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Jeffrey F. Addicott

St. Mary's University School of Law, jaddicott@stmarytx.edu

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Military Justice at Abu Ghraib

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JURIST Contributing Editor [Jeffrey Addicott](#) of St. Mary's University School of Law, formerly a Lieutenant Colonel in the US Army Judge Advocate General's Corps, says that the convictions of nine US soldiers for Abu Ghraib abuses and the various official investigations of the scandal testify to the strength of the military justice system, and should dispel allegations that there is any secret Pentagon "culture of permissiveness" toward prisoner abuse.

There is no such thing as a "clean" war. As the War on Terror continues into its fourth year, America has suffered a significant number of tactical errors in the use of its military, ranging from friendly fire incidents that have killed American soldiers and the soldiers of its coalition partners, to the unintended deaths of non-combatants by coalition military fire power. While these tragedies have been leveraged by some to criticize the legitimacy of the American led effort to employ force against its enemies on the battlefield, all such attempts to denigrate the war polices and credibility of the United States pale in the wake of the prisoner abuse scandal at Abu Ghraib. Not only did the photographs of American soldiers abusing Iraqi detainees at the Abu Ghraib prison in Iraq create a firestorm of allegations concerning illegal interrogation practices, but it provided terrorist groups and other anti-American groups a "propaganda bonanza" that threatened to derail fundamental legal and policy pillars upon which America conducts the War on Terror. Many even suggested that there was a moral equivalency between the systemic tactics of the terrorists and the modus vivendi of the United States.

Was the prison abuse a reflection of a systemic policy — either de jure or de facto — on the part of the United States to illegally extract information from detainees, or was the abuse simply isolated acts of criminal behavior on the part of a handful of soldiers amplified by an incompetent tactical chain of command at the prison facility? Now that Lynndie England, the "poster child" of the Abu Ghraib scandal and the last of the nine members of the 372nd Army Reserve unit to be convicted, has been sentenced (to three years confinement) the answer is clear - the legal and policy pillars that support the War on Terror are still standing strong.

The public was first shown the infamous photographs taken inside of the U.S. military run prison at Abu Ghraib in the CBS show 60 Minutes II aired on April 28, 2004. The widely circulated photos showed a handful of U.S. military police soldiers engaged in a variety of abusive and sexually sadistic acts against mostly blindfolded Iraqi detainees. Among other things, the photos showed naked prisoners stacked in pyramids, connected by wires, on a dog leash, and threatened by dogs. In addition, a handful of U.S. military police charged in the abuse scandal had forced naked prisoners to simulate sex acts.

The chronology of how the Abu Ghraib abuse story shows that the military self-reported the crimes. On January 13, 2004, Army Specialist Joseph Darby, a military policeman at Abu Ghraib, gave a computer disc containing the abuse photos to a military investigator. On January 14, 2004, the Army immediately initiated a criminal investigation and the United States Central Command (the four-star combatant command located in Florida) informed the media in a press release on January 16, 2004, that it was investigating detainee abuse at an unspecified U.S. prison in Iraq. On February 23, 2004, the military informed the U.S. press that 17 Army personnel had been suspended of duty pending further criminal investigations about the detainee abuse. Then, on March 20, 2004, the military reported to the media that it had charged six soldiers with detainee abuse to include criminal charges of assault, cruelty, indecent acts and mistreatment. Interestingly, however, the press did not fully respond to the growing story as the mere fact that soldiers were being punished for misconduct did not constitute news that was out of the ordinary — the military regularly punishes soldiers who violate the law. In fact, the media only became energized on April 28, 2004, when 60 Minutes II aired the photos.

Pursuant to evidence of criminal misconduct contained in a U.S. Army Criminal Investigation Division (CID) Report, nine enlisted reserve soldiers all from the 372nd Military Police Company, 320th Military Police Battalion, 800th Military Police Brigade were charged and convicted for an assortment of violations of provisions of the Uniformed Code of Military Justice. The central figure in the scandal was Private First Class Lynndie England who is known for poses in which "she pointed at the genitals of a naked detainee while a cigarette dangled from her lips" and "holding a [dog] leash around a naked prisoner's neck." All of those charged were reservists and all worked the night shift at Tier 1 in Abu Ghraib, where the abuses took place in the last months of 2003.

The particulars relating to the Abu Ghraib abuse story are now well settled thanks to the CID's criminal investigation and a number of collateral administrative investigations. To include: (1) the April 2004 Taguba Report, prepared by Major General Antonio Taguba; (2) the July 2004 Army Inspector General Report, prepared under Lieutenant General Paul Mikolashek (3) the August 2004 Fay Report, prepared by Major General George Fay; and (4) the August 2004 Schlesinger Report, headed by the former Secretary of Defense in the Nixon administration, James Schlesinger.

The overriding question regarding the prisoner abuse echoes the thoughts of Senator Lindsey Graham (R-S.C.), a member of the Armed Services Committee: "How could we let this prison melt down and become the worst excuse for a military organization I've seen in my life?" None of the Reports have found that there was an official policy - either written or oral - to torture or abuse prisoners. According to the Schlesinger Report, the most far reaching investigation to date and the one which the Wall Street Journal deemed the "definitive assessment of what went wrong," "no approved procedures called for or allowed the kinds of abuse that in fact occurred." In fact, the Schlesinger Report found: "There is no evidence of a policy of abuse promulgated by senior officials or military authorities." In addition, none of the Reports cite any direct abuse of prisoners by officers or by superiors ordering subordinates to commit the abuses. In short, the Schlesinger Report concurs with all the Reports to date in finding that the individuals that conducted the sadistic abuse are personally responsible for their acts.

