

Taming America's Warriors: Assessing United States Military Discipline and Responses to Law
of War Violations, 1943-2004

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Abstract

Why does violence continue against non-combatants in the twenty-first century? Although the United States is a signatory to most conventions regarding the law of war, and enjoys technological superiority in most relevant warfighting technologies, violence against non-combatants remains an unfortunate but all-too-familiar by-product of its military campaigns. This thesis examines whether the U.S. military has failed to make adequate efforts to eliminate this violence or if their efforts have been undermined by other influences.

This thesis specifically focuses on a comparative evaluation of law of war violations and other severe ethical infractions committed by personnel of the Army and Marines and from Vietnam until the present. It also examines how external influences, like political pressure or public opinion, affected the military's propensity to respond to such violations. By doing so it challenges the ideas of writers such as Nick Turse who asserts the United States military's policy was to ignore the rights of non-combatants as a matter of policy. Instead, by drawing on works by Gary Kulik and others, and making extensive use of primary sources such as investigations, court proceedings, and oral history interviews conducted by the author, the thesis offers a more nuanced understanding of military responses. To discern the civilian reaction to the events, contemporary media accounts and polling data are explored.

The thesis findings are closer to that of Kulik with regard to the causal nature of violations, but sees clear ties to government vacillation between intervention in military justice and inaction to improve policy or accountability and the effect of public social attitudes and apathy concerning violations. This thesis acknowledges the existence of law of war violations, but in seeking to ascertain the cause does not find them to be a matter of policy within the military. Rather, I contend they are the joint product of actions, or in some cases lack of actions, and attitudes within the military, government, and society.

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Introduction

War is violent, and violence against non-combatants, whether it be civilian casualties, the maltreatment or killing of prisoners, or the desecration of the dead is an unfortunate, yet all too common, feature 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 themselves existed.¹ In the recent fighting between Russia and Ukraine, for instance, the world has witnessed Russian soldiers perpetrate several 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, where more than 350 bodies were collected.² 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 just the latest to be chronicled, and law of war violations have been committed by almost every state which has entered armed conflict. As Louise Barnett asserts in her *Atrocity and American Military Justice in Southeast Asia*, discussing the trial of World War Two Japanese General Yamashita, “from

¹ Throughout this dissertation, many different sources were consulted both military and civilian in origin. Even in textbooks on the subject law of war, 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 dissertation, when drawing from a particular source to illustrate a case study or its discussion, the author will generally utilize 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 will also influence the wording within this dissertation.

² Mychael Schnell, ‘Putin honors brigade accused of Bucha war crimes’, *The Hill.com*, 18 April 2022, <<https://thehill.com/policy/international/3271952-putin-honors-brigade-accused-of-bucha-war-crimes/>> [accessed 2 November 2022]; ‘Putin Decorates Army Unit That Ukraine Blames for Bucha Deaths’, *Bloomberg News*, 18 April 2022, <<https://www.bloomberg.com/news/articles/2022-04-18/putin-decorates-army-unit-that-ukraine-blames-for-bucha-deaths?leadSource=verify%20wall&sref=mRZNLhn>> [accessed 4 November 2022].

time immemorial most soldiers have seen their role as subduing the enemy, or obeying their country's orders."³ Obedience to orders has always been a hallmark of disciplined fighting forces. Throughout history though, 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."⁴ 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 pressure from the public?

America's military has its own regrettable history of violations of the laws of war. This dissertation 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 from World War Two onward, bringing precision to the act of delivering violence to the enemy.⁵ However, incidents of violence against non-combatants remain a regrettable and persistent feature of war.

³ 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 which are less kinetic on the range of military operations, i.e., humanitarian evacuations, peacekeeping operations, 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.

⁴ Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army*, (Abingdon: Routledge, 2010), pp. 160-161.

⁵ Mick Ryan, Major General (Retired), 'An Evolving Twentieth-Century Profession: Technology after World War II', *Modern War Institute*, 1 July 2021, <https://mwi.usma.edu/an-evolving-twentieth-century-profession-technology-after-world-war-ii/> [accessed 24 November 2022]; David Whetam, *Ethics, Law and Military Operations* (Basingstroke: Palgrave Macmillan, 2011), p. 20.

International conventions, such as those negotiated at Geneva and The Hague, are a product of the last one and a quarter century.⁶ I will examine the progress of the United States land forces in terms of its soldiers' compliance and its efforts to hold its soldiers accountable from a baseline during World War Two to its recent war in Iraq. I will do this by presenting a series of cases containing law of war or ethical violations by American forces. These will start with two cases of execution of prisoners during World War Two at Biscari, Sicily and a discussion of the widespread violations in the Pacific Theater as a baseline to measure against. The remaining cases will cover the killing of non-combatants in Vietnam at My Lai and Son Thang, and in Iraq at Haditha, Mahmudiyah, and Hamdania, the torture of prisoners at Abu Ghraib, and the sexual harassment and assault of women at the Tailhook Convention in 1991.

For each case, scrutinizing the repercussions to the covered incident for any civilian reactions and military responses will 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 defences 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 United States 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 changed over time? All of these questions lead to the central enquiry that

⁶ The earliest of several 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.

this thesis addresses: to what extent is the military responsible for the continued violence against non-combatants and what else shapes the military responses to law of war violations?

The individuals that perpetrate these crimes have free will and 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, the thesis argues that the military also bears significant responsibility for the continuing violence, sharing some of this responsibility with both the United States public and its elected representatives.

How a public perceives its military, and how a government holds its armed forces to a standard of conduct, plays a part in a forces' behaviour. At one extreme, as briefly discussed above, is the Russian government's acceptance of the brutality against non-combatants 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 showed that the country's government and military could have done more to prevent the slaughter of over 8,000 men and boys by Bosnian-Serb forces in Srebrenica, Bosnia in 1995.⁷ The reactions of Americans to violations of the laws of war varied over the period this dissertation 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

⁷ Andrew Osborn and Paul Brown, 'Dutch Cabinet Resigns over Srebrinica Massacre', *The Guardian*, 16 April 2002, <<https://www.theguardian.com/world/2002/apr/17/warcrimes.andrewosborn>> [accessed 4 November 2022]. While this is 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.

following September 11, 2001. These biases, especially towards non-white ethnicities, will be explored further throughout the dissertation and help account for the public's share of blame mentioned earlier.

In order to determine how efforts to codify and legally constrain war allow us to determine US 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 Age depict what appears to be men fighting using bows.⁸ 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.⁹ 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.¹⁰ 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

⁸ John Keegan, *A History of Warfare* (New York: Knopf, 1993), p. 119.

⁹ 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* (London: Macmillan and Co, 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).

¹⁰ Robert Stacey, 'The Age of Chivalry', in Michael Howard et al. (eds), *The Laws of War* (New Haven: Yale Press, 1994), p. 27.

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.¹¹

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 behaviour nor taught the need to follow those laws during conflict against the “uncivilized.”¹² 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.¹³ Additionally, that 1949 convention also debuted the concept of grave breaches, with the requirement for signatories to seek out and prosecute those who commit them.¹⁴ 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 United States armed forces.¹⁵ Also, outside U.S.

¹¹ Adam Roberts and Richard Guelff, *Documents of the Laws of War 3rd Ed.* (Oxford: Oxford University Press, 2000), pp. 7-9.

¹² Mark Mazower, ‘An international civilization? Empire, internationalism and the crisis of the mid-twentieth century’, *International Affairs*, Vol. 82, Iss. 3 (2006), p. 557.

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

¹⁴ 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 and protected person under the convention.

¹⁵ 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

law, though the 1907 Hague Regulation IV imposed fines on the states of soldiers who violated the law of war, it left it to the states as to how, or if, the individual violator was punished.

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, fulfilling this requirement, it was not specifically designed to do so. Rather, its catalyst was the post-World War Two 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.¹⁶ The unique legal aspects of the UCMJ, both positive and negative, and discussed at some length below, will impact the prosecution of each and every case study from Vietnam to present. This exclusively military legal system was seen by the 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.¹⁷

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

World War Two 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.

¹⁶ Barnett, p. 211. Undue command influence (UCI) will appear in several case studies and is an impediment to the military justice system. While undetected UCI may work against defendants, more and more attorneys seek to raise concerns of UCI as diversions during proceedings to attempt to influence panels (juries) during courts-martial.

¹⁷ These domestic laws include the 1996 War Crimes Act and the 2005 Military Extraterritorial Jurisdiction Act (MEJA).

include the Constitution and international law. International law includes the law of war.”¹⁸ The *Manual for Courts-Martial* later restricts the ability to try subject personnel for war crimes to General Courts-Martial in its 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.¹⁹ One reason both the military and the government share responsibility for the continued violence against non-combatants 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 United States military. 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, et cetera. It is allowable, and routine practice, to levy charges for the article within the UCMJ without specifying the crime as a war crime.²⁰ The military has never attempted to seek a means to differentiate between law of war violations and other UCMJ violations, and 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

¹⁸ Department of Defense, *Manual for Courts-Martial* (2019 ed.) (Washington D.C.: Government Printing Office, 2019), p. 48.

¹⁹ *Ibid.*, pp. A2-7 and 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 and may be convened by a battalion commander (O-4 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). 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). Articles 22-24 of the UCMJ dictates convening authority (MCM, A2-8).

²⁰ Gary Solis, ‘There Are No Accurate War Crime Numbers’, unpublished paper sent to author in an email, 25 March 2019 subsequent to interview about the military and war crimes. Copy of email retained by author.

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 Uniform Code of Military Justice, many other countries use similar systems. The United States Department of Defense 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.²¹ The manual is nearly 1200 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.

Sources, methodology, and historiography

This dissertation examines case studies of violations of the law of war committed in various conflicts and situations from the last 80 years. To narrow the number of case studies to a manageable scope, those that were selected were crimes committed by members of the United States services whose focus is land warfare, 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, some potential cases, such as the large number of German World War Two POWs that remain unaccounted for, were not selected.

This said, we begin with the two incidents from the invasion of Sicily at Biscari during July, 1943 in the European Theater of the World War Two. Here an enlisted man murdered over

²¹ Department of Defense Directive 2311.01, DOD Law of War Program. Department of Defense, 2 July 2020, <<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007>> [accessed 13 Feb 2022].

thirty prisoners he was moving to a rear area and an officer ordered the killing of over thirty 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 dissertation’s remaining chapters. The remaining cases mentioned earlier allow us to analyze the variables listed above and assess 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 specific shortcomings in their execution and influences from without that all bear a share of responsibility for the continuing violence against non-combatants. Each of these episodes has generated a rich and burgeoning historiography in their own right. The focus of this work is the progress during the period of the Vietnam War to present compared to the baseline in World War Two. World War Two 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 during the Korean War—most notably at No Gun Ri—they preceded the time frame focused on by this dissertation.

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

There is much scholarship covering the U.S. military post-World War Two development, 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. Because this dissertation reviews case studies from various conflicts that cover similar themes in different conflicts I present the historiography that impacted this work thematically and as it pertains to specific conflicts. In some cases, such as the Vietnam War, or My Lai particularly, these can be quite extensive. In other 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 which necessitates working with heavily redacted materials.

In researching 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. Official government records and data were more difficult to access for more recent case studies due to security classifications in some cases, but in many others the Covid-19 pandemic's effects on travel and access to archives were to blame. Research at archives planned for mid- to late-2020 through mid-2021 became impossible in many cases due to the closures and reduced access.²² This held true even for information which would normally be publicly accessible through Freedom of Information Act requests. At the best of times, these requests could be lengthy processes, but in times of pandemic-related telework and low-manning of offices request times ballooned, with initial requests acknowledged with letters stating at least three times the normal wait should be expected, and a few were returned with significantly less information than expected.

²² The author was lucky to have made two trips to NARA before it restricted research visits for most of 2020 and 2021. Luckily, some archives, such as the Virtual Vietnam Archive at Texas Tech University were available for research of a few of the cases. In-depth comparison of training and education syllabuses from entry level training facilities of the Army and Marine Corps were hard to accomplish because the planned visits were cancelled.

The latter case studies provided ample opportunity 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 first-hand 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 due to 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, I 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 records to confirm pieces of information obtained during the interview to gauge the subject veracity. Another challenge specific to the type of case studies I am using 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 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 the aim of the case studies is to examine not only the incident for causal factors to determine accountability but 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 dissertation as well.

In the historiography of many of these incidents, there is some sort of continuum of treatment or opinion on the causes, meanings, and outcomes of the event in question. On the subject of the war crimes committed by U.S. forces, there are those who see violence against non-combatants as an intentional means of warfighting, a part of the military's doctrine, if an unwritten one.²³ Nick Turse, whose *Kill Anything that Moves: The Real American War in Vietnam* asserts the United States military's policy was to ignore the rights of non-combatants, that the targeting of them was policy. Others—and, in contemporary polling, the public—see these episodes as exceptions rather than the rule, either unfortunate consequences of high-end operations in heavily kinetic fights—unintentional, or as the consequences of individuals who act outside orders and professional military ethical standards—criminal in nature.²⁴ Turse's premise, which expanded on some of his earlier published articles, and many of the accounts he relied on, ignored the research of others such as in Gary Kulik's *War Stories: False Atrocity Tales, Swift Boaters, and Winter Soldiers—What Really Happened in Vietnam* and were to a large extent refuted after *Kill Anything* was released in an article co-written by Kulik and Peter Zinoman.²⁵ While Kulik does not deny atrocities happened, his interviews and research disprove many of Turse's assertions about the prevalence of atrocities and the existence of a military policy of war by atrocity in Vietnam.²⁶

²³ Nick Turse, *Kill Anything That Moves: The Real American War in Vietnam* (New York: Picador, 2013), p. 6.

²⁴ Gary Kulik and Peter Zinoman, 'Misrepresenting Atrocities: Kill Anything that Moves and the Continuing Distortions of the War in Vietnam', *Cross-Currents: East Asian History and Culture Review* E-Journal No. 12 (2014), p. 165; Hannah Rosin, 'When Joseph Comes Marching Home', *Washington Post*, 17 May 2004, <https://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16.html>; 'Iraq', *Polling Report.com*, (2015) <https://www.pollingreport.com/iraq14.htm>; Kulik.

²⁵ Gary Kulik, "*War Stories*": *False Atrocity Tales, Swift Boaters, and Winter Soldiers—What Really Happened in Vietnam*, 1st edition (Washington, D.C: Potomac Books, 2009); Kulik and Zinoman, pp. 163-165.

