout the entry-level process from basic training through combat training and occupational specialty schools and continued during annual refresher classes and predeployment training. The Marine Corps also deployed staff judge advocates with infantry battalions and major commands to provide follow-on training in addition to providing advice to commanders.



Services took seriously the need to educate forces about the importance of observing the law of war and realistically training to support the education.

While it is obvious the military was aware of the impact a negative civilian reaction would have, it seems many lessons from the Vietnam War had to be relearned, including the previously mentioned tendency for unit commanders to have blind spots regarding the potential for crimes by their subordinates that increases the chances of ineffective or delayed investigations or risk of cover-ups. Increasing staff judge advocate support for deploying units, increasing training effectiveness and opportunities, and increasing its public messaging through briefings and releases concerning the pursuit of justice in the cases were positive steps. Haditha demonstrated that red flags that should be apparent from the reporting requirements on today's battlefield are still missed or ignored, as they were in Vietnam. Mahmudiyah demonstrated that suddenly lowering recruiting standards, and especially waiving civilian convictions that point to moral turpitude or addiction, will result in military personnel who may more easily succumb to fatigue and stress and fail to uphold Service values. Finally, Hamdania and Haditha further showed that the lack of experience among military prosecutors in these types of cases makes achieving accountability for law of war violations much more difficult when facing more experienced and savvy civilian attorneys.

Evaluating the post-incident policy and training initiatives added to preexisting training and education protocols suggest that the military took its obligation to enforce the laws of war seriously. The situation in which the military found itself during the Iraq War—first responding to an insurgency brought on by faulty administration policies and then sectarian violence with a force not adequately sized for the tasks—was difficult. Rather than assisting a country in transition after the fall of Saddam Hussein's regime, it was focused on quelling violent outbreaks and defending itself from attacks. This limited introspective evaluation by commanders on the state of their units and troops and kept them focused externally on the threats at hand. Small unit discipline will always be handled by the officers and noncommissioned officers closest to the enlisted personnel, but commanders at the company level and higher have an additional duty to continuously evaluate and address the mental and ethical health of their

### Discussion Three

units. This systemic breakdown, in addition to the blind spots addressed previously, along with the probable effects of large numbers of young men and women swelling the ranks post-9/11 with a self-described desire to avenge those attacks, all worked against the reforms instituted by the military from Vietnam onward.

Just as has been shown in previous chapters, the public reaction—or fear of it—combined with the military’s desire to forestall any negative fallout and dampen potential effects to recruiting efforts. It also caused changes in the Army and Marine Corps, most notably in their approach to training units and augmentation of commanders’ staffs with lawyers before deployments.



## EPILOGUE

Nearly nineteen years from the last episode examined in these chapters, conflict around the world continues. Russia invaded Ukraine in February 2022 and to date the conflict continues, with weekly reports of more violations of the law of war. In 2023, after members of Hamas entered Israel on a killing spree and left with more than 200 hostages, Israel began military action in Palestine, killing untold numbers of noncombatants. The U.S. conflicts against the Taliban and al-Qaeda were replaced with one against the Islamic State of Iraq and Syria (ISIS) and continuing actions in the Horn of Africa and in the Sahel.

While fighting near Mosul, Iraq, in 2017, U.S. Navy SEALs called down airstrikes on a building, destroying it. One of the ISIS fighters was wounded and was taken prisoner only to later die. In the trial that followed, Chief Petty Officer Edward R. Gallagher stood accused of fatally stabbing the injured 17-year-old prisoner and several other lesser offenses, including taking photographs with the corpse. The main evidence against him were photographs he had taken showing him posing near the body holding a knife and the testimony of a fellow SEAL. He was placed in pretrial confinement after sending threatening texts to the sailors who had testified against him, which were deemed attempts at obstruction of evidence.<sup>1</sup> Although this investigation began more than a year after the incident, it progressed normally enough until the pretrial confinement. Nearly 20 congressmem-

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<sup>1</sup> David Martin, "Eddie Gallagher, Navy SEAL Acquitted of Stabbing Wounded ISIS Prisoner to Death, Tells His Story," *60 Minutes*, CBS News, 1 March 2020.

## Epilogue

bers requested that the secretary of the Navy review the confinement. At this point, President Donald Trump ordered Gallagher transferred to “less restrictive confinement,” the first time since President Richard M. Nixon likewise assisted Lieutenant William Calley of the My Lai Massacre, that a president intervened in a soldier’s confinement.<sup>2</sup> President Trump’s involvement did not end there.

The trial lasted from 18 June to 2 July 2019, when a court-martial panel of five Marines and two sailors acquitted him of six of the seven remaining charges that were not dismissed during pretrial proceedings. The lone offense for which he was found guilty was taking a photograph with an enemy casualty, which garnered punishment consisting of a reduction of one pay grade and confinement for four months.<sup>3</sup> As seen in other case studies from preceding chapters, the investigation’s start after a lengthy interval from the incident made physical evidence scarce. Also, as seen earlier, testimony secured through witness immunity helped undermine the case when the SEAL who initially related seeing Gallagher stab the prisoner instead testified that he had plugged a breathing tube, killing the prisoner to keep him from being tortured by Iraqi interrogators. Serious missteps by the military prosecutors ended with one being fired, and high-profile civilian defense teams again outmaneuvered the prosecution efforts. Still, on 29 October, when the Chief of Naval Operations, Admiral Michael M. Gilday, upheld the panel’s recommended sentence, it looked as though there would be some measure of accountability. Like Wuterich before him, Gallagher used a *60 Minutes* interview to gain public sympathy, while his family used social media to request a presidential pardon, which increased the political pressure. In mid-November, the president reversed Gallagher’s demotion and days later ordered the Navy to cease a review that would have stripped the SEAL of his special operations qualification. The ensu-

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<sup>2</sup> Charles Lane, “Opinion: Trump’s War-crime Pardons Could Be His Most Nixonian Moment Yet,” *Washington Post*, 20 May 2019; and Ed Kilgore, “Will Trump Go Nixonian with Clemency for War Criminals?,” *New York Magazine*, 20 May 2019.