Nevertheless, taking a broader examination of what happened at Abu Ghraib, the Schlesinger Report did find fault with the senior levels of command; there were "fundamental failures throughout all levels of command, from the soldiers on the ground to [the United States] Central Command and to the Pentagon" that set the stage for the abuses.

The Schlesinger Report agreed with the calls for disciplinary action in the Fay Report for a number of officers in the immediate tactical chain of command who knew, or should have known, about the abuses at Abu Ghraib. "The commanders of both brigades - 800 Military Police Brigade Commander Janis Karpinski and Military Intelligence Brigade Commander Thomas Pappas - either knew, or should have known, abuses were taking place and taken measures to prevent them." Certainly, however, this would include not only Brigadier General Janis Karpinski and Colonel Thomas Pappas, but those subordinate commanders and on down the chain of command to the battalion, company and platoon level. The chaotic environment at the prison existed in large part due to the dereliction of tactical commanders on the ground at Abu Ghraib.

Apart from the issue of individual responsibility the factor that weighed the heaviest in explaining the abuses at Abu Ghraib was clearly the total break down in the immediate chain of command. While the Schlesinger Report provides some blame to all levels of command, it is certain that a key causative factor was the failure at the Brigade — both the military police brigade and the military intelligence brigade. This dereliction in leadership extended to the subordinate officers in the command and the senior non-commissioned officers as well. These individuals are certainly responsible for what occurred in the light of culpability by omission; at a minimum they were guilty of dereliction of duty. The primary responsibility for ensuring adherence to the law rests in the officer corps. As noted, the Schlesinger Report followed suit with all the Reports and found that there was a "failure of military leadership and discipline."

Understanding the stresses of combat and the fact that the soldiers involved in the abuse at Abu Ghraib were untested reservists, the leadership should have taken greater precautions to ensure that a strong and dedicated chain of command was in charge to "inspect what was expected." Accordingly, the officer corps must be filled with only the finest available men and women; only officers of the highest moral caliber and military skill should be assigned the responsibility of command. In commenting on leadership skills for combat officers, World War II General George S. Patton, Jr. correctly stated: "If you do not enforce and maintain discipline, you [officers] are potential murderers."

At the end of the day, it seems improbable that the United States military engaged in command directed torture or ill-treatment at Abu Ghraib, particularly when it was the military itself that self-reported to the media the fact individual soldiers were being investigated and punished in accordance with the rule of law for wartime abuses at the prison. Clearly, the best indicator that the senior leadership is not culpable is found in its continuing commitment to criminally investigate and prosecute those soldiers accused of committing detainee abuses. Numerous soldiers have already been prosecuted and sentenced for their crimes, and criminal trials will continue for others.

When one considers that the number of detainees in the War on Terror - including Afghanistan, Iraq and other operations - is about 50,000, it is unrealistic to expect that abuses will not occur. Violations of rules occur in every human endeavor, to include war. In an interview with the Wall Street Journal, James Schlesinger correctly noted that the "behavior of our troops is so much better than it was in World War II." The so-called "bad apple" syndrome is in fact the primary causative issue at Abu Ghraib — a handful of closely knit reserve personnel engaged in acts of sadism as they worked the night shift from October to December of 2003. Former U.S Senator Ben Nighthorse Campbell provided the most pointed assessment of the entire affair: "I don't know how the hell these people got into our Army."

It is equally true that the Abu Ghraib story has been devastating to the United States. While each and every case of abuse is repulsive to American standards of decency and justice, terrorists and other opponents of the United States have certainly become "media-savvy" in their quest to parlay these individual cases into marketable propaganda. For example, many nations that are opposed to the United States are quick to exploit the individual cases of abuse at Abu Ghraib by painting the entire conduct of all American soldiers as immoral and illegal. Of course, Americans do not need to be told that the abuses are beyond the pale of conduct expected of its military. A CNN Gallup poll taken in May 2004, showed that three in four Americans agreed that the abuses at Abu Ghraib could not be justified.

The investigative Reports and the convictions of the nine soldiers have done a great service to the American people and the world by dispelling the shrill cries of those who blame a secret Pentagon "culture of permissiveness," for the abuses at Abu Ghraib. While the Schlesinger Report found institutional and even personal responsibility in the tactical chain of command for allowing conditions for abuse to occur at Abu Ghraib, the Report specifically found that "[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities."

America's fundamental values have been translated into well-rooted rules of law at the cost of untold blood and treasure. Hope remains that the attendant sacrifices in the War on Terror will not be overshadowed by the inexcusable conduct of the few at Abu Ghraib. Indeed, as long as the military maintains its policy of transparency - as it did in the Abu Ghraib abuse case - the nation will understand.

Jeffrey Addicott is Associate Professor of Law and Director, Center for Terrorism Law, St. Mary's University School of Law. An active duty Army officer in the Judge Advocate General's Corps for twenty years, he spent a quarter of his military career as a senior legal advisor to the United States Army's Special Forces. He retired in 2000 at the rank of Lieutenant Colonel. His latest book is Winning the War on Terror: Legal and Policy Lessons from the Past (2003).

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