

# A FEW GOOD SCAPEGOATS: THE ABU GHRAIB COURTS-MARTIAL AND THE FAILURE OF THE MILITARY JUSTICE SYSTEM

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*The way to have good soldiers is to treat them rightly. . . A private soldier has as much right to justice as a major general.*<sup>1</sup>

The recent Abu Ghraib courts-martial have once again raised the issue of the disparate treatment of enlisted soldiers in the military justice system. This article explores the issue of what, if any, changes can be made to the Uniform Code of Military Justice to ensure enlisted soldiers are not singled out for the most punitive measures available under the Uniform Code of Military Justice, such as the general court-martial, while officers who are involved in acts of misconduct either as principals, accessories, or through the doctrine of command responsibility are allowed to either retire, resign their commissions, or receive administrative reprimands. Under the current system of military justice, there is no mechanism in place to prevent the disparity of discipline demonstrated in the Abu Ghraib scandal. The article calls for the adoption of a new Rule for Courts-Martial which would require, in cases raising issues of command responsibility, the commander filing the court-martial charges to certify that he has investigated the issue of command responsibility and has found that the misconduct committed by the soldier was not the result of orders given by a superior officer nor the result of culpable negligence on the part of any superior officer. This information will be presented to the court-martial to be used in the appropriate manner during sentencing proceedings. Such a rule would restore legitimacy to a system that has lost credibility as a result of the Abu Ghraib courts-martial, provide a necessary curtailment of command discretion, help promote good order and discipline, and reaffirm the notion that commissioned officers are to be held to a higher standard than enlisted soldiers.

## I. INTRODUCTION

Consider the following hypothetical scenario: Captain Smith and Specialist Jones are assigned to a combat team that has captured an enemy soldier. The two servicemen are tasked with interrogating the prisoner in order to obtain critical battlefield intelligence. Captain Smith knows that Specialist Jones has not received training in the *Geneva Conventions* and suspects that he may have abused prisoners in the past.

After several days of failed attempts to obtain information from the prisoner, Captain Smith tells Specialist Jones that he wants results and instructs him to do what is necessary to obtain the information. Captain Smith leaves Specialist Jones alone with the prisoner and returns several hours later to discover the prisoner has died as a result of a beating administered by Specialist Jones.

Captain Smith informs military law enforcement personnel of the incident. Colonel Doe, the brigade commander, decides to prefer court-martial charges against Specialist Jones for the death of the prisoner. Specialist Jones is court-martialed and sentenced to twenty years confinement, reduction to the

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<sup>1</sup>. Abraham Lincoln, (available at [http://jaghunters.blogspot.com/2004/08/so-in-libyan-fable-it-is-told-that\\_31.html](http://jaghunters.blogspot.com/2004/08/so-in-libyan-fable-it-is-told-that_31.html) (accessed Mar. 23, 2006)).

lowest enlisted grade, and is dishonorably discharged from the service.

Based upon the facts, Colonel Doe concludes Captain Smith was derelict in the performance of his duties by allowing Specialist Jones to interrogate the prisoner. Captain Smith is given an extremely poor officer evaluation report which effectively guarantees he will not be promoted to the next rank.

Most observers would agree that such a result would be patently unfair. However, this is precisely what occurred in the Abu Ghraib affair. Under the current military justice system, there is no rule or mechanism that would prevent such a result from taking place. Unbridled command discretion is a feature of the military justice system that allows a commander to engage in such a disparity of discipline.

The military justice system's failure to address the issue of command responsibility in the Abu Ghraib courts-martial raises the issue of what, if any, measure can be implemented to ensure such failures will not be repeated in the future. Under our current system of military justice, there is no effective mechanism to ensure that commanders will adequately incorporate issues of command responsibility into the decision matrix when evaluating the appropriate disposition of offenses. Thus, the Abu Ghraib courts-martial rendered verdicts that indelibly changed the lives of several enlisted soldiers and yet ignored the pink elephant of chain of command responsibility for the actions of these soldiers. To prevent such an event from taking place in the future, I propose the adoption of a rule of military justice that will force the military justice system to address the issue with the requisite amount of depth and formality.