<sup>3</sup> The counts for which Gallagher was found not guilty were premeditated murder, willfully discharging a firearm to endanger human life, retaliation against members of his platoon for reporting his alleged actions, obstruction of justice, and the killing of two Iraqi civilians. He was given credit for time already served in confinement and did not serve the further four month of confinement.

## Epilogue

ing debacle led to the secretary of the Navy's forced resignation and finally Gallagher's retirement.<sup>4</sup>

While law of war violations occurred after the four case studies in part three, few incidents rose to the notoriety of those early-war examples due in large part to better response by the military. Even so, later law of war violations, such as those Gallagher had been charged with, occasionally became the focus of public debate and dialogue due to political intervention. In addition to restoring Gallagher's rank just after Veteran's Day in 2019, President Trump issued pardons for two Army officers, First Lieutenant Clint Allen Lorange and Major Mathew L. Golsteyn, the first already convicted of a crime and the second preparing for his own murder trial.<sup>5</sup> These incidents shared many aspects with the cases already discussed and underscore the continuing difficulty in eradicating law of war violations.<sup>6</sup>

In the introduction of this book, the main research question was stated: To what extent is continued violence against noncombatants affected by the military or influences outside its control? Through the cases examined from World War II through the Iraq War, it is clear that while a large degree of culpability must begin with the perpetrators, it is also shared by the military, government, and public. An examination of the improvements versus the remaining shortcomings shows there remain many areas the military can improve its efforts at eliminating violence against noncombatants. Due to the remaining room for improvement, it is obvious that the military bears a large measure of responsibility for the continuing persistence of incidents of violence against noncombatants.

Clearly, among the most important reasons for the continuation of violations is the difficulty in their prosecution within the existing system, which minimizes deterrence. The mere existence of international laws is not enough to prevent atrocities or guarantee humane treatment of noncombatants. Societies and their military leaders must enhance the prohibitions in international laws with a lack of acceptance of violations and

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<sup>4</sup> George Petras, "Timeline: How Trump Intervened in the Navy SEAL Eddie Gallagher's War Crimes Case," *USA Today*, 27 November 2019.

<sup>5</sup> Richard Gonzales, "Trump Pardons 2 Service Members Accused of War Crimes and Restores Another's Rank," NPR, 15 November 2019.

<sup>6</sup> Dave Philipps, "Trump's Pardons for Servicemen Raise Fears that Laws of War Are History," *New York Times*, 22 November 2019.

## Epilogue

strict adoption and enforcement of domestic laws or military codes. This includes the full execution of awarded punishments to further inculcate their military forces with the predisposition to exercise necessary restraint in the face of the kinds of extreme circumstances that often precede such atrocities.<sup>7</sup> Most of the 1949 Geneva Conventions signatory states, which include all members of the United Nations, comply with the requirement to enact domestic legislation through their military justice systems. This was the case in the United States—using the Uniform Code of Military Justice (UCMJ)—for more than 40 years, until Congress eventually passed additional legislation covering civilians with the War Crimes Act of 1996 and the Military Extraterritorial Jurisdiction Act (MEJA) in 2000.

The first obstacle to prosecuting war crimes by the UCMJ stems, as demonstrated through these case studies, from the nature of the environments in which the crimes are perpetrated. Very often, these crimes occur in the situationally fluid and friction-filled areas where combat operations are occurring. Sometimes, crimes are simply not reported for a variety of reasons, including the killing of all who may have witnessed the crime. Sometimes reporting is challenging. Even when crimes are reported, investigations may prove difficult for several reasons. The immediate danger of ongoing kinetic combat operations makes detailed investigations into the circumstances and access to important evidence challenging, whether that be the evidence of the weapons used, in the form of spent cartridge casings or quantifiable damage to the environment or surroundings or in some cases to the victims or their remains. In the cases of My Lai (chapter 4), where the Army's initial attempt to cover up the atrocity delayed investigation, and in Mahmudiyah (chapter 9), where the perpetrators took measures to redirect culpability to insurgents to hide the need for investigation, the sites were not examined for long periods after the crime. Additionally, ongoing combat operations may make it problematic to immediately apprehend perpetrators or to limit contact between those who were responsible to prevent their collaboration on testimony. This may especial-

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<sup>7</sup> This is especially true in the case of international law, which has no enforcement agency and relies on states to enforce the laws on their citizenry. The lack of acceptance of international law violations by a society is also very important, as societal attitudes greatly influence the conduct of a state's soldiers.

## Epilogue

ly be true if crimes are committed while the subject units or individuals remain engaged with the enemy or have moved on to a different area as part of their operation.