²⁶ In both Kulik's book and his article with Zinoman, challenged Turse's arguments regarding prevalence of atrocities and the command-driven nature. Credibility-challenged witnesses from the Winter Soldier Hearings and other sources were examined in detail, with follow up interviews conducted to attempt to find more substantial evidence supporting Turse's claims. Kulik went so far as to research in detail a case, Trieu Ai, that Turse used as evidence of his argument and found a markedly different set of circumstances than Turse recounted.

More recently, Samuel Moyn argued that the continued technological progression has created such a disconnect between the U.S. use of military force, for example through drones, and casualties the public is conscious of, that wars are prolonged due to lack of public outcry over the violent consequences on their behalf.²⁷ This dissertation specifically focuses on evaluating the efforts of the American land forces to fight within the laws of war from Vietnam until the present and how external influences, like political pressure or public opinion, affected the military's propensity to commit such violations or its behaviours in response to them. The dissertation's findings are closer to that of Kulik with regard to the causal nature of violations but sees clear ties to government vacillation between intervention in military justice and inaction to improve policy or accountability and the effect of public social attitudes and apathy concerning violations. This dissertation also acknowledges the existence of law of war violations, but in seeking to ascertain the cause does not find them to be a matter of policy within the military. Rather, I contend they are the joint product of actions, or in some cases lack of actions, and attitudes within the military, government, and society.

For the most part, though, wherever on that continuum the writer resides, the acts of violence against non-combatants, civilian or those combatants rendered hors de combat, are generally thought of as the vilest of actions. A description of this is found in Ron Milam's *Not a Gentleman's War: An Inside View of Junior Officers in the Vietnam War*. In this 2009 book, he describes the actions of killing during war as a continuum ranging from the most righteous—which he labels slaying the noble enemy—met directly in armed combat—through progressively less acceptable and more traumatic kinds of killing, which he labels gray, dark, and black areas.²⁸

²⁷ Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Strauss, and Giroux, 2021).

²⁸ 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), pp. 116-138.

The killing of civilian non-combatants falls into that last, and most atrocious, black area, and this area is one that is normally expected to elicit condemnation from the public and governmental spheres.

John Grenier, in his 2005 book *The First Way of War: American War Making on the Frontier*, highlights the use of violence against Native American non-combatants as a pattern of American conflict in the early history of the colonies through the war of 1812, predating the Hague and Geneva Conventions. He argues violence against non-combatants was a common pattern in early America's way of war and that the more brutal, and total, way in which colonial and revolutionary Americans fought had a continuing influence on the way Americans fought later.²⁹ As America and, indeed the world, developed more weapons of greater lethality, particularly in the latter half of the 19th century, international conventions attempting to reign in the horror of war were ratified. Grenier's assertion that the early American military used techniques, such as destroying fields, villages, and either killing or intimidating non-combatant populations freely provides a point of reference when later discussing the public's willingness to dismiss incidents which should call for renouncement. The use of those tactics, in the absence of later conventions banning them though, is an unsurprising use of asymmetric means against either a stronger foe—Great Britain—or an enemy race which, as this dissertation will strive to argue would remain a trend, was seen by the public to not warrant equal consideration. Russel Weigley's 1973 book, *The American Way of War*, defined America's way as having evolved from a style of attrition when America was weaker, from colonial periods until the Civil War, that transitioned to a style of annihilation after the Civil War as America became politically,

²⁹ John Grenier, *The First Way of War: American Warmaking on the Frontier* (New York, Cambridge University Press, 2005).

militarily, and economically stronger.³⁰ This use of overwhelming force, often also technologically superior to enemies, came to characterize U.S. military efforts and has become what Americans envision when discussing their military.

The effect of racism is one of the most prevalent of external influences on the military behaviour. This is seen in the soldiers directly—products of the society from whence they came, and their leadership. Its influence also seemed to direct, at times, the political and societal pressures that would alter punishments awarded at courts-martial. To delve into racism during war, especially when establishing a baseline during World War Two, John Dower’s *War Without Mercy: Race and Power in the Pacific War* describes well some of the root causes of enmity against the Japanese soldiers and differences to be seen between the theaters of Europe and the Pacific.³¹ In *After Hiroshima: The United States, Race, and Nuclear Weapons in Asia, 1945-1965*, Matthew Jones notes Americans “exhibited a level of hatred for their Asian adversary that some historians have argued gave the fighting in the Pacific a different quality to that found in the European theaters of war.”³² The racism described thus can be seen in the case studies from Vietnam and those in Iraq as well. Indeed, just as “racial animosity, fueled by a desire for revenge” gave the fighting in the Pacific its “defining characteristics,” one can see the same type of racism and desire for revenge within the U.S. society after the attacks of 11 September 2001,

³⁰ Russell F. Weigley, *The American Way of War: A History of United States Military Strategy and Policy* (London: Macmillan, 1973).

³¹ John W. Dower, *War Without Mercy* (New York: Pantheon Books, 1986). For other perspectives of the effects of racism on U.S. government policies at the turn of the Twentieth century, pre-dating World War Two, Paul Kramer’s *The Blood of Government: Race, Empire the United States and the Philippines* (Chapel Hill: University of North Carolina Press, 2006) discusses the contemporary public and political attitudes which lingered long into the next century.

³² Matthew Jones, *After Hiroshima: The United States, Race, and Nuclear Weapons in Asia, 1945-1965*, (New York: Cambridge University Press, 2010), pp. 7-8.

which doubtless had some effect on the attitudes of those who swelled the military ranks during that war.³³

The works of Walker Schneider, Simon Harrison, and James Weingartner all discuss relevant discussions of trophy taking, the dehumanization of one's enemy, and societal acceptance of certain violations against an enemy³⁴ Several of the concepts from these sources are clearly seen again in the cases to be covered from the Vietnam and Iraq conflicts. Among these was what Weingartner argued was the pervasive enmity against the Japanese resulting from the attack on Pearl Harbor, which helped amplify the racial undertones of that theater's conflict. This sort of amplification will again be evident in societal attitudes after the attacks of September 11th and influences the Iraq cases that are discussed in Chapters Four and Five which arguably leads to the lack of a more universal public condemnation of the soldiers' conduct. Schneider's article, meanwhile, examines the American public's various responses to revelations of trophy-taking during World War Two and helps explain future lack of denouncement, and apathetic or apologist sentiments, at the revelations of law of war violations during later conflicts. He also introduces the "morally-charged" relationship between society and its military which helps partially explain this lack of public condemnation to many violations. The further idea of near and distant enemies found in Harrison's article, which explains how dehumanization of the enemy can go further and drive actions in violation to the laws of war when there is a racial or cultural difference between foes, is evident in the Vietnam and Iraq cases.

³³ Jones, p. 7.

³⁴ Walker Schneider, 'Skull Questions: The Public Discussion of American Trophy Collection During World War II', *Penn History Review* (University of Pennsylvania) 25, no. 2 (2019); Simon Harrison, 'Skull Trophies of the Pacific War: Transgressive Objects of Remembrance', *The Journal of the Royal Anthropological Institute*, 2006; James Weingartner, 'Trophies of War: U.S. Troops and the Mutilation of Japanese War Dead, 1941-1945', *The Pacific Historical Review* (University of California Press) 61, no. 1 (1992).

Racism was not only an issue with regard to treatment of the enemy. Though segregation within the military was officially ended by President Truman's Executive Order 9981 in July 1948, the Army and Marine Corps' respective roads to integration took time, well into the conflict in Korea, and reflected the prejudices of greater society in addition to those within the military. These prejudices are worth noting due to the role they played in prosecution or sentencing of soldiers guilty of violations. They also help explain what actions by U.S. troops abroad, almost always against an enemy that was racially or culturally different, would receive—or not—public condemnation or conversely, pressure for reduced sentences. Several works cover this struggle between the intentions and efforts of the services—some positive and some negative—toward integration and the continued difficulties societal influences introduced into the forces from 1948 through Vietnam. These include Jeremy Maxwell's *Brotherhood in Combat: How African Americans Found Equality in Korea and Vietnam*, and Natalie Kimbrough's *Equality or Discrimination: African Americans in the U.S. Military during the Vietnam War*.³⁵ Key again to this dissertation is the connection between U.S. society and its military and the influence the latter possesses on military leadership's actions and among the soldiers themselves.

In the same manner that societal struggles with race affected military justice regarding law of war violations or treatment of the enemy, society's attitudes on gender were also influential. It is my aim to build upon recent works, like Thomas Guglielmo's *Divisions: A New History of Racism and Resistance in America's World War II Military*, that identify the impact

³⁵ Jeremy Maxwell, *Brotherhood in Combat: How African Americans Found Equality in Korea and Vietnam* (Norman, OK: University of Oklahoma Press, 2018); Natalie Kimbrough, *Equality or Discrimination: African Americans in the U.S. Military during the Vietnam War* (Lanham: University Press of America, 2007).

on the military of racial and gender attitudes, both within and from the public sphere.³⁶ That book explores the differing experiences of African Americans, Japanese-Americans and impact of societal attitudes on the military's treatment of their own and of the enemy, and the similar impact of societal attitudes regarding gender roles on the treatment of women. Gender also serves as a lens through which this dissertation analyzes and assesses how the military has failed to enforce consistent internal discipline among its soldiers. Understanding how societal attitudes regarding race and gender influence the military, from top to bottom, are important in determining if society shares any culpability for continued violence against non-combatants with the military. There are several works that were beneficial in framing the arguments concerning societal influence of this dissertation. Chief among them was Joshua Goldstein's *War and Gender*, which concentrates on gender roles within the military as well the importance of masculinity in the behaviours of soldiers.³⁷ His work points out the in-group and out-group dynamic that gender causes between males and females which parallels Harrison's idea of near and distant enemies. Additionally, he concludes that neither biology, psychology, nor cultural variables alone account for the prejudice against women in combat or by soldiers, but that it is instead an overlapping of these variables. Ryan Ashley Caldwell's *Fallgirls: Gender and the Framing of Torture at Abu Ghraib*, discusses how gender attitudes prompted unfair treatment for those women serving at Abu Ghraib, but also is useful, along with Goldstein's work, in defining some of the actions discussed in the sexual harassment and assault scandal of Tailhook discussed in Chapter Three.³⁸ The unit cultures, biases, and systemic failings which degrade the discipline

³⁶ Thomas A. Guglielmo, *Divisions: A New History of Racism and Resistance in America's World War II Military*, (Oxford: Oxford University Press, 2021).

³⁷ Joshua S. Goldstein, *War and Gender* (Cambridge: Cambridge University Press, 2001).

³⁸ Ryan Ashley Caldwell, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (Surrey, UK: Ashgate Publishing, 2012).

and lead to law of war violations are similar to those which allow for abusive or discriminatory behaviours against women in the force. Steps to correct the latter may have synergistic effects on the former.

Articles such as R. Claire Snyder's, "The Citizen-Soldier Tradition and Gender Integration of the U.S Military" also delve into the false dichotomy of arguments concerning womens' right to serve versus military effectiveness.³⁹ These were augmented with works on how the U.S. forces have been manned since the beginning of the All-Volunteer Force (AVF), like Beth Bailey's *America's Army : Making the All-Volunteer Force*, articles like Molly Clever and David Segal's, "After Conscription: The United States and the All-Volunteer Force," and testimony before the U.S. Congress and various studies by think tanks and the services concerning attitudes about integration.⁴⁰ All of these confirm the need to integrate women in the AVF, to take advantage of the diversity of thought and inherent strengths of both genders, which runs counter to the male-dominated culture of the military.

When researching cases from various conflicts, some of which possessed their own exhaustive historiography, I attempted to examine and address materials from multiple perspectives on each. To address the case studies from World War Two in Biscari, Sicily, primary sources from the U.S. National Archives and Records Administration (NARA) provided numerous interviews of key witnesses and leadership, and memos concerning the disposition of cases showing the concern of high ranking military and government leaders for the public

³⁹ R. Claire Snyder, 'The Citizen-Soldier Tradition and Gender Integration of the U.S. Military', *Armed Forces & Society*, Vol. 29, No. 2 (Winter 2003), p. 185.

⁴⁰ Beth Bailey, *America's Army: Making the All-Volunteer Force* (Cambridge: Harvard University Press, 2009); Molly Clever and David Segal, 'After Conscription: The United States and the All-Volunteer Force', *Security and Peace*, Volume 30 (2012).

reaction should the events in the European Theater come to light.⁴¹ Patton's own words, available digitally from the Library of Congress or transcribed in Martin Blumenson's collection of his papers, *The Patton Papers 1940-1945 Vol. 2* were helpful. Secondary sources of value included narrative accounts of the massacres and those that focused on the legal aspects specifically.⁴²

In the Pacific, an entirely different story is told or, rather, left untold. Though violations were chronicled as publicly as the cover or full-page photo spreads in *Life* magazine, as well as recalled in countless memoirs after the war, little in the way of accountability, either investigation or prosecution, could be found. When there was, it was often after intercession from higher headquarters following, or in anticipation of, public outcry.

Of the two Vietnam case studies, My Lai is by far the best known, and probably the most well-known of any United States military war crime. Son Thang is much smaller in scope but shows the Marine Corps' own reactions to a contemporary violation. The episodes themselves, investigations, and prosecutions provide a means to begin comparison with the baseline cases from Biscari. The public reactions to the cases provide a means to assess the existence of similar sentiments discussed when examining public attitudes during World War Two. The historiography for this case alone is staggering. In exploring it, I used a mixture of primary sources like the interviews and information found in the Army's investigation completed by Lieutenant General Peers, and statistics on the soldiers of Project 100,000 from the RAND

⁴¹ Forest Cookson, Colonel USA, transcribed interview by Brigadier General Philip Brown and Colonel Franklin Babcock. '(De-Classified) Testimony of Forrest Cookson' (February 16, 1944). Biscari Massacre Collection, National Archives and Records Administration; and Brown, Brigadier General Philip. 'Memorandums dtd 7 January, 5 and 17 February 1944', *Office of U.S. Army Inspector General*, Washington, D.C., 1944.

⁴² Martin Blumenson, *The Patton Papers, 1940-1945 Vol. 2*. (Boston: Houghton Mifflin Company, 1974); James Weingartner, 'Massacre at Biscari: Patton and an American War Crime', *The Historian* 52 no.1 (1989); Fred L. Borch, 'War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943', *Army Lawyer*, March 2013.