It has been almost two years since the world was shocked by the pictures documenting the abuse and torture of prisoners at Abu Ghraib by United States troops.<sup>2</sup> "Abu Ghraib" has become one of those phrases, such as "My Lai,"<sup>3</sup> that exemplify misconduct by members of the United States military. Decades from now, perhaps the most memorable images of the United States military campaign in Iraq will be the photos of the horrific acts of torture and abuse committed by United States military forces at the Abu Ghraib prison. The images of United States troops degrading, abusing, and torturing Iraqis instantly became a metaphor for all the failures and abuses of the United States campaign in Iraq. Abu Ghraib has also become an effective recruiting tool for the Iraqi insurgency and has been used as the justification for acts of murder against members of the United States and allied forces.<sup>4</sup>

In response to the abuses at Abu Ghraib, President Bush engaged in a public relations offensive, during which he gave two interviews on Arab speaking television stations.<sup>5</sup> During these interviews, the President expressed his disgust, and that of the American people, for what had taken place at Abu Ghraib and signaled the intention of the United States to quickly bring to justice those responsible for the acts. Since that time the military justice system has responded by initiating courts-martial against nine of the soldiers who were directly responsible for the acts of abuse and torture.<sup>6</sup>

One of the advantages of the military justice system is its ability to respond quickly to acts of misconduct. However, speed and efficiency are not the primary goals of the military justice system. Those who care about the integrity of the military justice system should be concerned about the fact that,

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2. Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* 22-23 (1st ed., HarperCollins 2004).

3. See Seymour M. Hersh, *Cover Up* 1-25 (1st ed., Random House of Canada 1972) (describing My Lai).

4. Phillip Carter, *The Road to Abu Ghraib*, 35 *Washington Monthly* 20, 29 (Nov. 2004).

5. U.S. Govt., *White House, President Bush Meets with Al Arabiya Television on Wednesday: Interview of the President by Al Arabiya Television* [¶ 3], <http://www.whitehouse.gov/news/releases/2004/05/20040505-2.html> (May 5, 2004).

In an interview with Al Arabiya television President Bush, commenting on the Abu Ghraib scandal said,

In our country, when there's an allegation of abuse – more than an allegation in this case, actual abuse, we saw the pictures – there will be a full investigation and justice will be delivered. We have a presumption of innocent until you're guilty in our system, but the system will be transparent, it will be open and people will see the results. This is a serious matter. It's a matter that reflects badly on my country. Our citizens in America are appalled by what they saw, just like people in the Middle East are appalled. We share the same deep concerns. And we will find the truth, we will fully investigate. The world will see the investigation and justice will be served.

*Id.*

6. See *infra* pt. VII, Appendix 1.

thus far, only enlisted soldiers have been court-martialed for actions relating to the Abu Ghraib scandal.<sup>7</sup>

While the investigation of the Abu Ghraib scandal is not complete, it now appears that no commissioned officer will face a court-martial for any acts related to the Abu Ghraib scandal that took place, despite strong evidence that command responsibility played a role in the acts of abuse and torture which took place at Abu Ghraib.<sup>8</sup> In fact, if recent news reports are credible, it now appears that several high ranking officers who may have been involved in the Abu Ghraib scandal, including Lieutenant General Ricardo Sanchez, are now being considered for promotion and assignment to prestigious billets.<sup>9</sup>

The chronology of the Abu Ghraib courts-martial stands in stark contrast to how the British system of military justice has handled a similar affair. On September 14, 2003, British soldiers of the Queen's Lancashire Regiment raided a hotel in Basra and detained eight men after weapons were found. The men were hooded and handcuffed and taken to a former torture center once used by Iraqi forces. British troops abused the men for several hours. One prisoner was beaten so badly that he eventually died as a result of his injuries.<sup>10</sup>

Seven soldiers involved in the incident now face courts-martial charges. One soldier has been charged with manslaughter in connection with the death. He and two of his fellow soldiers have also been charged with inhumanely treating prisoners. A fourth soldier faces assault charges.

The commander of the soldiers has also been charged with crimes arising out of the incident under the theory of command responsibility. The doctrine of command responsibility allows a superior officer to be held criminally responsible for the failing to exercise reasonably necessary care to prevent or punish misconduct by subordinates.<sup>11</sup> Military prosecutors have charged Colonel Mendonca with negligence not because he condoned or abetted the crimes, but because he did not know what was going on in his own command, and failed to impress upon his men the requirement that they act in accordance with the *Geneva Conventions* and British military law at all times.<sup>12</sup>

Given the similarities between the Abu Ghraib and the Mukhabarat scandal and the historical linkage between the British and American military justice system, one would think that the high ranking officers involved in the Abu Ghraib scandal might face charges similar to those levied against Colonel Mendonca. While the courts-martial dealing with the Mukhabarat scandal appear to be a serious attempt to deal with the full range of accountability issues raised by the facts, the Abu Ghraib courts-martial thus far can fairly be viewed as having ignored the issue altogether.