Poor access to witnesses or availability of interpreters may also slow or hinder investigations and, at times, victims or witnesses are less than eager to provide any assistance to investigators despite the pursuit of accountability. The cases of My Lai, Son Thang, and Haditha all demonstrate this. Further, the willingness of witnesses to cooperate with U.S. military investigators is sometimes strained in areas where operations have caused casualties, damaged homes, or have continued unabated—disrupting life—for prolonged periods of time. The trust of the local civilians regarding the motives or the abilities of the investigators to provide justice in these situations is often low. The case studies from the Iraq War in part three demonstrate this at various levels. Finally, as at Abu Ghraib, in cases involving investigations by headquarters with purview over several Services, there are often multiple investigations, each with limited scope or jurisdiction, that make it difficult to create one complete assessment determining cause and culpability.

Obstacles derived from enduring operations or mistrust from the local population may be beyond the military's ability to change. But the way in which investigations are initiated and parameters and jurisdiction assigned is something that can be influenced. If Services are unable to agree on a sole investigatory party between themselves, the Department of Defense (DOD) could take the responsibility for the investigation to ensure unity of effort, resources, and control.

Once a violation is investigated and a decision is made to go to trial, there are, as we have seen, several systemic obstacles. As almost all law of war violations prior to recent changes in the U.S. Code were prosecuted under the UCMJ's punitive articles initiated most often by the commands to which the accused were assigned, prosecution was handled by teams of prosecutors of the various Services to which the alleged perpetrator was affiliated.<sup>8</sup> Many of these prosecutors have very little in the way of real tri-

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<sup>8</sup> Congress directed the establishment for Special Trial Counsels in the National Defense Authorization Act for Fiscal Year 2022 to create independent prosecution and referral authority for certain offenses.



## Epilogue

al experience in cases as complicated as most law of war violations prove to be.<sup>9</sup> In cases with multiple defendants and victims, it becomes very difficult to prove who was responsible for which specific act, and panels, as court-martial juries are called, can be every bit as unpredictable as civilian juries in their interpretation of “beyond reasonable doubt.” The case of Son Thang, during the Vietnam War, demonstrates how this can lead to problems during the course of several trials. Compounding the lack of prosecutorial experience is the fact that many perpetrators that go to trial do so with both military-appointed counsel and civilian defense attorneys. The civilian attorneys often possess much more experience in trying complex cases in court, providing a distinct advantage against relatively inexperienced military prosecutors. Finally, the use of immunity from prosecution—a tool with which a savvy prosecutor can secure key testimony—by inexperienced teams is often poorly executed with little to no plan, something evidenced by the trial in the Haditha case, where 17 grants of immunity were handed out with zero convictions resulting.<sup>10</sup> While there are options to mitigate this experience/talent gap, they are all resource intensive and, in Gary Solis’s opinion, “would require legislative support to overcome the resource and inter-service bickering over organizational and courtroom issues.”<sup>11</sup>

Prosecuting any crime in court can be difficult, but within the military system the right against undue command influence in the proceedings was designed to protect servicemembers from being punished wrongly or excessively at the behest of higher authority. The hierarchical structure of the military can make it plausible that senior members of the chain of command have exerted influence in how a case is investigated or prosecuted—to include the type of punishment sought. In the event that an assertion of undue command influence is determined to be founded, the military judge may throw the case out, leaving the Service to determine whether the case’s work (often from the investigation onward) can be replicated af-

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<sup>9</sup> Gary D. Solis, “Is Military Justice Just,” *Los Angeles (CA) Times*, 20 September 2007; and Solis, “There Are No Accurate War Crime Numbers.”

<sup>10</sup> Gary D. Solis, “Losing Haditha” (unpublished paper sent to author, 14 December 2020).

<sup>11</sup> Gary D. Solis, email to author, 19 January 2023.

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ter charges are brought again by a different—often senior—convening authority, as seen in the Haditha case. Used inappropriately, it can become an additional tool that defense teams may use to cause reasonable doubt among courts-martial panels or cause the military judge to throw out the case and cause a different convening authority to start the entire process over. While a potential obstacle to obtaining accountability, the protection against undue command influence is one of the few protections service-members enjoy in a hierarchical system, although recent legislation, discussed later, may make undue command influence less common.

Even after a case is successfully prosecuted and a panel returns a guilty verdict and a sentence, there are still obstacles to accountability that may be encountered. The sentence is offered to the convening authority as a recommendation. The convening authority may approve it or any lesser sentence they determine is acceptable. After the convening authority agrees to a sentence, it comes under several appellate reviews both inside and outside of the armed forces, where the results may be dismissed on technicalities or the sentence may be further reduced. Last, after a final approval is given to the findings, social or political pressure can be brought to bear on or by civilian members of the chain of command, such as Service secretaries, secretary of defense, or the president. This was the case in November 2019, mentioned earlier, when President Trump pardoned First Lieutenant Lorange, convicted of ordering the shooting of a group of Afghan civilians, and Major Mathew Golsteyn, who was awaiting trial for killing an unarmed man in 2010. The lieutenant had served 6 years of a 19-year sentence before clemency was granted.<sup>12</sup> While this system of adjudicating law of war violations is not ideal, the problem is exacerbated in multiple ways by each of three important influences on the soldiers who commit atrocities: the military itself, the government, and the public. As a Western military, the political and public pressures and influences on the actions

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<sup>12</sup> Philipps, “Trump’s Pardons for Servicemen Raise Fears that Laws of War Are History.” Intercession on behalf of servicemembers by prominent members of the government is not new. In 1901, Supreme Court Justice Henry B. Brown wrote a letter to Secretary of War Elihu Root urging leniency on behalf of a soldier who murdered a Filipino civilian. Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (New York: Routledge, 2010), 57–58.