Corporation study for the Department of Defense.⁴³ Additionally, the Marine Corps Historical Division Archives personal papers collections of former Commandants Wallace M. Green and Leonard Chapman provided context to how military leadership sought to shape civilian reaction to Son Thang and other events of that era. Other primary sources included oral history interviews I conducted with former Marines who served in infantry or combat arms leadership billets during Vietnam, including Brigadier General Thomas V. Draude (USMC, ret.) and LtCol Gary D. Solis, PhD, JD, (USMC, ret.). Solis has written extensively about law of war violations and law of war topics from Vietnam to the present and his generous loan of materials from his research on Son Thang and several unpublished articles helped to broaden the research herein.

The secondary sources I used included authors across the orthodox and revisionist spectrum of the academic writing on Vietnam, but were mostly focused on the events at My Lai and Son Thang—the cases I explore—rather than the war at large. In the Vietnam War historiography, the orthodox and revisionist schools of writing involve many different components, but for simplicity's sake for this dissertation, I include much of the work critical of the U.S.'s purpose, that embraces an inevitability of defeat in Vietnam, or focusing on aspects of the anti-war movement as Orthodox. The later writing that sought to recognize the roles of media and public, accepted the government stated purposes, and were less critical of the reasons for the war than the execution I include as Revisionist. Turse, mentioned earlier, and Kendrick Oliver's work, *The My Lai Massacre in American History and Memory*, exploring My Lai in America's consciousness fall toward the Orthodox end, while William Thomas Allison's *My Lai: An*

⁴³ United States, Department of the Army, and William R Peers. *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident. Vol. 1.* (Ann Arbor, Mich.: MLibrary: Google Books, 2011); and RAND, 'RAND Study on Project 100,000' <<https://www.rand.org/content/dam/rand/pubs/monographs/MG265/images/webG1318.pdf>> [accessed November 3, 2019]

American Atrocity in the Vietnam War falls toward the Revisionist side.⁴⁴ Two later works offering statistical and anecdotal counterpoints to orthodox critiques that were helpful in describing the larger community of the veterans and the training they received to prepare them were Ron Milam's *Not a Gentleman's War: An Inside View of Junior Officers in the Vietnam War* and Karl Marlantes' *What it is Like to Go to War*.⁴⁵ Several other sources examine the incidents and the law at work rather than the war itself, and among these are Gary Solis' *Son Thang: An American War Crime*, and several of his articles.⁴⁶ Solis' work closely examines the crime and its consequences, this thesis will further explore causal factors to this and other crimes and the ensuing effects on the military as its leadership responded to the crimes and public reactions. Finally, Gregory A. Daddis' *Pulp Vietnam: War and Gender in Cold War Men's Adventure Magazines* examines the effects Post-World War Two men's magazines' glamorization of war, depiction of women as either sexual objects or sexualized villains, and set unreal expectations for the men who would fight in Vietnam.⁴⁷ Daddis' work reinforces much of the theory on the need for dominance between genders in Goldstein's work. These false expectations contributed to the disillusionment with the war and added to the other realities and stressors of combat, helped engender ill-will toward the Vietnamese non-combatant population. The underlying societal attitudes inherent in these magazines caused lingering cultural norms which ran counter to ongoing military efforts at eliminating violations of the law of war and internal discipline.

⁴⁴ Kendrick Oliver, *The My Lai Massacre in American History and Memory* (New York: Manchester University Press, 2007); William Thomas Allison, *My Lai: An American Atrocity in the Vietnam War* (Baltimore: Johns Hopkins University Press, 2012).

⁴⁵ Milam, *Not a Gentleman's War*; Karl Marlantes, *What it is Like to Go to War* (New York: Atlantic Monthly Press, 2011).

⁴⁶ Gary D. Solis, *Son Thang: An American War Crime* (Annapolis, Md: Naval Institute Press 1997).

⁴⁷ Gregory A. Daddis, *Pulp Vietnam: War and Gender in Cold War Men's Adventure Magazines* (New York: Cambridge University Press, 2021).

To examine the 1991 Tailhook Incident and later attempts to expand women's roles in the armed forces several primary sources were invaluable, including the Investigation Reports of the Department of Defense Inspector General's Office, the legislative hearings and reports of the experiment conducted by the Marine Corps.⁴⁸ Additionally, interviews by the author of a member of the Presidential Commission on the Assignment of Women in the Armed Forces (1992), and both military leaders and civilian scientists from the Marine Corps experiment helped bring context to the case study.⁴⁹ Secondary sources included books and articles on the scandal itself, the treatment of women and the emasculation of enemies, the role of women in building the all-volunteer force, and the remaining barriers to integration. The latter helped provide insight into keys to culture shifts necessary to further reduce violence internally within the military, which in turn may lead to a reduction in violence against non-combatants. Combined with Daddis' work, they were also useful in understanding how small unit cultures help undermine discipline described in Chapter 3 and 4 and the sexualization of efforts to dehumanize prisoners later at Abu Ghraib.

The case studies within the last two chapters covering the prison abuses at Abu Ghraib and several incidents of violence against non-combatants in Iraq offered challenges obtaining unredacted government records, in part owing to the pandemic effects described earlier. For primary sources, several oral history interviews of soldiers and Marines stationed at Abu Ghraib

⁴⁸ 'Report on Tailhook '91: Part 1, Review of Navy Investigations', *Office of Inspector General, Department of Defense*, 21 September 1992; 'Report on Tailhook '91: Part 2, Events of the 35th Annual Tailhook Symposium', *Office of Inspector General, Department of Defense*, 12 April 1993; Public Law 102-190, *National Defense Authorization act for FY 1992-1993*, 5 December 1991; Smith, George W. 'United States Marine Corps Assessment of Women in Service Assignments', *Memorandum for the Commandant of the Marine Corps from Force Innovation Office Director*, May 2015; Marine Corps Operational Test and Evaluation Activity (MCOTEA), 'Ground Combat Element Integrated Task Force Experimental Assessment Report', *US Marine Corps*, 14 August 2015.

⁴⁹ 'Final Report to the President', *The Presidential Commission on Assignment of Women in the Armed Services*, 15 November 1992, (Washington, D.C.: GPO, 1992); Oral history interviews with Thomas Draude, Robin Fortner, Paul Johnson, and Justin LeHew.

during and after the incident supplemented official investigations released in the aftermath of the prison scandal.⁵⁰ Additionally, the jurors' notes and copies of the autopsy and other evidence presented in the Hamdania case were obtained from one of the jurors the author interviewed.⁵¹ Helpful secondary sources included a compilation of the official correspondence and legal findings of the Bush administration regarding the use of interrogation techniques, and others addressing moral and gender framing of the issues at Abu Ghraib.⁵² Again, Goldstein's work is relevant here with regard to dominance over detainees and need to emasculate them putting them in staged homo-erotic situations or by humiliating them in front of women. Haditha and Mahmudiyah each had good quality narrative and investigative secondary sources to start researching the incidents.⁵³ For Hamdaniyah, the primary sources noted above and contemporary media accounts provided important information and context for the case. As with all the other case studies, news reports, letters to the editor, government studies and research company polling data also provided context for the conclusions. In these four case studies, the influence of race and gender continued to be evident. Additionally, the shortcomings of the UCMJ in prosecuting war crimes, need for domestic legislation, and trend of accountability

⁵⁰ Antonio Taguba, 'Article 15-6 Investigation of the 800th Military Police Brigade', *Coalition Forces Land Component Command, U.S Central Command, U.S. Army*, 26 February 2004; Interviews with Major Warren Ferdinandsen, USA, and Fletcher Pearson, Sergeant Major USMC (retired) for Abu Ghraib, and Sergeant Major Justin LeHew, juror for a Hamdania trial, and an anonymous member of the Hamdania platoon.

⁵¹ Jurors notes, including written statements of Corporal Trent Thomas, USMC, to Naval Criminal Investigative Service dtd 8 and 16 May 2004 and 'Autopsy Examination Report #06-0476, Awad, Hashim Ibrahim', Armed Forces Institute of Pathology, 6 July 2006; LeHew Interview; Anonymous interview with member of the Hamdania platoon which was responsible for the incident.

⁵² Karen Greenberg and Joshua Dratel, *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005). Douglas V. Porpora and others, *Post-Ethical Society: The Iraq War, Abu Ghraib, and the Moral Failure of the Secular* (Chicago: University of Chicago Press, 2013).

⁵³ Jim Frederick, *Blackhearts: One platoon's Descent into Madness in Iraq's Triangle of Death* (New York, NY: Broadway Paperbacks, 2010); Kenneth Englade, *Meltdown in Haditha: The Killing of 24 Iraqi Civilians by US Marines and the Failure of Military Justice* (Jefferson, NC: McFarland & Co., 2015).

being found mostly at junior levels were again on display, along with the influence of societal attitudes and political pressures on the military.

Structure and Main Themes

The first chapter provides an examination of cases of U.S. Army and Marine Corps violations from World War Two. They include the Biscari Massacre in World War Two's European Theater in Sicily (1943, US Army) and the wide-spread taking of trophies in the Pacific Theater throughout the war (both services), to provide a baseline for the efforts of the military at training, educating, properly manning, and policing its services' use of force. Biscari shows the difference made by the type of defence used at trial, the impact of the military's fear of civilian response, and the willingness to overlook a commander's culpability higher in the chain of command in order to preserve the capability brought by that leader. Unfortunately, this would not be an exceptional circumstance. The examples, or more precisely, the lack of good examples in the Pacific Theatre illustrates the effect of media and societal values on what behaviours are punished. Throughout the dissertation, the various cases—spanning five decades - will offer points of contrast or comparison to determine whether any improvement is evident in either preventing or prosecuting law of war violations and seek to answer the central question of the extent the military is responsible for continued violations. This case introduces several themes that will recur throughout the dissertation. First, the tendency of the military to respond to many incidents based on an expectation of the public's reaction. Second, the underlying influence societal attitudes about the enemy exerts on both the behaviour of the soldier and the pressures brought to bear for or against punishment for those found guilty of law of war violations. Next, trends in the circumstances preceding law of war violations and in the types of

defences used by the accused perpetrators. Last, the difficulties in successfully prosecuting law of war violations.

The next chapter focuses on two case studies, those of My Lai and Son Thang during the Vietnam War. These two cases differ in scope of human tragedy if merely comparing the number of victims, but the events leading up to the incidents bear remarkably similar traits when examined side-by-side. The handling of the cases by the Army and Marine Corps were quite different, likely because the Army's lessons learned from My Lai affected the Marine Corps' handling of Son Thang. From the investigation through the prosecution of the accused, the differences were noteworthy. The end result in both cases, however, left much to be desired in terms of a true accountability for the crimes being reached, though this was not entirely the fault of the military, as political and public pressures both added to a military justice system that was less than optimal and caused disparities in the prosecution and the acquittal of several key perpetrators. Comparing these cases to our baseline for recurring themes, the influence of race, the problems inherent in the UCMJ as a tool to prosecute law of war violations, and the public reaction's role in shaping accountability become apparent.

Because gender perspectives impact the culture within the military and affect discipline within the services, the next chapter discusses the Tailhook scandal of the Marine Corps' aviation arm, its effects on the armed services' assignment policies for women in combat and the larger issue of attitudes about women in the service. These attitudes greatly affected the operations of the Army and Marine Corps, particularly in the age of the All-Volunteer Force, and show the potential for societal feelings and pressures to not only drive change within the military, but to prevent realization of the full potential contribution the entirety of America's population, male and female, could make toward its defence. The link between the law of war

violations against non-combatant women, use of demeaning sexual acts with prisoners, and harassment and assault against the services' own connect to societal attitudes. This case and the later ongoing efforts to integrate women fully in the armed forces allows one to assess the influence of cultural attitudes in and out of the services for their impact on change within the military and handling of internal discipline.

The prisoner abuse scandal at Abu Ghraib prison explores how the treatment of non-combatant detainees by U.S. forces could depart so drastically from acceptable norms. It also continues an examination of attitudes about gender in relation to both the emasculation of prisoners to "soften them up" for interrogation and in the treatment of the women soldiers accused in the incident. Additionally, the lack of real clamor for change in the wake of the scandal is examined for the presence of cultural prejudice similar to the racial prejudice obvious in the Pacific Theater of World War Two. The repetitive nature of real accountability stopping with lower levels of soldiers, harkens back to My Lai in particular but will also be evident in the final chapter's case studies as well. As in the preceding cases, the limits of the Uniform Code of Military Justice in delivering equitable justice in the face of societal or political pressure and the underlying aspect of race as it influences treatment of the enemy are again displayed.

The final chapter examines three case studies during the United States' War in Iraq following the terrorist attacks of 11 September 2001. These three cases differ dramatically from each other in causal factors and final accountability outcomes achieved, but share many of the same trends in the investigation, prosecution, and final sentencing of the accused. Taken together, they reinforce earlier identified trends, such as displaying the limits of education alone absent engaged leadership as a deterrent to non-combatant violence, especially in the charged

post-9/11 context, the limitations of the UCMJ, and again display the importance of societal attitudes regarding its soldiers, race, and gender in influencing military decisions or actions.

When examining the various cases, it becomes clear that the military has had a vested interest in preventing law of war violations but on several occasions failed to do so for a number of reasons. One of these is a legal system not designed specifically to address these types of crimes and possessing serious limitations due to multiple levels of internal and external review where outside pressures may influence true accountability. While not apparent at the beginning of the research, this became an important factor preventing deterrence against continuing violence. An associated reason to this is the lack of deterrence of the UCMJ when sentences are so often mitigated or eliminated. The system of training and education about the law of war has improved over the time period studied, though the overwhelming concern for personal safety in 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 defence, 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 are often 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 firmer resolve to hold accountable senior members who fail to enforce the standards appear to offer at least partial remedies to the continued violence against non-combatants.