This article argues the Abu Ghraib courts-martial thus far have been a serious failure of the military justice system. The bedrock of the system of military justice is the promotion of justice, good order, and discipline.<sup>13</sup> A fundamental requirement for the promotion of these goals is the maintenance of a perception of legitimacy and fairness. The fact that only enlisted soldiers have been court-martialed for these offenses despite clear evidence of command responsibility for their crimes has stripped away this perception of legitimacy and fairness.

For various reasons, the military justice system deviates from accepted norms found in the civilian justice system. Many of these differences are necessary given the unique nature and role of the military and the fact that unlike the civilian justice system, our military justice system has as its primary goal the

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7. Faye Bowers, *Abu Ghraib's Message for the Rank and File*, Christian Science Monitor 3, 3 (May 6, 2005).

8. See *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, 17 Human Rights Watch No. 1(G) 1, 2-3 (Apr. 2005) (available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf> (accessed Mar. 19, 2006)).

9. Lieutenant General Sanchez was the supreme commander of allied ground forces when the Abu Ghraib abuses were committed. See Eric Schmitt, *Army Advances Officers Linked to Abu Ghraib*, Intl. Herald Tribune (June 30, 2005) (available at <http://www.iht.com/articles/2005/06/29/news/army.php> (accessed Mar. 19, 2006)).

10. See Sean Rayment, *Ten U.K. Soldiers Face International War Crimes Trial*, News Telegraph A2 (May 29, 2005).

11. See e.g. Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 165 (2000).

12. See generally Rayment, *supra* n. 9.

13. See *U.S. Navy-Marine Corps Ct. of Mil. Rev. v. Carlucci*, 26 M.J. 328, 333 (1988) (Primary objective of military justice system is promotion of good order and discipline and national security).

furtherance of the military mission. Military justice is not and should not be an identical twin of the civilian justice system.<sup>14</sup>

The need for a unique system of military justice, however, does not preclude the need for reforms to improve the system in order to make it more fair and just. The disparate treatment between enlisted soldiers and officers that has taken place in this scandal has tarnished the reputation of the military and its justice system.<sup>15</sup> The Abu Ghraib courts-martial have also provided ample evidence for those critics who believe that the harsh, disparate treatment of enlisted soldier is an inherent and consistent part of the military justice system and has impaired the ability of the military justice system to fulfill its mission of promoting good order and discipline. Many now view the system as lacking legitimacy as a result of its inability to ensure its enlisted ranks are treated fairly. This loss of legitimacy has a corresponding effect on good order and discipline, an effect that over time will affect not only the accomplishment of the military mission but also potentially the continued existence of a separate system of military justice.

Part II of this article provides a brief synopsis of the Abu Ghraib scandal and the United States' military investigations into the allegations of abuse and torture. Part III of the article provides an overview of the American system of military justice and the various options for punishing misconduct on the part of service members, with a particular focus on the court-martial system.

Part IV of the article addresses the issue of the perception that there is a disparate discipline in the American military justice system referred to as "different spansks for different ranks." Part V of the article deals with the issue of command discretion and command responsibility and proposes the creation and implementation of a new of rule of military justice designed to deal with these issues.

The article proposes that in courts-martial cases where there is evidence that a soldier's misconduct may have been the result of orders, actions, or the culpable negligence of a superior officer commanders there should be a formal investigation of the issue prior to the preferral of charges. Additionally, the findings of this investigation will be reported to the chain of command and will be available for use by the sentencing authority during the court-martial.

The War on Terror has and will continue to place extraordinary demands on the nation's military. The maintenance of a highly effective and well disciplined fighting force is essential to our eventual goal of winning the War on Terror. Given the volunteer nature of our armed forces, it is imperative that the perception of unequal military justice, a perception that has unfortunately been bolstered by the Abu Ghraib prosecutions, be dealt with immediately. How can we expect men and women to join the enlisted ranks of the military if they believe that there are two systems of justice, one for officers and one for enlisted soldiers?

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14. The most frequently cited rationales for a separate military justice system include national security and the unique nature of military organizations. See generally Joseph W. Bishop, Jr., *The Case for Military Justice*, 62 Mil. L. Rev. 215 (1973).

15. Milwaukee Journal Sentinel, *Editorial: Abu Ghraib Whitewash*, (Apr. 30, 2005), <http://www.jsonline.com/story/index.aspx?id=322451>.