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of the military concerning adjudication and punishment cannot be understated, although they normally begin after the application of the UCMJ.

The UCMJ, the system of adjudicating infractions that are counter to good order and discipline—necessary hallmarks of any military organization—originates with Congress but is implemented by the military. Before beginning the research for this book, the author had discounted the importance of the UCMJ's role in the continuation of violence against noncombatants. It has been successful in dealing with most routine transgressions and serious crimes committed by those subject to it even through tumultuous periods of time like the Vietnam War era, but it has not been particularly successful when dealing with law of war violations.<sup>13</sup> The limitations in this regard were apparent as far back as My Lai when, in addition to issues of command influence arising, the limits of the UCMJ's jurisdiction were made obvious by the inability to prosecute discharged soldiers. Flaws within the system that become apparent to the military but are not held up for remedy by Congress have little hope for change. That the military has not sought a surer means of holding its soldiers accountable in any of its constant updates to the U.S. legislative bodies governing it, such as either the Senate or House Armed Services Committees, communicates a lack of priority by the Services to improve the rate of prosecution for these types of offenses. Such a conversation could also broach better oversight from these governing bodies aimed at preventing undue interference in military justice in the form of pressure to mitigate, or in the case of the presidential pardons earlier mentioned, completely circumvent, punishment.<sup>14</sup> In a Western military wherein the military is, and should be, under civilian control, this would be a sensitive discussion but one worth undertaking.

Remedying the justice system and influence from the outside would still leave several obvious shortcomings on the part of the military. The first

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<sup>13</sup> Law of war violations often are charged as the same serious offenses as assaults and murders, which the UCMJ most often handles successfully, but they bring added complexity due to many factors, including their commission during combat operations in environments that are difficult to investigate, victims and witnesses of different cultures or nationalities necessitating interpreters, and more. This produces inefficiency in prosecuting law of war violations under the UCMJ.

<sup>14</sup> While broad, the president's pardon authority has limits imposed by the Constitution. Not among those limits is when a pardon is conferred after the commission of a crime. It can be before, during, or after judicial proceedings.

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is the repeated failure, as evidenced in almost every case examined here, to follow and ensure accountability beyond administrative measures at levels in the chain of command that are responsible for the supervision of troops and conduct of operations.<sup>15</sup> Whether the reluctance to pursue General George S. Patton's responsibility for the incidents at Biscari, the single prosecution for My Lai, or any of the other instances of senior officers not held accountable for lack of action or—worse—action to interfere with investigations or prosecution, the record of real effort to hold all with responsibility to account is not good. Unfortunately, at times, efforts to hold more-senior members to higher account, as seen with General James N. Mattis's sentencing approval actions with both the Haditha and Hamdania cases, comes with leniency for those responsible for the crimes, a situation equally unsatisfactory.

Also, while both the Army and Marine Corps have made great strides in the quality of education and training for their soldiers and Marines since World War II, a second shortcoming is a lack of leadership at critical points in situations that are obviously rife with potential for a violation to occur. Leadership in these instances is crucial, both in modelling proper behavior by authority figures, and supporting and reinforcing the ideals and requirements learned in the aforementioned training and education of the lower-level leaders who are often present at the point of friction. Consider the similarities of conditions in the case studies examined. In many instances, the violations occurred when the perpetrators experienced extreme stress for prolonged periods, usually having taken casualties—often to well-liked comrades—very shortly before the incidents, and in situations where there was either a lack of midlevel supervision, such as junior officers or mid- to senior enlisted leaders, or the presence of leaders who had shown a propensity for lax discipline or were attempting to prove themselves. Recall the words of a member of the platoon responsible for the Hamdania case:

There is something that could easily have prevented it. Command climate is something we create. If the 1stSgt was making his rounds, we could have brought up concerns and removed uneasiness with what was going on. The 1stSgt failed in his duties, he

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<sup>15</sup> Gary D. Solis, "Is Military Justice Just?," *Los Angeles (CA) Times*, 10 September 2007.

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was one individual who could have prevented this. That's the importance of mentoring on the enlisted side—we had no voice. But how do you express that without consequences?<sup>16</sup>

The presence of one, or several, of these conditions are immediate red flags that engaged leaders respond to with closer supervision and increased communication with their troops regarding the reasons for the mission, the importance of following rules of engagement and laws of war, and other measures aimed at reducing the potential flashpoints. Luckily, for most units, good leadership is present, and many similar situations are often handled professionally and without violence against noncombatants due to good leadership. Several or all of these conditions were noted in My Lai, Son Thang, Abu Ghraib, Haditha, Mahmudiyah, and Hamdania and unfortunately such intervention was lacking in all six incidents. The needed effort throughout the chain of command extends beyond remaining vigilant to the situations and types of stressors that have repeatedly been identified here. It also includes a commitment to proactive action to rotate fatigued units, act on the advice of the medical professionals who counsel the soldiers, and, when necessary, replace leaders who have been shown unwilling or unable to maintain the highest levels of discipline within their ranks. Until then, instances of substandard frontline leadership will continue to be an enabler of violence.