Chapter One: World War Two—Setting a Baseline for Comparison

When Americans think about World War Two today, invariably some images called to mind, like the iconic flag raising over Iwo Jima, transcend generations but some are dependent on the age of the individual. Those born in the last twenty years might picture Tom Hanks in *Saving Private Ryan* rushing to evacuate a paratrooper, the last son of a family, after his brothers are all killed in other actions. For others, the scenes of Bastogne or Guadalcanal portrayed by relatively unknown actors in the epic series of *Band of Brothers* or *The Pacific* might resonate. The generation born thirty 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 Hitler exhorting his army, bodies awash in the surf of Normandy or Pacific islands, or film footage of concentration camps being liberated. They sat with their grandfathers, fathers, and uncles to hear stories about the war—its costs and the triumphs. Handed down through these succeeding generations were stories and myth. 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 feeling that World War Two 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.¹

¹ Over the last three decades, more and more memoirs of the service of World War Two veterans have become published and accessible to the general public. A major theme in many is the 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 experiences' darker turns or just the ever-presence of fear which did not square with the image of returning victorious soldier of the day. More well-known examples are Eugene B. Sledge's *With the Old Breed in Pelelieu and Okinawa* (New York: Random House Publishing, 1982), discussing the barbaric conditions—and actions—he witnessed, and James Bradley's *Flag of our Fathers* (New York: Random House Publishing, 2000), which tells of his father's reticence of discussing his own

As the myth of the “Good War” became stronger, prewar tensions in America, such as those from isolationists who opposed the U.S.’s involvement even after Pearl Harbor, were largely a forgotten aspect of public sentiment.² Also largely unexamined, were the violations of the law of war committed by U.S. forces. Though whether or not it was “good” can be argued, the importance of the conflict to the military and society 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 as to the ‘right answers’ to tactical and operational problems, drove innovation in the continuing development of combined arms. Together, these shaped the U.S.’s preference of what Weigley later defined as the “American Way of War” over Grenier’s “First Way of War”.

Though a conflict that is widely accepted today as having been “necessary,” World War Two, 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 total nature of that war and its romantic place in popular memory and myth, it is instructive to draw several case studies from World War Two to serve as a starting point with which to measure the U.S. military’s efforts and progress toward eliminating those violations over the span of five decades that is the focus of this dissertation. Upon examining these and later cases for the contributing factors that caused the incidents themselves and how they were handled, the race of the enemy or non-combatant victims of the crime will emerge as important. The responses of the military leadership to the violations often anticipated the

experiences from that war. Lesser known but equally powerful works include Kerry Lane’s *Marine Pioneers: The Unsung Heroes of World War Two* (Atglen: Schiffer Publishing, 1997), and *If You Survive* (New York: Ballantine Books, 1987) by George Wilson.

² Studs Terkel, interview with Eileen Prose. *Good Day!* (1984). <<https://www.youtube.com/watch?v=UMtbfqpKVBM>> [accessed 3 March 2022].

reactions of the public, and many times these reactions would reflect the public's attitudes, creating double standards for military actions based on the color of the victim. The responses of the fighting men themselves to the events reflect a tension between the realities of the ferocious combat environment and prevailing societal attitudes and 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 would be treacherous on all fronts, but a special level of enmity seemed to have been displayed for the enemy in the Pacific.

World War Two was not the first time the United States fought a determined enemy in the Pacific. The Filipino-American War from 1899-1902 witnessed the United States fighting to exert its control over the Philippines following victory over Spain in the Spanish-American War. In the Philippines, US 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.³ 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 of which was as a derivative of the term "goo-goo" referring to a Filipino in the Spanish-American War, though some thought it could also have been a mocking imitation of Filipino speech.⁴ In any case, the term would become common to Marines for natives anywhere, and it was used again in

³ Louise Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (Abingdon: Routledge, 2010), p. 2, 5-7.

⁴ David Roediger, 'Gook: The Short History of an Americanism', *Monthly Review*, Vol 43, Issue 10, 1992. <http://www.davidroediger.org/articles/gook-the-short-history-of-americanism.html>; Paul Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines*, (Chapel Hill: University of North Carolina Press, 2006), p. 125.

Nicaragua during the Banana Wars of the early 20th century. By the time of the conflict in Vietnam though, it was predominantly applied to Asian cultures. While several authors, like 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 Two meant it, like Vietnam, was in many ways a variation on prejudices dating back to the Filipino-American War.⁵

As noted by John D. LaWall, in his memoir about his service during the conflict in the Philippines, 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.”⁶ This sort of denigration of other cultures as less than civilized and unworthy of consideration or basic rights and protections were rampant and on full display during the Filipino-American War. It was again demonstrated in the World War Two Pacific campaigns, and just barely concealed by the time of Vietnam. 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.⁷ Like LaWall, many veterans of World War Two 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.

⁵ Barnett, pp. 5-7, 175-179; Paul A. Kramer, ‘Race-Making and Colonial Violence in the U.S. Empire: The Philippine-American War as Race War’, *Diplomatic History*, April 2006, Iss. 2, pp. 173-176.

⁶ ‘Affairs in the Philippine Islands. Hearings before the Committee on the Philippines of the United States Senate’, *Document 331, 57th Congress* (Washington, D.C.: Government Printing Office, 1902), p. 2932.

⁷ Barnett, p. 237.

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 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.⁸ This ambiguous handling of what treatments should be accorded irregular fighters had second and third order effects on the population such fighters lived and hid among. Although the forces killed in the first case study 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 defence presented by one of the perpetrators.

This chapter sets a baseline to compare future changes 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 thesis, starting with those in this chapter, 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 chapter 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 providing a starting point for comparison of later cases. Next, it will contrast the actions taken in the European Theater with the conspicuous inaction in the Pacific Theater, where countless acts of trophy-taking and violence were perpetrated against personnel rendered

⁸ Sibylle Scheipers, 'Is the Law of Armed Conflict Outdated?', *Parameters* 43, No. 4 (2013), pp. 45-46.

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.

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 their campaign in North Africa and was aided by a major series of deception operations to convince the Axis the invasion was aimed for Sardinia.⁹ 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 July 14th, that two separate incidents, which came to be called the Biscari Massacres, occurred.¹⁰

Biscari is located on the southern portion of the island, not far from the Gulf of Gela on the southwest side 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 slowed by a skillfully executed delaying action by German troops. These Americans, part of the 180th Regiment, of the 45th Division, itself 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 the July 13th, 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.

⁹ Gerhard Weinberg, *A World at Arms: A Global History of World War Two* (Cambridge, Cambridge University Press, 1994), pp. 593-595.

¹⁰ Though 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.

By the early hours of the 14th, they were involved in a bitterly contested struggle, which continued until the objective was secured in the afternoon.¹¹

The wordy, if dry, summary of the events of the morning in question describes the violation of the 92nd Article of War for which Sergeant 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.”¹²

This, though, does not tell the entire story of the morning. The fighting had begun around 04:00, and it was described as a severe, close-in fight, leading to considerable disorganization of the attacking, inexperienced Army units. Around 08:00, with the battle ongoing, Sergeant West was given control of forty-six prisoners, three Germans and forty-three 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 that “This is orders,” and instructed the other guards around his nine-man detail that if they, “did not want to see it to walk away.”¹³ He then fired a full magazine of 30-rounds into the group. After exhausting the first magazine, he obtained a second, moved through

¹¹ James Weingartner, ‘Massacre at Biscari: Patton and an American War Crime’, *The Historian* 52, no. 1 (Nov 1989), pp. 24-25.

¹² Ide and Simpson Holmgren, ‘De-classified Review of General Court Martial Proceedings against Sergeant Horace T. West’, *Branch Office of Judge Advocate General North Africa Theater of Operations* (25 Oct 1943), p. 1.

¹³ *Ibid.*, pp. 2-3.

the group and shot the survivors. All testimony at the subsequent court-martial, including West's, would agree that he had done almost all the shooting.¹⁴

The same morning, Captain John C. 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 his men witnessed two enemies, 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 forty 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.¹⁵ 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...", would decide to prosecute Captain Compton alone for this incident.¹⁶

At this point, it would appear that although a crime has been committed, the system worked well enough to bring the perpetrators to trial in order to gain accountability for their actions. Several keys to this were the quick reporting and initiation of an investigation, despite being in the midst of an ongoing combat campaign. Although these events occurred during

¹⁴ Weingartner, 'Massacre', p. 27.

¹⁵ 'De-Classified Testimony of Colonel Forrest Cookson', taken by Brigadier General Philip Brown, *Office of U.S. Army Inspector General*, 16 February 1944, p. 16.

¹⁶ 'De-Classified Case of Sgt. Horace T. West', *Branch Office of The Judge Advocate General, North Africa Theater of Operations*, 1943, p. 3. The specific general rule quoted is found in the 92nd Article of War (Murder) contained in the cited manual.

fighting near the highest end of the Range of Military Operations continuum, there was a recognized need to assign responsibility and punish the guilty. Recognizing and acting on the need and actually seeing justice done, though, were two different things, and some of the other variables mentioned in the introduction would affect the outcome. Among these were the defence used and also the failings of the legal system the military had to use to adjudicate these crimes.

Though both men were brought to trial for the violations of the 92nd Article of War, both the defence strategies employed, and the outcomes of the trials, would be very different. West's lawyers offered several points for his defence. Among these were that he had witnessed three Axis soldiers murder soldiers who 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 caused a fatigue that, combined with the other events, led him to believe, "He might not have been quite himself." Last, he had heard the regimental commander, Col Cookson relay General Patton's orders, to his recollection, that "no prisoners would be taken and not to stop to take them."¹⁷ This defence was basically one of temporary insanity with the additional aspect of compliance with superior orders. Four members of the five-man medical board which 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 thirty-seven persons and sentenced to life imprisonment 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.¹⁸ West remained in a detention center in North Africa until November 1944, when the

¹⁷ Holmgren, p. 8.

¹⁸ Ibid, p. 13.

unexecuted portion of his sentence was remitted and he was returned to duty as a private, ultimately serving just over a year of confinement for the murder of over thirty men.¹⁹

Captain Compton's defence 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. From various witness accounts, it seems that 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 his message to them 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.²⁰ The court, after deliberating, returned an acquittal verdict based on the belief 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 the members of the firing squad who killed the prisoners.

While in 1943, at the time of these trials, 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 defence resting on execution of superior orders and, in November of that year, the United States took similar action and revised its relevant orders and manuals.²¹ This would conveniently ensure that any further war crimes by Americans for which

¹⁹ Weingartner, 'Massacre', pp. 38-39. Remission is the act of cancelling any unexecuted portion of a punishment.

²⁰ 'De-Classified Testimony of Colonel Forrest Cookson', pp. 20-21.

²¹ Gary Solis, 'Obedience of Orders and the Law of War: Judicial Application in American Forums', *15th American University International Law Review* (New York: Cambridge University Press, 2003), pp. 481, 510.

they were convicted would set a more recent precedent before the trials of German and Japanese soldiers began.

While both incidents saw more than thirty 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 a defence of temporary insanity. In the case of Compton, his defence was focused on his following a superior's orders; a defence theory which was also used by the 45th Division's Inspector General in reasoning 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 soldiers were snipers and that some were wearing civilian clothes in order 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.²² 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 under an "order" he believed was "so

²² 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 assault of two soldiers who were suffering the effects of combat stress. The public reaction to the assaults aided in his being passed by General Eisenhower for command of the ground assault troops in the coming invasion of Europe in favor of his subordinate Corps Commander Lieutenant General Bradley. This was the same Bradley who so quickly alerted him to the massacre and ordered further investigations. The War Department became sufficiently uncomfortable with the information that it had seen that it appointed an officer to travel to directly question Patton on the allegations, which if proved founded, 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 him from his command of an army and sent him back to the United States reduced in grade, options General Marshall had given Eisenhower. This is related in both Weingartner's work on Biscari (pp. 34-35) and in the *Patton Papers, 1940 to 1945* Vol. 2, (pp. 449-450) edited by Martin Blumenson.

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, Eisenhower in Europe and Marshall back in the United States.²³

The documentation of the courts-martial was classified secret and top secret, and neither was de-classified until 1958, so word of the killings and the trials were not reported by the media in the United States. The Army was concerned with both public reaction and with the possibility of enemy reprisals, something that would be seen also in the later cases of Abu Ghraib and Mahmudiya.²⁴ Compton was reassigned to another unit and was 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 that 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 1944.²⁵

In the Biscari Massacres, and many instances in the European Theater, the military demonstrated, albeit with a system that was not perfect and at times ineffectual, that it felt compelled to uphold the law of war and even changed its *Rules of Land Warfare* during the ongoing conflict. In the attempt to keep the information from the public, the concern of the

²³ Weingartner, ‘Massacre’, pp. 30-32 and ‘De-Classified Case of Sgt. Horace T. West’, p. 1.

²⁴ Philip Brown, BG USA. ‘Memorandum dated 5 February 1944’, *Office of U.S. Army Inspector General*, 1944. The degree to which the Army was willing to go to delay any news of this was evident in this and other memoranda prepared by Brigadier General 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 also discuss his retention in Africa for incarceration instead of the United States and the belief if the press were to find out it would be “a columnist’s field day.”

²⁵ 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 <<https://tjaglcspublic.army.mil/war-crimes-in-sicily-sergeant-west-captain-compton-and-the-murder-of-prisoners-of-war-in-1943?inheritRedirect=true>> [accessed 14 Feb 2022].

military with public perception and reactions belied a belief that these crimes against the European Axis enemy would potentially harm support. In moving the 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 would become obvious, with weekly periodicals and newspapers publishing pictures or reports displaying obvious violations that drew much less negative feedback than one might expect.

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.²⁶ Once the United States recovered from the initial shock of the attack on Hawaii and declared war on Japan, the task of fighting its way back across the Pacific began. From the outset, this theater of the war would be different in the brutality displayed by both sides.²⁷ Both United States Marines and Army units served in the fight against the Japanese. All services would have incidents of violations; however, since the Marines and soldiers conducted the majority of the ground fighting, their face to face exposure with the enemy was greater, raising both the enmity between them and the Japanese, and the chance that law of war violations would occur. While there were obvious efforts in Europe to hold soldiers accountable for violations, in the Pacific there would be little evidence of any concerted effort to do so. Comparing the two theaters, one has to be struck with the clear contrast between efforts to uphold the law. This difference lends credence to the argument that the most influential variable to the way the laws of war were enforced—or

²⁶ James Weingartner, 'Trophies of War: U.S. Troops and the Mutilation of Japanese War Dead, 1941-1945', *The Pacific Historical Review* 61, no. 1 (Feb 1992), p. 53.

²⁷ Jones, *After Hiroshima*, pp. 7-9; Craig Cameron, *American Samurai: Myth Imagination, and the Conduct of Battle in the First Marine Division, 1941-1945* (New York: Cambridge University Press, 1994), p. 114; Keegan, *A History of Warfare*, pp. 375-379.

not—was the race of the enemy. And this influence started not within the military, where the dehumanization of the enemy is often pointed to as a factor for a disparity in violence, but society itself.