This last shortcoming was often compounded with a third, often in more-senior leaders, whose own commitment to the profession of arms and their military service helped create blind spots in their ability to recognize the potential for their soldiers or Marines to have acted inappropriately or illegally. This repeatedly led to delays in investigating allegations of crimes, as in Haditha, and to leaders testifying in the defense of their Marines, as happened at Son Thang. It was highlighted by Major General Antonio M. Taguba's criticism in his investigation of Brigadier General Janis L. Karpinski's lack of recognition of the part that poor supervision played at Abu Ghraib.<sup>17</sup> During periods of conflict where the government did not

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<sup>16</sup> Member of Pendleton 8 Hamdania platoon (anonymous), interview with author, 13 December 2022.

<sup>17</sup> Seymour Hersh, "Torture at Abu Ghraib," *New Yorker*, 30 April 2004.

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seek full mobilization of its Reserves, the lowering of standards of enlistment or retention worsened the effects of this blind spot. This exacerbating effect happened with Project 100,000 during the Vietnam War and again with the waiving of certain enlistment requirements during the Iraq War, as seen specifically in the Mahmudiyah case study, which was felt across all Services. It was also exacerbated after the 9/11 attacks when the American public and many new recruits to the Army and Marine Corps harbored desire for revenge against al-Qaeda and Islamic extremists.<sup>18</sup> This desire often led to prejudicial behavior against any Muslim, rather than just extremists. The results were that the introduction of soldiers who did not meet the usual moral or mental standards or who were negatively influenced by societal biases changed the dynamic within units, which should have signaled an increased requirement for close supervision and a leader's re-examination of formerly held assumptions regarding what a soldier under one's purview is or is not capable of doing. This did not always happen.

Two final shortcomings worth mentioning were systemic within the judicial system of the armed forces. One is the lack of standardization in reporting and tracking law of war violations among the Services. The creation of the DOD Civilian Protection Center of Excellence by the National Defense Authorization Act for Fiscal Year 2022 addressed this by providing a central organization charged with leading the efforts of mitigating and preventing harm against civilians and collecting reports from the U.S. armed forces.<sup>19</sup> This, combined with the earlier mentioned problem of these violations being prosecuted with the same UCMJ articles as non-law of war crimes made any meaningful attempt to accurately depict and characterize the true scope of violence against noncombatants nigh impossible. The second is that for most military prosecutors, there is a significant lack of experience in prosecuting law of war crimes, owing to both the relative rarity of these sort of trials and the short time many military lawyers spend in prosecutorial billets. This brevity of experience is due to rotations between billets deemed essential to the career development of

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<sup>18</sup> Peter Aitken, "9/11 Had the Biggest Effect on Military Recruiting Since Pearl Harbor," *Fox News*, 7 September 2021.

<sup>19</sup> National Defense Authorization Act for Fiscal Year 2022, Pub. L. No 117-81 (2021).

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the judge advocate career field.<sup>20</sup> The consequence of this is the disparity in experience between military prosecutor and civilian/military defense teams seen time and again in the cases examined. This also was finally addressed in the 2022 National Defense Authorization Act, tasking Services to provide special trial counsels for high profile cases, addressed at length later in this chapter.

Against the above-listed shortcomings, the Army and Marine Corps have made efforts to reduce violence against noncombatants from the time of the baseline cases of World War II discussed earlier. Those improvements started with the revision of the *Rules of Land Warfare* in 1944 to reject the defense of obedience to a superior's orders in trials prosecuting war crimes.<sup>21</sup> After My Lai and Son Thang, more education was included on the requirements of the law of war in entry-level, annual, and pre-deployment follow-on training for soldiers and Marines. In the Vietnam War and again in the earliest periods of the Iraq War, the instruction of these classes by nonunit personnel was recognized as being less than effective, and staff judge advocates were soon assigned to combat units early in predeployment training. The purpose of this was for them to become recognized members of the commander's staff so that their remarks and instruction would bear more consideration than that of a stranger's. Training was also improved through the realistic use of roleplayers portraying civilian noncombatants—augmenting those playing enemy combatants—and the use of scenarios that required cultural sensitivity and interaction with the civilian population. These scenarios included responsible use of force, shoot-no shoot scenarios, and situations where the proper engagement of the noncombatants was essential to mission success. While additional law of war violations have occurred, the U.S. military also continues to enact measures to reduce them alongside changes to the internal military culture that helps excuse them.

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<sup>20</sup> These billets include tours serving in prosecution, defense, family law, and command advisory billets, just to name a few.

<sup>21</sup> Gary D. Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums," *American University International Law Review* 15, no. 2 (1999): 510.

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In 2016, the secretary of defense moved to fully integrate the military, opening all previously restricted jobs to women. This is a positive step for several reasons, including providing the ranks of the all-volunteer force with a larger pool of citizens possessing higher physical and moral qualifications from which to draw. It may also help improve the diversity of thought. Also helpful in both building a stronger, integrated military and in reducing potential violence against noncombatants is the lower prevalence today of the type of misogynistic material found in some of the Cold War-era men's magazines Gregory Daddis wrote about in *Pulp Vietnam*. Any reduction in the beliefs of strict gender roles within the armed forces, as discussed in Goldstein's *War and Gender*, may also have the effect of reducing the reliance on sexual dominance or emasculation of the enemy by soldiers as a dehumanization technique when seeking to prepare prisoners for interrogation, as at Abu Ghraib.

In January 2022, Secretary of Defense Lloyd J. Austin III issued a memorandum directing a plan for mitigation of civilian harm be developed for review within 90 days.<sup>22</sup> Among other initiatives, the plan intended to provide for a center of excellence to expedite and institutionalize the knowledge, practices, and tools for preventing and mitigating civilian harm and develop standardized civilian harm operational reporting processes for the entire DOD. The DOD Civilian Protection Center of Excellence is projected to be fully staffed by 2025, addressing the mitigation and reporting techniques for civilian noncombatant casualties throughout the U.S. Services.<sup>23</sup>

Without acknowledging the improvements since World War II or continuing to investigate other culpable parties, it might be easy to conclude, as author Nick Turse asserted, that the military does not recognize the protections noncombatants should be afforded. However, through the research of this book, the culpability of two other parties has become evident: the government and the American public. It is also evident that, in

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<sup>22</sup> Lloyd J. Austin III, Memorandum for Secretaries of the Military Departments, "Improving Civilian Mitigation and Harm," Office of the Secretary of Defense, 27 January 2022.

<sup>23</sup> U.S. Department of Defense, "DOD Releases Memorandum on Improving Civilian Harm Mitigation and Response," press release, 27 January 2022.



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many cases, military responses to law of war violations are often taken in anticipation of the reactions of the government and the public.

The government bears the responsibility of making the laws of the land, including those that comply with international treaties and conventions to which the United States is a signatory, and for raising the forces for national defense. Within its responsibility of raising forces for national defense resides the requirement to ensure the existence of a legal system that can enforce the law of war. Here, the government has been slow to act and still relies primarily on a system—the UCMJ—that was not designed to address law of war violations and has been augmented with several stop-gap federal laws. The International Criminal Court was founded to prosecute these types of crimes, but the potential threat to U.S. sovereignty makes it less than acceptable to lawmakers. This failure both to advance and ratify legislation designed specifically to address law of war violations or to ensure that the UCMJ—if lawmakers are content to rely on it—is better equipped to do so through articles custom-designed is the government's first shortcoming. To that point, a separate system or group of domestic laws to prosecute grave breaches, committed either by military personnel or the ever-increasingly present civilian defense contractors, would remove the possibility of undue command influence from proceedings and close that loophole. Moreover, changes to the legal directives regarding authorized techniques for conducting interrogations that were forged during the Iraq War would lead to the conditions under which the abuses at Abu Ghraib occurred. While the government did finally pass the War Crimes Act in 1996 and the MEJA in 2000, the time elapsed since the requirement for these pieces of legislation was quite long. Also, there is still work to be done to ensure military contracting companies, an increasing presence on modern battlefields, are held accountable. The contractor CACI has denied and fought its liability for its interrogators' actions at Abu Ghraib, a fight that began in 2008.<sup>24</sup> In November 2024, a jury awarded \$42 million to three named plaintiffs for their abuse by CACI employ-

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<sup>24</sup> Matthew Barakat, "Judge Unimpressed by Latest Argument in Abu Ghraib Case," *Seattle (WA) Times*, 10 September 2021; and Pratap Chatterjee, "Iraqi Torture Victims [sic] Lawsuit Against Military Contractor CACI Allowed to Proceed," *CorpsWatch.org*, 21 August 2023.

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ees, although yet another round of appeals may be initiated.<sup>25</sup> Finally, after providing the legal means to adjudicate the infractions, the government should do its best to allow the provided system to work free of interference except in those situations where an obvious failure has occurred. This includes both interference during the prosecution of the crimes and in unduly influencing the resultant punishments, whether to score political points or any other reason.

As with the military, the government recently made some progress in this area. The National Defense Authorization Act for Fiscal Year 2022 directed some changes that will address both how a crime is charged under the UCMJ and who bears responsibility for prosecution. The newly added Article 24a of the UCMJ designates “covered offenses,” which will be tried by special trial counsels. These offenses include murder, rape and sexual assault, which represent some of the more serious law of war violations often tried under UCMJ articles of offense.<sup>26</sup> The special trial counsels would be senior lawyers outside the chain of command who would be authorized to make binding decisions on whether to prosecute, even against a commander’s wishes. They could potentially work to diminish the impact of leaders’ blind spots and the utility of undue command influence for defense lawyers. It would also at least partially address the concerns stated earlier when recommending a separate system for trying these types of crimes. The final push for these changes, called for since 2013 by one member of Congress, which will affect law of war violation prosecutions, followed the sexual assault and murder of Army specialist Vanessa Guillén by another soldier, Aaron David Robinson, at the former Fort Hood, Texas. The outrage following that crime underscored again the pervasive tie gender roles, sexual domination, and power struggles have to many of the incidents of violence against noncombatants, including those discussed throughout this book. Despite the positive steps, many lawyers in and out of the military believe more change is needed. Some, like Geoffrey Corn and Rachel E. VanLandingham, go so far as suggesting that in-

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<sup>25</sup> Mattathias Schwartz, “US Jury Awards \$42 Million to Iraqi Men Abused at Abu Ghraib,” *New York Times*, 12 November 2024.

<sup>26</sup> Rachel VanLandingham, “FY22 NDAA: A Missed Opportunity to Improve Military Justice,” *Just Security*, 8 December 2021.