In his book *War Without Mercy*, John W. Dower outlines the racial components of fighting during World War Two and offers a compelling argument for why some of the violations of the laws of war occurred with the frequency they did 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; their tenacity, seemingly to the point nearing the suicidal; and the long record of contempt in many Western and white societies for “colored” races.²⁸ While the European Theater would include many examples of violations concerning 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 (like bombing), the Pacific Theater would include these and, additionally, the desecration of remains and disregard of conventions concerning combatants rendered out of the fight, such as survivors of sinking vessels destroyed by Allied attacks.²⁹

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 that it was a prohibited activity and ordering commanders to see the practice stopped.³⁰ Later in the war,

²⁸ John Dower, *War Without Mercy* (New York: Pantheon Books, 1986), pp. 147-148.

²⁹ Dr. Alan Stephens, ‘The Battle of the Bismarck Sea’, *The Sir Richard Williams Foundation*, <www.centralblue.williamsfoundation.org.au/the-battle-of-the-bismarck-sea-alan-stephens> [accessed 9 March 2020].

³⁰ Simon Harrison, ‘Skull Trophies of the Pacific War: Transgressive Objects of Remembrance’, *The Journal of the Royal Anthropological Institute* Vol. 12, No. 4 (Dec. 2006), p. 827.

during January 1944, the Joint Chiefs of Staff felt compelled to issue a duplicative directive.³¹ Judging by the continued reporting, neither directive accomplished its purpose. One widely known incident that did actually result 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-sized photo in *Life* magazine on 22 May 1944, he had promised her a skull before he left. While *Life's* editors received a number of letters deploring the act and their publication of the photo, there was by far a greater sense of what Schneider described as acceptance or apathy regarding the incident, and others like it, among the media and many civilians.³² Reviewing the letters to *Life's* editor in the five subsequent issues of the magazine, only one of five responses was completely negative in tone and questioned the morality of the action. 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. There were more letters concerning the perceived abuse of a cat being removed from a tree published than those criticizing the publicizing of war dead. The editor's reply to those decrying the photo of the tank was "War is unpleasant, cruel, and inhuman. And it is more dangerous to forget this than be shocked by reminders. –ED."³³ Only after the Secretaries of State and War Department intervened did the Navy half-heartedly investigate the matter. In the end, the lieutenant received only a letter of reprimand for his "demonstrated poor judgment and lack of an appropriate sense of decency."³⁴

³¹ Walker Schneider, 'Skull Questions: The Public Discussion of American Human Trophy Collection During World War Two', *Penn History Review* 25, No.2, (April 2019), p. 143.

³² *Ibid.*, p. 127.

³³ 'Letters to the Editor', *Life Magazine*, 22 February 1943, <<https://books.google.com/books?id=gU8EAAAAMBAJ&printsec=frontcover#v=onepage&q&f=false>> [accessed 13 Feb 2022].

³⁴ Weingartner, 'Trophies of War', pp. 60-66.

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 Convention 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.”³⁵ The collecting of Japanese body parts also violated customary laws of warfare and for some Americans, though surprisingly less than would be thought, their sense of decency. Many Americans viewed the power of the government and military as being derived from 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.³⁶ 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 will be seen again in this dissertation’s cases in Chapters Two and Five.

Another example of a violation in the Pacific Theater of the war receiving hardly any criticism was the decision by General George Kenney, Commander of Allied Air Forces in the South Pacific Area from 1942-1945, to order his U.S. and allied aircraft to engage Japanese vessels attempting rescue—and the survivors themselves—following the Battle of the Bismarck Sea.³⁷ Indeed, following the initial inflated reports of up to 15,000 casualties (a figure later estimated to be just under 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*

³⁵ *Ibid.*, p. 59.

³⁶ Schneider, ‘Skull Questions’, p. 128.

³⁷ ‘Second World War Official Histories, RAAF, Vol. 1, Chap. 32’, *Australian War Memorial*, <<https://www.awm.gov.au/collections/C1417629>> [accessed 11 March 2020].

magazine.³⁸ This was a violation of the Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention in the Hague Convention of 1907, which prohibited the killing of shipwreck survivors.³⁹ It also violated the later 1929 Geneva Convention 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, though they signed it, however the United States had ratified it and was subject to its provisions.⁴⁰ 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 *Lisbon Maru*. The ship was transporting over 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.⁴¹

Cases of violations of the laws of war, customary or ratified, were widespread throughout the Second World War and were not confined to specific theaters, countries, or services. The idea of how prisoners and non-combatants should be treated evolved over time from early

³⁸ Lawrence Spinetta, 'Battle of the Bismarck Sea', *World War II Magazine* (Nov 2007).

³⁹ Hague Convention 1907 (X), 'Convention for Adaptation of Maritime Law to Principles of Geneva Convention', *Lillian Goldman Law Library* (2008), <https://avalon.law.yale.edu/20th_century/hague10.asp#art16> [accessed 5 Mar 2020].

⁴⁰ 'Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929', *International Committee of the Red Cross*, <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/300>> [accessed 9 March 2020].

⁴¹ Guy Walters, 'Was this Japan's most heinous war crime? How 800 British PoW's were locked up and left to drown when their prison ship was torpedoed', *DailyMail.com*, 23 October 2017, <<https://www.dailymail.co.uk/news/article-5010553/Was-sinking-Lisbon-Maru-Japan-s-worst-war-crime.html>> [accessed 13 Mar 2022]. Records of the trial are included in the National Archives and Records Administration facility at College Park in Box 6 of Entry A1 5 in RG 125: Records of the Office of the Judge Advocate General (Navy), Location 290/902/68/6.

examples in ancient Greece and Rome, where non-citizen prisoners or non-combatants enjoyed little to no relief from the cruelest treatment to the later ideas that a standard treatment for prisoners and non-combatants should be enforced.⁴² 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 distant enemies. According to Simon Harrison, close enemies, those like the combatants themselves, are viewed as fully human, and distant enemies, either geographically or socially, are viewed as semi- or sub-human and, therefore, subject to the collection of trophies, whether scalps, heads, or other body parts.⁴³

The implicit racist aspect to this concept appears across the world and repeatedly during conflicts since the earliest recorded history. Even in a country which proclaims its ideals to be that all men are created equal and universal nature of human rights, the underlying biases can be found within its society. The young, able-bodied men and women who were drafted (pre-1973) or recruited are reflections of the society from which they come and bring with them to the services those biases and prejudices which 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 One, 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

⁴² Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: Macmillan and Co., 1911), pp. 237-239, Internet Archive.

⁴³ Harrison, pp. 818-819.

the defensive.”⁴⁴ After World War Two, 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.

Preview of the Variables Impacting the Case Studies

Comparing the European and Pacific Theatres of World War Two, differences are readily apparent which may well be due to 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 introduced in the introduction. 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, starts on the most limited side 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.⁴⁵ 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 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.

⁴⁴ Mark Mazower, ‘An international civilization? Empire, internationalism and the crisis of the mid-twentieth century’, *International Affairs* 82, 3 (2006), pp. 558 and 564.

⁴⁵ Marine Corps Doctrinal Publication 1-0: Operations, *Headquarters, U.S. Marine Corps*, pp. 2-10.

Of course, World War Two was at the most violent end of the ROMO, and this certainly added to the conflict's savagery: over 16 million Americans served during the war in all branches, including over 11 million in the Army, and 660,000 in the Marine Corps. Of the Army personnel, roughly 2.75 million served in their Army Ground Forces, or ground combat units, though with engineers, military police, and other skill sets normally in direct support of infantry recognizes as Army Support Forces, the number seeing combat was much higher than the third of the Army recognized as ground forces.⁴⁶ In popular culture, World War Two 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 Two certainly dwarfed that of those who served later in Vietnam and other conflicts.⁴⁷ Walker Schneider's assertion about the relationship between society and its armies during World War Two 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."⁴⁸

During World War Two, part of the moral connection was also due to the sheer numbers of the population involved in that nation-wide 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

⁴⁶ Allyn Vannoy. 'Expanding the Size of the U.S. Military in World War II', *Warfare History Network*. 27 Oct. 2014, <<https://warfarehistorynetwork.com/2017/06/26/expanding-the-size-of-the-u-s-military-in-world-war-ii/>> [accessed 25 March 2020].

⁴⁷ In 1943, the mid-point of the war, the U.S. population was nearly 137 million. With over 16 million in uniform during the war, over 11.5% of Americans served in World War Two. In Vietnam, with the U.S. population 201 million near the end of 1968, a fair mid-point, and 8.7 million having served, the percentage of enlisted Americans was just over 4.3 percent, despite the conflict being over twice as long.

⁴⁸ Schneider, 'Skull Questions', p. 127.

others to do so. This difference in where World War Two and later conflicts fell on the ROMO may account for just how readily certain violations were overlooked during World War Two. 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 the detachment grew, the professionalization of the force became more widely accepted and the military grew in public esteem and trust. On the other, this detachment meant more than ever, the public awareness of the absolute need for discipline and adherence to law of war in winning the hearts and minds during the more prevalent limited wars was minimized. The 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—editorializing and even pressuring politicians to intercede—to the detriment of military efforts in enforcing its legal code and the laws of war.

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 by memoirs, officially released photos, and relics like the one documented in the *Life* photo. Despite this, and the need for multiple prohibitive directives to commanders, no records of prosecution 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 the accountability. The differences in the brutality committed on the enemy in each theater give credibility to Harrison's concept of near and distant

enemies. While the Germans and Italians were viewed as ‘men just like us,’ the humanity of the Japanese was held by many in much lower regard.⁴⁹

This would be clear in 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 though both were effective pieces of propaganda, his approach differed slightly. In his *Here is Germany* documentary, he 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* edition he focused on their atrocities in China and elsewhere and their belief in cultural superiority from the start.⁵⁰ Though *Know Your Enemy-Japan* was finished too late to be utilized 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 that do not resemble the fighting man would be seen again and again in future conflicts, though the overtness of the dehumanization in media and public conversation would be less, demonstrating how the existential nature of the war removed some of the social constraints allowing a more overt display. As we shall see in later chapters, the fact that there was justice, however limited, in Biscari and other European Theater cases but seldom any reaction to cases in the Pacific reflects a broader trend that would continue. Whether the difference be in race, religion, culture, or a combination of these, the military’s task when reinforcing the need to adhere to the law of war is harder in these cases.

⁴⁹ Harrison, ‘Skull Trophies of the Pacific’, pp. 819-821.

⁵⁰ Dower, *War Without Mercy*, pp. 15-23.

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 of the senior enlisted man, who gave Sergeant West his machine gun, before the events came to trial.⁵¹ Access to crime scenes which 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 the chaplain saw the bodies of the executed men when he did so his report could initiate a timely investigation, as the movement of the units ever onward would have left the site behind rather quickly. Lastly, 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 body may sometimes be lost. While not an issue initially in the Biscari Massacre, where investigation started quickly, and prosecution began just over 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 Massacres, it is unclear how Compton's order and the ensuing murders were first reported to higher headquarters, though Patton's diary mentioned his deputy 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 that was investigating, possibly sent by

⁵¹ 'De-Classified Testimony of Colonel Forrest Cookson', p. 11.

Bradley, and continuing on his way, found the second grouping 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.”⁵² When first informed, General Bradley’s recollection of the conversation made it seem as though Patton was inclined to dismiss and cover it up.⁵³ As the seriousness became apparent, however, the investigation was made and the two most responsible brought under charges. The investigation continued from that morning and West and Compton were tried in September and October.

While the soldiers that executed the prisoners under Captain Compton’s orders escaped prosecution, it is evident that later in the war this would have not 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, 1914*. 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 defence, the United Kingdom and the U.S.’s Department of War changed the wording in the *Rules*.⁵⁴ Captain Compton was acquitted, and Sergeant West had his confinement for life remitted after serving just over a year in custody. West’s reduction in sentence was due to a concern within the Army over the disparity in the outcomes of those courts-martial between an enlisted man and an officer but was carried out quietly for fears of both aiding the enemy and incensing the general public.⁵⁵ This may indicate that, while American society had little qualms

⁵² Weingartner, ‘Massacre’, pp. 25-26. His own words are found on page 209 of his handwritten diary of 15 July 1943, available digitally from the Library of Congress.

⁵³ Carlo D’Este. *Bitter Victory: The Battle for Sicily* (New York: Harper Perennial, 1988), p. 318. His own words are found on page 210 of his handwritten diary of 15 July 1943, available digitally from the Library of Congress.

⁵⁴ ‘Rules of Land Warfare, 1914, change 1’. *Department of War*. 15 Nov. 1944, para. 345.1 and Solis, *The Law of Armed Conflict*, p. 19. The United Kingdom changed their law of war manual to omit the flagrant double standard in April 1944 and the United States did so in November of that year.

⁵⁵ Weingartner, ‘Massacre’, p. 38.

about the collecting of skulls from the enemy or strafing swimming survivors of destroyed enemy ships in the Pacific, both highlighted in *Life*, the murder of Caucasian 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 during World War Two, there were correspondents assigned to theaters, 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. Later conflicts, especially after the advent of a 24-hour news cycle and, eventually, social media, would see the media play a much larger role in shaping public awareness and opinion. For a recent example of this, look no further than the media coverage, public sentiment, and finally, political intervention in the case of Chief Eddie Gallagher, a US Navy SEAL, who was tried for killing a wounded ISIS captive.⁵⁶ This type of extramural influence will be examined further in the chapters on Vietnam and Iraq.

As noted during the discussion of the case, both West and Compton used a defence that included following the orders of a superior. There was precedent for this in the military. During the Filipino-American War, Marine Corps Major Littleton Waller was tried at court-martial for killing "natives" on the island of Samar.⁵⁷ His defence was that with the exception of poor

⁵⁶ Dave Philipps, 'Anguish and Anger from the Navy SEALs Who Turned in Edward Gallagher', *New York Times*, 27 December 2019, <<https://www.nytimes.com/2019/12/27/us/navy-seals-edward-gallagher-video.html>> [accessed 12 June 2021].