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stead of using the UCMJ articles for crimes such as murder or rape that a servicemember could be prosecuted for while on liberty in the United States, prosecutors make use of the same enumerated war crimes the United States holds its enemies accountable for at proceedings such as those at Guantánamo Bay.<sup>27</sup>

Additionally, when raising forces for national defense, the government controls the power of the purse, approves its laws, and confirms its highest-ranking leaders to their positions. In every one of those responsibilities, there are means to exert its authority to ensure due attention is paid to preventing and, if necessary, gaining accountability for violations of the law of war. The failure to exert its influence accounts for the lack of accountability until the recent initiatives of Secretary Austin instituting standardized tracking and reporting of violence against noncombatants. This failure also accounts for Congress's lack of demand for the DOD to show that the responsibility truly stops at the low levels prosecutions have so far targeted and does not, in fact, rest at the feet of higher leadership. Also, military decisions on whether to utilize the Reserve forces more heavily during the Iraq War were influenced by domestic political considerations, specifically the desire to keep the war's impact on the average American as small as possible. It led to the lowering of enlistment or retention standards highlighted earlier in discussions of Project 100,000 or the Mahmudiyah case in Iraq. The lowering of standards often counteracts military efforts to increase the professionalism of the force through education on law of war and military ethics found in its military education courses.

The final shortcoming the government must account for is its role in preparations for military action. For example, the lack of ability by either administration or the State Department to convince Kuwait to support the planned housing of prisoners of war prior to the Iraq War in 2003, or failing this, authorizing additional forces to adequately contend with the volume of detainees. This lack of whole-of-government approach to planning set some of the conditions that made the abuses at Abu Ghraib possible. Additionally, the military provides advice on subjects such as troop strength required to accomplish government leadership's aims. When fighting with-

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<sup>27</sup> Geoffrey S. Corn and Rachel E. VanLandingham, "Strengthening American War Crimes Accountability," *American University Law Review* 70, no. 2 (2020): 317.

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out the overwhelming military force so essential to what Russell F. Weigley labeled the “American way of war,” the troop formations may quickly become task-saturated due to mission creep. When fighting any conflict, but especially in counterinsurgency fights like the Vietnam and Iraq Wars, high operational tempos and competing priorities and tasks with too few available soldiers leads to exhausted troops. These troops are more prone to mistakes or overreactions when responding to an elusive enemy fighting from among the civilian populace. This was the case in many of the incidents examined and described in detail during the interview with the anonymous platoon member interviewed for the Hamdania case study. Combined with the previously mentioned lowering of standards and failure to call up the Reserves it becomes evident that both civilian and military officials have given precedence to public opinion and considerations over force protection and minimizing the risk of law of war violations.

The public exerts much stronger influence on the continued violence against noncombatants than many acknowledge, although its influence against violence, through expressions of disgust or intolerance for it, were less than the author anticipated when beginning the research for this book. The armed forces are made up of young and often still impressionable and cognitively developing members of society. They enter with attitudes concerning race, gender, or enmity for enemies shaped by their upbringing and amplified by the media. In the Vietnam War, some of the preconceptions were shaped by the pulp magazines that helped influence the acceptance of violence against women and belief in the duplicity of the enemy’s civilians.<sup>28</sup> Following the 9/11 attacks on New York City and Washington, DC, the naturally strong inclination of citizens to join in calls for revenge was heightened by anti-Muslim voices in newer venues like social media. This public outrage, combined with governmental relaxation of rules of conduct for soldiers—particularly in interrogations—served to loosen restrictions and roll back advances that ensured better adherence to the law of war that the military had instituted since Vietnam. Initial instruction and training of the newly enlisted can do only so much to inculcate these soldiers into the professional ethic of the armed forces, particular-

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<sup>28</sup> Gregory A. Daddis, *Pulp Vietnam: War and Gender in Cold War Men’s Adventure Magazines* (New York: Cambridge University Press, 2021), 9.

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ly in the short time between training and deployment to combat that was standard during the Vietnam War era. The ability of the military to demand strict adherence to standards of conduct was additionally undermined when public attitudes bordering on apathy were obvious or when politicians or the public repeatedly pressured the government to reduce punishments against those who were prosecuted for violating the laws of war. Worse, the lack of indignation when politicians undermine the discharge of military justice can be seen as tacit approval. One of the sources of this apathy, seen again and again in the case studies examined, was racial bias, which in the cases explored fueled a lower regard among U.S. troops for the enemy and by extension its society.

The anti-Asian racist undertones embedded within the World War II-era media and entertainment industry that John Dower described in *War Without Mercy* no doubt affected, to some degree, the way soldiers thought about their enemy. The material in the men's magazines of the Cold War that Daddis studied, in which images of masculinity were confirmed by defeating the often-caricatured enemy, served to amplify the attitudes in mainstream media. The public reaction, or lack thereof, to the trophy-taking of skulls or the disparity in how soldiers were held accountable between the European and Pacific theaters clearly reveals that actions deemed acceptable against a non-White enemy from Japan would be met with outrage if perpetrated against White foes in Europe. It is likely that had *Life* magazine printed a picture of a young, blonde woman displaying a German or Italian skull on her desk, its editors would have received many more negative responses than it did for its picture showing a Japanese skull. This demonstrates how the near- and distant-enemy concept factored into the public's expectation or desire for investigating or prosecuting violations of the law of war. The "mere gook rule" during the Vietnam War and the later use of *haji*, among others, as an ill-informed insult for enemy soldiers or civilians in Iraq are later manifestations of these racial attitudes.<sup>29</sup>

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<sup>29</sup> The term *haji* is, properly used, an honorific for one who has completed the pilgrimage to Mecca. It may also be used as a form of respectful address to an elder who has not made the *haji* but is respected nonetheless. However, it has been appropriated for as derogatory or dismissive slang to describe all Muslims by servicemembers in the twenty-first century.

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Another source of apathy toward accountability for those committing violations is the morally charged connection between society and its soldiers. This connection, also described by Charles Lindbergh, was one of the factors that Walker Schneider said accounted for apathy or acceptance of American trophy-taking during World War II.<sup>30</sup> This connection and the belief that fighting a war against a “savage” foe required savage acts, thereby absolving U.S. soldiers of any moral or legal restraints, helped preserve the “noble” quality of the Good War.<sup>31</sup> This connection, born from the view that the soldiers were manifestations of American virtues and superior morality, was bolstered by wartime propaganda. Although tested during the darkest hours of the Vietnam War, this connection and belief would re-emerge after the institution of the all-volunteer force and it remains strong, as evidenced through polling on subjects such as trust and respect for various government institutions—until a recent drop in the wake of increasing public politicization of the military.<sup>32</sup> In addition to dampening the effects of any moral outrage in the country at large, the connection felt by society for its soldiers was also displayed in these case studies by the donations raised to fund the defenses of Marines of Son Thang and of Wuterich’s Haditha case. Finally, the support in popular culture for Lieutenant Calley after My Lai, as evidenced by Joe Watford’s “Rally for Lt. Calley” song, which was released under the Ginny and Joe record label or Plantation Records’ “Battle Hymn of Lt. Calley,” as well as support for the Pendleton 8 after the killings at Hamdania show the continued force of the connection.<sup>33</sup>

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<sup>30</sup> Walker Schneider, “Skull Questions: The Public Discussion of American Trophy Collection During World War II,” *Penn History Review* 25, no. 2 (2018): 127.

<sup>31</sup> Paul A. Kramer, “Race-making and Colonial Violence in the U.S. Empire: The Philippine-American War as Race War,” *Diplomatic History*, no. 2 (2006): 172, 205, <https://doi.org/10.1111/j.1467-7709.2006.00546.x>.

<sup>32</sup> This politicization has much to do with the use of the military as backdrops by politicians on both sides of the aisle, although the actions of many veterans and some active duty servicemembers during the campaign and aftermath of the 2020 elections contributed to this decline of trust and respect.

<sup>33</sup> A piece in *Billboard* magazine addressed Plantation Records’ inability to meet demand for the single of “Battle Hymn of Lt. Calley.” Distributors had thousands of copies on back order, with Southland Distributors in Atlanta, GA, waiting for the 100,000 they had ordered and Heilicher Bros. in Minneapolis, MN, waiting on 58,000 among the many listed. “Calley Disk Stirs Market; Supply Runs behind Demand,” *Billboard*, 17 April 1971, 3.

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The constitutionally mandated tradition of civilian control of the U.S. military means that although the profession of arms may call for certain actions and standards, the military must rely on the laws and rules approved by Congress to regulate its forces. As the U.S. public votes its senators and representatives to six- and two-year terms, respectively, and its president—the commander-in-chief of the military—to four-year terms, the public can influence the military through the ballot box. Despite occasional outcries over incidents such as My Lai or Abu Ghraib, there has never been a sustained effort by the electorate to oblige elected officials to prescribe laws that better influence the military to investigate and prosecute law of war violations or ratify domestic legislation that would bind military and civilians alike to follow the law of war conventions. No matter the reason for this, it is an indictment on the public's regard for the law of war and bears on ultimate culpability for the continued violence against noncombatants.

So, to what extent is continued violence against noncombatants affected by the military or influences outside its control? Beyond the central culpability of the individual soldiers who commit the crimes, which cannot be overstated, the military bears a large measure of the responsibility for the continued violations. The profession of arms is replete with individuals who serve honorably and who step in to stop violations to its ethics or the law of war such as Chief Warrant Officer Hugh C. Thompson (My Lai), Sergeant Joseph M. Darby (Abu Ghraib), and Private Justin P. Watt (Mahmudiyah). It also includes many whose experience and intellect should adequately arm them to provide enough supervision and direction down the chain of command to reduce violence against noncombatants to levels much lower than seen today. The military cannot, however, do everything necessary without the help of the government charged with regulating it or the public from whence its soldiers come and who elect the officials of the government. Additionally, although many of the U.S. military's actions in response to law of war violations are seemingly anticipatory to public reaction or government influence, this reflects a healthy awareness of its accountability to the government and people. There has been progress from World War II onward, but there remains room for more.

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## TAMING AMERICA'S WARRIORS

Violations of the laws of war have occurred as long as those laws or the norms that preceded them have existed, and incidents of violence against noncombatants remain a regrettable and persistent feature of war. *Taming America's Warriors* focuses squarely on U.S. land forces, assessing their commitment to fighting within the laws of war and their own set of professional values and exploring the factors that contribute to soldiers and Marines choosing to disregard those values, along with their training, to commit crimes that are detrimental to their missions. Retired Marine Dr. Scott Hamm recounts several cases of American war crimes in World War II, the Vietnam War, and the Iraq War and identifies the progress that has been made to reduce violence against noncombatants as well as failures to hold perpetrators and those who enable their crimes accountable. This book addresses the central question: To what extent is continued violence against noncombatants affected by the military or influences outside its control, including public opinion? *Taming America's Warriors* is a valuable roadmap to diminishing the incidence of war crimes through an understanding of the law, as well as recognizing that they can be fostered by influences within and outside of the military.

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