⁵⁷ 'Major Waller Acquitted', *The New York Times*, 14 April 1902, <https://timesmachine.nytimes.com/timesmachine/1902/04/14/118468001.pdf?pdf_redirect=true&ip=0> [accessed 9 March 2022].

wording in one of his orders, all actions he and his men took were under the orders of U.S. Army Brigadier General, Jacob 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 acquitted, Smith was tried and convicted for inciting and ordering his subordinates to commit atrocities.⁵⁸ While West's attempt was unsuccessful, due to the defence's attempt to rely more on battle fatigue and temporary insanity as its primary focus, Compton's won an acquittal.⁵⁹ Numerous writers, such as Fred Borch III in his article about Biscari, and Ian Sayer and Douglas Botting in their book *Hitler's Last General*, question whether Compton's defence would have been successful after November 1944 when the Army revised its *Rules of Land Warfare*. While in future conflicts, superiors' orders would not be considered as a defence, 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 non-combatants, and his soldiers who 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 defence were acquitted.⁶⁰ There were other circumstances considered, but this displayed a double standard from which the trials held similar Axis defendants. In the ensuing legal review of the case, the judge noted a soldier in

⁵⁸ Solis, 'The Law of Armed Conflict', pp. 63-65.

⁵⁹ Borch, 'War Crimes'.

⁶⁰ James Weingartner, 'Americans, Germans, and War Crimes: Converging Narratives from "the Good War."' *The Journal of American History*, March 2008, p. 1175. 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 92 (murder). The three enlisted men all testified 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.

those circumstances “should follow a course of obedience, leaving the superior officer responsible for the consequences...”⁶¹

The Pacific Theatre provided no proceedings with defences to analyze. Given the media treatment of the enemy and characterization 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 Kenney in explaining his order to strafe the Japanese sailors in the sea following the Battle of the Bismarck Sea.⁶² A further illustration of the difference between the theatres is that in contrast to the few cases of accountability in the Pacific, between June 1944 and May 1945, over ninety soldiers were court-martialed and executed in Europe for misconduct against non-combatant civilians or prisoners.⁶³ This disparity in accountability for those who violated the law of war against this “different” foe and those whose crimes came against an enemy that looked like them 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.

Though 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 theatres. While this could be attributed to the censorship of media or the obstacle noted earlier of law of war violations labeled by their UCMJ specification, the distaste for the action as described by the men complaining to

⁶¹ Weingartner, ‘Americans, Germans, and War Crimes’, pp. 1167-1175.

⁶² 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, access to the National Archives in College Park, Maryland, which houses the Army and Navy disciplinary records for this era was restricted. Those restrictions have begun to lift and the author is currently waiting to interview one of the archivists of those records to again confirm the absence of accountability there through an examination of existing primary sources.

⁶³ W. Hays Parks, ‘Crimes in Hostilities’, *Marine Corps Gazette*, August 1976, p. 17.

the 45th Division chaplain about their comrades at Biscari may argue in favor of a lower overall prevalence. A culture of under-reporting of these crimes may also be to blame.

Training and education in the Army and Marine Corps during World War Two differed, due to the differences in their size and their primary missions, though because of their focus on land combat both used the Army's FM 27-10 *Rules of Land Warfare* as the basis for their basic military training regarding the law of war. The basic information in this manual included the rights of both combatants and non-combatants when taken prisoner, the prohibition against summary execution of prisoners, the principle of military necessity, and other applicable rules and principles.⁶⁴ In the early stages of the war, the need to greatly expand the size of the military saw initial training times shorten. However, as feedback from the front showed more skill was needed, both Army and Marine Corps initial basic training and follow-on infantry training, 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—though not lawyers—to units during training before deploying.⁶⁵

In the case studies that comprise the following chapters, the same variables will be compared to assess whether the military made any positive efforts to reduce the prevalence of violations and improve its ability to hold its members 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 will be assessed. Finally, the following chapters look for indications the public really cares about its military's behaviour.

⁶⁴ 'FM 27-10 Rules of Land Warfare', War Department, 1 Oct 1940 (Washington D.C.: United States Government Printing Office, 1947), pp. 1, 6-9.

⁶⁵ Kenneth Condit et al., *Marine Corps Ground Training in WWII*. Historical Branch, G-3, Headquarters U.S. Marine Corps (Washington D.C.: Government Printing Office, 1956), pp. 102-103.

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.

Chapter Two: Vietnam—Does a Massacre Matter?

In March 1968, over thirty years after World War Two's brutal campaigns in Europe and the Pacific, the United States Army and Marine Corps were once again engaged in a war. This was also almost twenty years after the 1949 Conventions in Geneva which greatly expanded protections against non-combatants—personnel rendered prisoners or hors de combat. A comparison of cases from Vietnam to the baseline cases in the last chapter 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 soldiers, the massacre at My Lai, several years into the Vietnam War, resonates to this day as probably the worst sort of behaviour of an American fighting unit. Just after revelations about what happened at My Lai were published, Marine Corps personnel carried out their own massacre at Son Thang. Why was there no improvement? Were the causes of these horrific crimes similar to the cases from World War Two? Was there a lack of prevention effort on the part of the military? Were the perpetrators held accountable in any more meaningful way? Did the public clamor for justice in a war which was covered much more meaningfully than World War Two? Did the services learn from the law of war violations and subsequent trials from World War Two? These questions all play a part in answering the extent to which the military is at fault for continuation of violence against non-combatants.

This conflict would be different from World War Two in a number of ways, including its relative place on the range of military operations (ROMO), which influenced how the war was fought and the public perception and support of the conflict. Also changed was the media coverage of the war, which up to this point had been, by and large, supportive of the war effort—as had public sentiment. But the Tet Offensive earlier that year proved much of the positive reporting about the war effort's progress false, which added an eroding level of trust to the

public's weariness with the war.¹ Had the "Good War" experienced the sort of coverage possible during Vietnam, its reputation through today may not have favorably endured a side-by-side comparison of the violations of its Pacific Theatre and those of Vietnam. The type of war and media exposure impacted the politicians and generals running the 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.

Throughout this chapter, the culpability of the military for these crimes is examined, but also whether other factors influence 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, My Lai's attempted cover-up notwithstanding, they were often hampered by outside influences.

This chapter begins with comparison of cases of law of war and ethical violations with the baselines from World War Two, spanning an approximately 50-year period from the Vietnam War, 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 racism demonstrated during World War Two by the differing responses to violations between theaters continues? Were there differences between how each service responded to violations, and why might that be? Examining both the civilian reactions to the cases outlined in this chapter, as well as the military responses—both to the incidents and also to the civilian reaction—illustrates a complex

¹ Barry Sussman and Kenneth John, 'War Bequeaths a Distrust of Government', *The Washington Post*, 15 April 1985, <<https://www.washingtonpost.com/archive/politics/1985/04/15/war-bequeaths-a-distrust-of-government/848b7b4e-ea02-4f14-93d4-41b7ff6c75fd/>> [accessed 29 March 2022]; Paul J. Noto, *At the Crossroads of Justice: My Lai and Son Thang—American Atrocities in Vietnam* (Bloomington: iUniverse, 2011), p. xii.; Edwin B. Moise, 'Tet in the News', *Vietnam*, Vol. 31, No. 5 (2019), pp. 32-34.

relationship between what the word of the law says, and what the actual expectations of society and the organizations are. The My Lai and Son Thang case studies represent just two incidents from the Vietnam War but happened in fairly close proximity to each other both temporally and geographically and help to answer these questions. Because the My Lai massacre had so many of the charges against the parties implicated either dropped before a trial or found the parties, save Calley, acquitted, compared with four of the five accused perpetrators from Son Thang being tried at court-martial, this second incident and its trials have been examined in more detail.

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 US Army's Americal Division, entered a hamlet in the village of Son My. That day Charlie Company's 1st platoon would kill many, though not all, of the more than 300 old men, women, and small children who were indiscriminately killed. For a number of victims, rape and torture would come before death.² How this infantry unit in the US Army arrives at the point it mercilessly inflicts that sort of criminal behaviour on non-combatants is not a unique story. There are parallels to be found with the story of the 180th regiment at Biscari, from its early "bleeding" 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

² Kendrick Oliver, *The My Lai Massacre in American History and Memory* (Manchester: Manchester University Press, 2006), p. 1; Noto, pp. 29-30.

necessarily point to a lack of lessons learned from Biscari or absence of effort on the military to do better at protecting non-combatants. However, careless language that hints at avenging losses or acting to instill fear for its own sake rather than accomplishing specific missions is a trend seen again and again and points to a lesson lost.

The company arrived in Vietnam a few months before the atrocity, 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, 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 February 12th, after a mine detonated, causing injuries; Lieutenant William 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 Weber. Knowing he made a poor decision, Lieutenant Calley compounded his error by radioing in a false battle damage assessment, claiming six enemy dead, to justify the loss of one of his own. Over the next month, the company continued to take casualties, which weighed on the men. On March 14th, the company once again took a casualty when Sergeant George Cox was killed by a landmine.³ At the memorial service the next day, Captain Ernest Medina, the company commander, told the men they would have a chance for revenge for Sergeant Cox and the rest of their comrades the next day.

Prior to the memorial service for Cox, Lieutenant Colonel Frank Barker, the commander of Task Force Barker, which was clearing out the areas around Son My to locate and destroy the

³ William Allison, *My Lai: An American Atrocity in Vietnam* (Baltimore: Johns Hopkins University Press, 2012), pp. 25-26.

48th Local Forces 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 a 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 Kotouc. After the memorial service, Captain 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 that, "all civilians had left the area, there were no civilians in the area. And anyone there would be considered enemies."⁴

The next morning, the operation began. While a number of units participated (in fact another was guilty of an almost equally egregious atrocity, killing over a hundred 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. He claimed to reply that processing so many detainees was slowing him down to which he claimed Medina responded, "Get rid of 'em" and "waste all those goddamn people." Calley took that to mean he should kill

⁴ Allison, pp. 28-31.

the villagers, while Medina claimed he meant for Calley to just get moving due to expected contact with the 48th 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.⁵ It would not be until Warrant Officer Hugh Thompson, the pilot of an OH-23 observation helicopter put his aircraft between some soldiers and civilians, risking being fired on himself, that some of the villagers would be 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 before firing a burst from his rifle into her.⁶ 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.⁷

The response of the US Army to the events of that day failed to uphold the requirements of either international laws of war or MACV mandatory reporting directives. 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

⁵ Noto, p. 29; Allison, pp. 32-42.

⁶ William Peers, *The My Lai Inquiry* (New York: W.W. Norton and Co., 1979), pp. 66-72.

⁷ Noto, pp. 30-31.

crew chief were interviewed by Colonel Henderson two days later, not by his own chain of command.⁸ They were neither sworn in nor asked to write out or sign any written testimony, but the colonel took notes. Thompson would not be interviewed again regarding the incident until August 1969, more than a year later.⁹

Over the next year, there were several missed opportunities for the Army to have investigated and determined 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 non-combatant casualties. The assistant division commander of the Americal Division, Brigadier General 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 his questioning of 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 Henderson to conduct the investigation, as Henderson, had been observing the operation from a helicopter overhead and thus knew already some civilians had been killed.¹⁰ Later tried, but acquitted, for charges of covering up the massacre by inadequately investigating, Henderson was one of several officers who failed in their duties to report such crimes.¹¹ 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 such as this. By mid-April, the Military Assistance Command, Vietnam had been made aware of the massacre through their South

⁸ While Thompson fell under an aviation unit’s command, Henderson was the infantry Brigade Commander.

⁹ Peers, *The My Lai Inquiry*, pp. 72-75.

¹⁰ Oliver, p. 32.

¹¹ Douglas Robinson, ‘Col. Henderson Acquitted in Last of the My Lai Cases’, *The New York Times*, 18 December 1971, <<https://www.nytimes.com/1971/12/18/archives/col-henderson-acquitted-in-last-of-the-mylai-cases-colonel.html>> [accessed 5 May 2022].

Vietnamese counterparts. Over the entire 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 investigation, and Colonel Henderson appointed Lieutenant Colonel Barker, despite the obvious conflict of interest, to conduct the investigation.¹² As rumors circulated throughout the brigade and division headquarters, many heard them, but Ronald Ridenhour, a helicopter gunner, began collecting statements and accounts from those who had been there. He eventually wrote to the President, senior members in the Pentagon, and 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 Ronald Haeberle, a 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 which prevented 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.¹³ What became known as the Peers Inquiry, after its senior member, Lieutenant General William Peers, recommended charges for quite a few officers and enlisted persons. In the end, twenty-five officers and enlisted faced charges.¹⁴ While the recommendations for charges show that the work Peers' team conducted was thorough and willing to assign culpability up and down the chain of command at the end of his inquiry, the

¹² Allison, pp. 60-74.

¹³ Oliver, pp. 33-40.

¹⁴ Peers, *The My Lai Inquiry*, pp. 221-228.

military justice processes that followed failed demonstrably to measure up to the same commitment to justice.

Lieutenant Calley was convicted of premeditated murder of 22 civilians and sentenced to dismissal from the service and life imprisonment with hard labor at the Fort Leavenworth Disciplinary Barracks. He was the only person, officer or enlisted, to be convicted for the atrocities at My Lai. Generals Koster and Young, the leadership of the division, were given letters of censure. Colonel Henderson and Captain Medina would be tried, but acquitted, as would Staff Sergeant David Mitchell and Sergeant Charles Hutto. Others would have charges altogether dismissed.¹⁵

The civilian response to Lieutenant Calley's conviction was in contrast to its general reaction to the massacre. It is difficult to obtain a sense of how the population would have reacted to the news during World War Two; the heavy censorship 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.¹⁶ Examining the public reaction here, then, gives some evidence of the "morally-charged connection" Simon Harrison mentioned in his work on skull trophies in the Pacific. 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 Uniformed Code of Military Justice instituted after World War Two. Had

¹⁵ Oliver, p. 89.

¹⁶ Weingartner, 'Massacre', p. 38; Rick Atkinson, *The Day of Battle: The War in Sicily and Italy, 1943-1944* (New York, Henry Holt & Company, 2007), p. 20.

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 though it would ultimately affect the punishment Calley would, rightfully as the on-scene commander and a participant in the atrocity, bear.

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.¹⁷ 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.¹⁸ It appears that the Army attempted to shield more senior individuals from accountability and that caused the end result of Calley alone being found guilty. With the difficulty 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 for Calley, only a small number took this stance because they did not believe the massacre to be a crime.¹⁹ It appears that while the behaviour of the soldiers mattered to the public, the impression that Calley bore the accountability alone mattered more. The reasons for this will be examined later in this chapter.

¹⁷ W. Hays Parks, 'Crimes in Hostilities', *Marine Corps Gazette*, August 1976, p. 16.

¹⁸ Allison, p. 111.

¹⁹ Oliver, p. 89.

This public opinion would factor 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 Connor affirmed the jury's guilty verdict but reduced the life sentence to twenty years at hard labor. While President 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 Froehlke, rejected Calley's request via a clemency board in 1973, but his successor, Howard Callaway, would further reduce the sentence to ten years in April 1974. After Nixon reviewed the case, taking no action despite the public interest remaining high, and a complex series of appeals culminating in a decision of the Supreme Court not to review the case, Callaway eventually paroled Calley in November 1974.²⁰ While the initial rejection of Calley's clemency request signaled the Army was intent on upholding its professional ethics, the ultimate parole suggests political and public pressure, and quite possibly the tacit acknowledgement of the inequity of prosecuting Calley alone, were factors too influential to withstand.

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 non-combatants. In February 1970, just a few months after the massacre at My Lai came to the public's attention the preceding November, the Marines of Company B (Bravo Company), 1st

²⁰ Allison, pp. 113-114.

Battalion, 7th Marine Infantry Regiment were conducting a patrol near the village of Son Thang, only 25 miles distant from My Lai. As dark approached, the company laagered for the night on Hill 50, some 500 yards from the village of Son Thang.²¹ In order to rest the Marines and keep them in as strong a defensive position as possible, the company commander, Lieutenant Louis Ambort, made the decision to send out a 5-man “killer team”²² to harass any enemy which may be close by and keep their attention from the bedded-down company. Volunteering for this dangerous patrol were five relatively junior-ranking Marines, including its leader, Randy 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 was Private First Class Sam Green, who had only joined the Marine Corps five months earlier and had been in Vietnam for just three weeks.²³

In a variation on a theme found time and again during the violations by ground troops discussed in this dissertation, the company had been subject to heavy casualties in the preceding months, and they had lost a popular leader, Staff Sergeant Jerry Lineberry, just a week before and another of their own the day the incident occurred. Additionally, those who were to lead the men 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; in the process they lost 15 Marines killed in action (KIA) and 84 wounded in action (WIA). On 6 January 1970, while “resting” on Fire Support Base Ross, a major attack claimed the lives of 13 more Marines and

²¹ Gary Solis, *Son Thang: An American War Crime* (Annapolis: Naval Institute Press, 1997), pp. ix-x.

²² Noto, p. 54. This was not a widely used or accepted tactical term, rather was fairly confined to the parlance of the 1st Battalion, 7th Marine Regiment. It meant to have a small number of men, moving quickly and silently, patrol away from the main body in order to create chaos for the enemy by executing small attacks or ambushes. Its duties were flexible depending on who was asked to define it.

²³ Solis, pp. 12-28.

wounded 63, with 40 requiring evacuations.²⁴ The high number of casualties in this unit, like others, caused many replacements to fill the ranks. This process was unlike Marines' experiences in other wars, where units receiving high casualty rates would be pulled from the lines to reconstitute and absorb new manpower. The Battalion Commander, Lieutenant Colonel Cooper would testify during the trial that this constant inflow of unknown replacements played an "unnoted but important role" in the Son Thang incident.²⁵ The first few weeks of February would be among the most brutal. On 12 February, the unit was ambushed and among those killed was the platoon sergeant for 2nd platoon, Staff Sergeant Linesberry. He was among nine Marines killed that week. On the 19th, the company was moving by day back to FSB Ross. As dark approached, 1st Lieutenant Ambort made the decision to use Hill 50 as his company's position overnight. As the company's required perimeter would be 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 the 2nd platoon, and Sergeant Harvey Meyers, Lineberry's successor, went about finding volunteers.²⁶ In addition to Private Herrod and Private First Class Green, Lance Corporal Michael Krichten and Private First Class Thomas Boyd from 2nd platoon volunteered. A sniper from the headquarters section, Private Michael Schwarz also volunteered to go, bringing the total to five Marines. Just before they were to depart at 18:30 hours, Lieutenant Ambort brought the team in to brief them. 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."²⁷

²⁴ Noto, pp. 52-54.

²⁵ Gary Solis, *Marines and Military Law in Vietnam: Trial by Fire* (Washington D.C.: History and Museums Division, HQMC, 1989), p. 174.

²⁶ Solis, *Son Thang*, pp. 14-17, 22-24.

²⁷ Solis, *Marines and Military Law*, p. 175.

Son Tra, a designation given the cluster of buildings on the Marines' maps by analysts was known to the Vietnamese who actually knew 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.²⁸ They left the company's lines between 19:00 and 19:30 hours. 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.²⁹ 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 twenty-five meters further up the trail to the next one, where voices could be heard. Though Krichten 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, women of 50 and 21 years of age, and girls of 16 and 5 years. As Schwarz searched the inside of the emptied hooch, he heard Herrod order the team outside to "Shoot them! Shoot them all! Kill them!"³⁰ The team opened up as Schwarz ran out in time to see Herrod fire at one of the women running toward the treeline and was told to "finish her off."³¹

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

²⁸ Noto, p. 57.

²⁹ Solis, *Son Thang*, p. 35.

³⁰ Solis, *Marines and Military Law*, p. 176.

³¹ Noto, p. 58.

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. The team reversed their 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 M-79 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, aged 50 and 40, two girls, 12 and 6, and two boys of 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 pistol. No weapons were recovered at any of the hooches. It was following this third series of gunfire that the team received a radio call from the company telling them to return to the company position on Hill 50.³² During the radio call they falsely reported six confirmed enemy kills.

Upon returning, 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 to 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 at 19:50 hours included the report that the team spotted 15-20 Viet Cong, set up an ambush and killed 6 enemy and 1 female.

³² Solis, *Son Thang*, pp. 46-69.

Afterward the patrol withdrew to company position with one rifle.³³ Recalling Calley's false report to higher headquarters alongside Ambort's fabrication efforts, a trend begins to emerge that will be repeated in subsequent case studies in this thesis and which mirrors 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 which eventually became crimes.

This false report would soon come under scrutiny, as the next morning, 1st Lieutenant Lloyd Grant, the battalion's Intelligence Officer, led 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 M-16s, an M-79, and .45 pistol and immediately recounted finding the bodies.³⁴ The battalion's Operation's Officer, Major Dick 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 though they were not due to arrive back at FSB Ross until the next day, asked them to return directly.³⁵ That evening the 1st Marine Division sent a secret message to its parent command, III Marine Amphibious Force.

Eyes only for LtGen Nickerson: This is an initial report of possible serious incident involving elements of B/1/7 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 recently slain

³³ Solis, *Marines and Military Law*, pp. 177-178.

³⁴ Solis, *Son Thang*, pp. 2-4, 60.

³⁵ Noto, p. 61.

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

The Marines had apparently learned something from the My Lai Massacre, 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.”³⁶ 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 08:30 hours, he was beginning to interview 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 three of the team members had been told by Ambort the night previous that battalion had some suspicions regarding the incident and that he intended to come clean and encouraged them to do likewise.³⁷

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, let

³⁶ Graham Cosmas and Terrence Murphy, *U.S. Marines in Vietnam: Vietnamization and Redeployment, 1970-1971*, History and Museum Division, USMC (Washington D.C.: Government Printing Office, 1986), p. 346. In this passage he was quoting Lt. Gen Leo Dulacki’s comments about the subject when reviewing the draft manuscript.

³⁷ Solis, *Son Thang*, pp. 62-67.

alone unarmed women and children. The closeness of the details each member told 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.³⁸ The victims at the third hooch were killed under the belief they were party to the ambushes or the snipers themselves, according to Herrod's statement, though those of the other team members failed to note that fact.³⁹ Major Theer briefed the battalion commander about what he discovered to that point and his fear of the men's compromised statements. Here, the speed with which the investigation began probably aided Theer, as a more prolonged time period after the event would have allowed the team to further solidify and practice their contrived story. He reported that he needed some 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 FSB Ross. As scarce as legal resources were in Vietnam at the time, it seems like the system worked well to get support to 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 the allegations were taken seriously.

Major Theer, though an infantryman rather than a trained legal specialist, did much to ensure the investigation was successful. Following a conference with the battalion commander and the Division judge advocate, Theer re-interviewed 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 with no ramifications. Prior to these re-interviews, he and the CID went to Son Thang to search for any evidence of enemy, and especially sniper, presence. An

³⁸ Noto, pp. 61-62.

³⁹ Solis, *Son Thang*, pp. 63-66.

experienced infantry leader, with three tours in Vietnam, They 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 casings for US-utilized weapons. During the course of the new interviews, Boyd, Krichten, and Schwarz all admitted to lying about taking enemy fire, Green became openly hostile and Herrod stuck by his original statement.⁴⁰ On 22 February, Lieutenant Ambort was relieved of command, and the battalion commander decided to have the members of the killer team put in pre-trial confinement at the III MAF brig near Da Nang.

Military justice was swift in application, and the results of the courts-martial were varied.⁴¹ Probably 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.⁴² 1st Lieutenant Ambort was initially charged with three offenses, and his Article 32 hearing began on 9 April, taking 6 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 men knew the rules of engagement. The third was for making a false official statement in making the report of contact and capturing the rifle. The witness list for Ambort's hearing included most of the key players in the chain of

⁴⁰ Solis, *Son Thang*, pp. 66-74.

⁴¹ 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: An American War Crime*. The details that are provided in this case study are done so to help illustrate some of the processes inherent to the U.S. military justice system that will arise in this work's chapters.

⁴² An Article 32 hearing is the military equivalent to a preliminary hearing, designed to ensure there was a chargeable offense, and there exists probable cause to believe the accused was responsible, before a charges are sent to a court martial.

command and its staff, including the battalion commander, operations officer (who conducted the initial investigation), intelligence officer (who found the bodies on his 19 February patrol), and fellow company commanders, among others. At the conclusion of their testimony, Lieutenant Colonel James King, assigned to conduct the hearing was left with a substantial amount of testimony as to the professionalism of Lieutenant Ambort, 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 Ambort recalling his pre-patrol 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.⁴³

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.⁴⁴

The testimony left King with the additional task of determining if, in a parallel to 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 Ambort had reported, although containing false details, the initial incident that he did not know at the time to be a war crime. On the second, 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 had to the ends of trying to prevent non-combatant deaths and keep his men aware of rules of engagement. As to the question of whether

⁴³ Solis, *Son Thang*, pp. 91-94.

⁴⁴ 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 rather that firing at valid targets within the zone do not require pre-approval before engaging.

he was responsible for the murders, due to his words during the pep talk, Lieutenant Colonel King wavered on the decision, admitting it was very close, but in the end decided Ambort was not responsible, but was grossly negligent.⁴⁵ 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 showed that Herrod knew that the killing of non-combatants was not what Lieutenant Ambort had meant by paying the Vietnamese back.⁴⁶ That left the third charge for a false official statement, for which King recommended a letter of reprimand from a non-judicial punishment by the Division Commanding General, which would effectively end his career.⁴⁷ 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 thirteen-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.⁴⁸

Lance Corporal Michael Krichten 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 it needed to convict the members of the team, 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

⁴⁵ There was precedent for this in the military. During the Spanish American War, a U.S. Army Brigadier General, Jacob Smith, ordered a subordinate Marine commander that, "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.

⁴⁶ Solis, *Son Thang*, pp. 100-102.

⁴⁷ Non-judicial punishment is an administrative punishment, rather than judicial at a court martial just as the name 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.

⁴⁸ Solis, *Son Thang*, pp. 106-107.

needed.⁴⁹ 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.⁵⁰ 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 Gary Solis said in an interview with the author regarding immunity, “So part and parcel of an immunity grant, is the prosecutor nailing down the testimony expected and letting the witness know that if he or she equivocate, saying well, I can't remember that, or changes the story that there will be consequences.”⁵¹ The poor use of grants of immunity would be seen again in future cases.

The court-martial of Private Michael Schwarz proceeded first, a month after Lieutenant Ambort received his nonjudicial punishment. The charges were for sixteen specifications of premeditated murder at Son Thang-4 village. After several pre-trial motions were heard and decided, his hearing began with his statements to Major Theer admissible, despite the motions, and his plea of not guilty. Among the pre-trial considerations were Schwarz's ability to understand some of the concepts that would be applied to his case, such as lawfulness of orders. His pre-enlistment testing was low enough that before the application of Project 100,000 lowered the requirements for IQ and bars against some pre-service civil law convictions, few with his background and scores would have been accepted for service.⁵² The program, initiated by Robert McNamara, inducted 100,000 otherwise-ineligible men a year into the armed services, and because all services were required to take a portion, the Marine Corps, which had a higher

⁴⁹ Solis, *Son Thang*, pp. 89-91.

⁵⁰ George Prugh, *Law at War: Vietnam 1964-1973* (Washington D.C.: Department of the Army 1991), pp. 101-102.

⁵¹ Gary Solis, interview by Scott D. Hamm, 24 November 2020, transcript and recording currently in possession of author. Hereafter referred to as Solis 1st interview.

⁵² Solis, *Marines and Military Law*, pp. 182-184.

volunteer rate, had to turn away some qualified men for the unqualified. Studies indicated these men were responsible for a disproportionately large number of disciplinary problems.⁵³ For the sake of political expediency—saving a few more middle-class youths from the draft or failing to call up more reserve units—under-qualified individuals were added to units to the detriment of efficiency and good order and discipline.

In the end, the defence attempted first to once again get the written admission excluded, better to show Schwarz believed they were under attack when they fired on the victims.⁵⁴ Failing that, the defence 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 the Marines, and finally that Schwarz only acted in obedience to the direct orders of Herrod. 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 disciplinary history to date; he had received three other, less severe, court-martials 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.⁵⁵ This seemed to be progress, real accountability for an obvious crime against a non-combatant.

Private First Class Thomas Boyd's court-martial began on 22 June 1970, the day after Schwarz's was completed. Boyd was represented by both military counsel and a civilian lawyer. The notoriety that cases such as Son Thang-4 garnered from the media, especially following the

⁵³ Barnett, p. 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 were part of the program.

⁵⁴ William Coughlin, 'U.S. Marine Gets Life Sentence for Slaying of 12 Viet Civilians', *The Washington Post*, 22 June 1970, Section A.

⁵⁵ Solis, *Marines and Military Law*, pp. 182-184.

revelations of My Lai, often led to lawyers offering 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 defence counsel had observed the last days of Schwarz's trial and concluded that a jury of career Marines was likely to find Boyd guilty, as they had Schwarz, and that the only hope was to be tried by judge alone and hope they could present evidence in a way that the judge would find that the evidence did not make the measure required for conviction. During the proceedings, several things went right for the defence. Krichten, 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 week unauthorized absence before going to Vietnam 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 defence. After closing arguments, the judge Lieutenant Colonel Paul St. Armour, closed the proceedings to deliberate on his verdict.⁵⁶ When he returned, he delivered his verdict of not guilty.⁵⁷ 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."⁵⁸

Private First Class Green's court-martial would be delayed, due to a number of requests from a civilian lawyer who intended to represent him until lack of funds caused him to withdraw

⁵⁶ Lieutenant Colonel St. Armour was the only General Court Martial-level Staff Judge Advocate in South Vietnam, the others in Japan, consequentially he sat on three of the four courts-martial for the killer team. All except Herrod's.

⁵⁷ Noto, p. 67.

⁵⁸ Letter from LtCol Paul St. Armour to Gary Solis, dated 4 March 1991, letter still in Solis' possession.

and began on 13 August 1970. Again, like in Boyd's trial, the sixteen specifications would be 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. He would emphasize that Green had only been with the company less than three weeks and in the Marine Corps under six months, to strengthen the defence that Green was acting under orders. Green's own 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 Krichten's testimony that, although Green had fired at every hooch, he had not witnessed any of Green's rounds hit a victim. Green's own testimony was that he had fired, but intentionally aimed to miss, and only fired at first because of the orders from Herrod. Though held before a different jury than the one which convicted Schwarz, after a three-day trial, they deliberated for a fourth before returning a verdict of guilty for all but one of the specifications. The one specification he was not found guilty of was the small 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 5 years, reduction to private, forfeiture of all pay and allowances and dishonorable discharge from the Marine Corps.⁵⁹

Last to be tried was the leader of the killer team that night, now truly demoted Private Randy Herrod.⁶⁰ Beginning on 20 August 1970, just past 6 months from the night of the patrol, Herrod's trial would differ from that of his peers in several, substantial ways. The presiding judge who had heard the three previous courts-martial, Lieutenant Colonel St. Armour, had been replaced with Commander Keith Lawrence, the General Court-Martial SJA from Subic Bay in

⁵⁹ Solis, *Son Thang*, pp. 201-209.

⁶⁰ Though he had removed his rank after his court-martial 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.

the Philippines. Commander Lawrence was not new to murder cases in Vietnam, he had sat on several previously, but his personality was a departure from St. Armour's driving and direct style. Like Boyd, Herrod would have civilian representation, although in his case he would have two civilian attorneys, Gene Stipe and Denzil Garrison, two state senators from Oklahoma. Additionally, 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, back in the states a Marine First Lieutenant, serving at The Basic School teaching brand new officers, 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 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 would face sixteen specifications for premeditated murder. He pled not guilty to all specifications. Prior to the members of the court, the jury, entering the court, the defence unleashed a flurry of pre-trial motions, most of which were denied on the basis of existing military law rules. Two that were not were funding for a defence psychiatrist and the exclusion of the color photos 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 defence made clear they were going to defend along the lines of Herrod and the team defending themselves, and went one step farther, saying they would prove they were fired upon.

The prosecution proceeded as it had with the previous trials, a parade of the witnesses who had testified already, the platoon sergeant who had warned against doing something stupid, the patrol members who discovered the bodies and expended brass from the weapons. This time though, 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. All in all, the prosecution was relying on the same information that had successfully already been used in two of the three preceding cases. The defence in this case, though, had an entirely different playbook it would use to defend Herrod and it seemed to put the prosecution off-balance.

The defence 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 M-60 machinegun being used by Viet Cong fighters. They then paraded a number of witnesses reaffirming the dangers of the area, as had the previous defence teams. They then brought forward Lieutenant North. During pre-trial motions, Commander Lawrence had rightfully excluded a copy of a Silver Star recommendation for Herrod submitted by his previous command.⁶¹ By having North testify to Herrod's character and reaction under fire, they were able to introduce the information contained in the denied recommendation anyway. The defence additionally presented secret messages from the division to higher headquarters, which said Vietnamese officials were not upset over the incident as the families were considered VC, and the other incorrectly informing higher that the team had observed rules of engagement. The final two important witnesses for the defence were Herrod himself, and a psychiatrist that the

⁶¹ The Silver Star Medal is the third highest award for combat valor in the US 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.

defence 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 defence, twelve days after pre-trial motions had begun, the members of the court began deliberation.

The members deliberated for nearly three hours before returning to the courtroom. Upon return they notified the judge they had a verdict and read it. 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, racist attitudes toward the Vietnamese, and the exclusion of the photographs were cumulatively enough to tip the verdict to not guilty.⁶² The apparent leader of the massacre being acquitted of the crime shows the difficulties in prosecuting these types of crimes under the UCMJ.

Despite convictions in the cases of both Private Schwarz and Private First Class Green, the sentencing, as would be true during the My Lai case, would not be the end of the story. Schwarz was sentenced to confinement at hard labor for life, Green to confinement at hard labor for five years. In the subsequent mandatory staff judge advocate review, the Division Staff Judge

⁶² Solis, *Son Thang*, pp. 224-256.

Advocate recommended a reduction in Schwarz's sentence to twenty years, and no change to Green's. Major General Widdecke, who had assumed command of the division, and therefore final approval authority of the cases, two months before the courts-martial, sought to address the inequity between the acquittals of Herrod and Boyd with the sentences of Schwarz and Green, and approved the guilty verdict but reduced both sentences' confinement to one year.⁶³

In the case of Son Thang, III MAF kept the press fully informed throughout the proceedings, and in the early going 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, it drew increasing attention from the press and eventually from the public. As in 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 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 soldiers in the European Theater of World War Two, lack of trials in the Pacific, 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 when a crime is committed it must be dealt with according to the law.⁶⁴

Though it is clear from the numbers that only a small percentage of individuals within the services commit these types of violations, when it does occur it can be linked to both the

⁶³ Solis, *Son Thang*, pp. 264-276.

⁶⁴ Cosmas, pp. 346-347.

command climate present in the military organization and the prevailing attitudes of society. During the period from 1965-1971, III MAF reported 27 Marines were convicted of murder in cases where the victim was Vietnamese, another 16 were convicted of rape, and 15 of manslaughter.⁶⁵ The Army's numbers, from 1965-1973, were 41 convictions for murder, 25 for rape and 26 for manslaughter.⁶⁶ There are a number of issues to consider affecting both of those factors, like the relationship between accountability for the crimes and where in the range of military operations the conflict in which the crime happens occurs.⁶⁷ Other issues include: the speed of reporting and accountability measures, including awarded punishments; the legal defences utilized; prevalence of incidents; and education and training regarding the law of war of those guilty of these crimes.

Discussion

During the Vietnam War, considerably higher on the ROMO than many later conflicts and operations but still limited when compared to World War Two, 4.3 million served in the Army (which had shed the Army Air Corps after World War Two, creating the U.S. Air Force), and 794,000 in the Marine Corps.⁶⁸ Harrison's "morally-charged connection" would seem to be as present during this conflict as it had in World War Two. While the Vietnam War was growing unpopular by the time of the two cases highlighted in this chapter, there were multiple arguments for excusing violations by the public, with one of the more popular being the soldier or Marine

⁶⁵ Cosmas, pp. 346-347. 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 1965-1972 was over 390,000.

⁶⁶ Parks, p. 18. The number of soldiers serving in Vietnam was over 1.7 million throughout the war.

⁶⁷ 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 Two, 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.

⁶⁸ Department of Defense. Historical Research Branch. 'Principal Wars in Which the United States Participated, U.S. Military Personnel Serving and Casualties Chart', [accessed 30 March 2020].

was “just doing what they were trained to do.”⁶⁹ During World War Two, part of the moral connection, it could be argued, was due to the sheer numbers of the population involved – every family had members serving, or knew many friends who were. In Vietnam, however, a much smaller percentage served, but did so in numbers making it unnecessary for others to do so. John Grenier pointed out the many soldiers and students of military history do not acknowledge some of the more inconvenient truths and ignominious events of the U.S.’s evolution in warfighting because of the dearth of sophisticated literature on the subject.⁷⁰ If this be the case, is it surprising the public writ large embraces Harrison’s connection, with little real in-depth knowledge of the profession of arms to give it reason to question the actions of its soldiers or question how well those that violate the law of war represent them?

There was less blatant dehumanization of the Vietnamese in the mass media and, in general, a higher level of respect and admiration among some sectors of the American public.⁷¹ But despite less demonization in the press and media compared with the Japanese enemy, the Vietnamese Communists fought an insurgency; they knew they were weaker than their opponents in conventional military terms and fought to their advantage, using ambushes, booby traps, and hit and run tactics. This caused just as much enmity in the U.S. infantryman, and before long the civilians among whom the enemy often faded away into after attacking became guilty by association, if not their outright support for the enemy. This same result was evident in the Philippines at the turn of the 20th century and in the Iraq case studies to be seen in Chapter Five. 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

⁶⁹ Parks, pp. 16-17; Belknap, pp. 130-131.

⁷⁰ Grenier, p. 223. This includes the attacks targeting both Native American crops and their non-combatants.

⁷¹ Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press 1980), p. 220.

maim a Vietnamese because he was a mere gook.”⁷² These sorts of feelings among the servicemen fighting every day would mean that, while less so than World War Two, there would be violence against those protected by the Geneva Conventions and other laws.

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 Two. There were 41 soldiers and 27 Marines prosecuted for murder or manslaughter of Vietnamese non-combatants from a much smaller population of fighters than fought in World War Two’s Pacific Theatre. From 1965 to 1975, the Army had 241 allegations of war crimes of all types besides the massacre at My Lai. Of those, 78 were found to be substantiated and 56 taken to courts-martial, though only 36 convictions were attained for various reasons.⁷³ Over a ten-year conflict this does not seem substantial, but when considering the aspect of race and how damaging to a service reputation pursuing these convictions can be, it is still an improvement over the level of accountability during World War Two, especially when compared to its Pacific Theater. This may seem counterintuitive, because while many portrayals within popular culture—and some orthodox scholars of the Vietnam War—tend to paint the servicemen of this time as running rampant, and higher headquarters caring little about their actions, the “Good War” of World War Two could have a much worse reputation 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 paper, the brutality in the World War Two Pacific Theatre notwithstanding, was actually quite good and reflects well on the individual character and the organizational training and

⁷² Richard Hammer, *The Court-Martial of Lt Calley* (New York: Coward, McCann & Geoghegan 1971), p. 392.

⁷³ Gary Solis, “Military Justice, Civilian Clemency,” *Transnational Law and Contemporary Problems* (2000), pp. 65-66.

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 following such laws brought a military. These efforts were buttressed with orders and directives at several levels within the chain of command, though at times there were failures by subordinate units to comply.⁷⁴ There would, of course, be exceptions in all conflicts—a notable one from Vietnam being the Tiger Force.⁷⁵ However, memoirs from World War Two onwards 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 Thompson reported on the crimes at My Lai as they happened and again afterward 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 in the two cases selected for this dissertation appeared after the initial reporting.

In My Lai, after the massacre perhaps as many as fifty people in command billets knew there was something amiss yet did nothing. The massacre and attempted cover-up were investigated by an Army inquiry yielding results Lieutenant General Peers said, “had the most damaging effect upon the image of the U.S. Army as a professional institution and has cast doubt

⁷⁴ Parks, pp. 20-22.

⁷⁵ The so-called “Tiger Force” was a small unit from the Army’s 1st Battalion, 327th Infantry Regiment, 101st Airborne Division, founded to “out guerilla the guerilla.” In 2003, a reporter with the Toledo Blade came in possession of previously unreleased confidential papers of a commander and, after corroborating many of the stories in the paper 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 non-combatants. It is one of the units that writers like Turse point to when claiming the existence of a policy of violence against civilians on the part of the U.S. military.

upon the integrity of all its officers and men.”⁷⁶ Of the more than twenty people the inquiry forwarded recommendations for charges on, only Lieutenant Calley was convicted and his sentence, in the end, greatly reduced. In Son Thang, four courts-martial occurred from the incident leaving sixteen Vietnamese women and children murdered. Each used slightly different defence tactics. The differing Son Thang outcomes could be explained, of course, by a number of variables that are also found in the courtrooms of any city. The higher percentage of convictions against accused members at Son Thang versus My Lai was helped by the quicker investigation and prosecution. Prosecutors of varying skill in identifying and countering defence tactics, evidence allowed in some cases was disallowed by a different judge, members of the court identifying with and, if not excusing, condoning the accused’s actions due to the stress of the situation were all contributing factors. Weighing equally to any of those in the final outcome was an underlying racist attitude that was summed up by the phrase “Mere Gook Rule” used by some as the justification for crimes committed against the Vietnamese—enemy or non-combatant. This was not a phenomenon unique to the battalion or the Marine Corps, or even Americans, but pervasive in and out of the services; though not as prevalent as in past wars, it could be found in the media or in conversations with average citizens talking about the violence waging in Vietnam.

Turning again to the role of the media, while during World War Two 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 Two and early in Vietnam, at

⁷⁶ Peers, *The My Lai Inquiry*, p. 209.

least pre-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 U.S. to leave the war appeared more frequently.⁷⁷ 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 would lead to increased interest in the cases, both by lawyers seeking to make their name, and by the anti-war establishment which pointed to them as yet one more reason the U.S. should cease involvement in the war.

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 non-combatants. 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 5 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 seven of under 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 one Marine served longer than 10 years, and 10 others served longer than 5 years. These results, while initially calling into question the seriousness

⁷⁷ Joel Achenbach, 'Did the news media, led by Walter Cronkite, lose the war in Vietnam?', *The Washington Post*, 25 May 2018, <https://www.washingtonpost.com/national/did-the-news-media-led-by-walter-cronkite-lose-the-war-in-vietnam/2018/05/25/a5b3e098-495e-11e8-827e-190efaf1f1ee_story.html> [accessed 19 December 2022]. Though it is debatable whether the "Cronkite Moment" led to the eventual outcome in Vietnam, there is no question the tenor of coverage changed after February 1968.

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 over a quarter of cases, to confinement for life in three cases. In 77 cases, the sentences were for less than 5 years, and only 14 cases for 5 years or more and 1 death sentence. No data is available for what those sentences were potentially reduced by any subsequent appellate actions.⁷⁸ 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.⁷⁹ 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.

Earlier in Chapters One and Two, the problems endemic to investigating and prosecuting allegations of violations in a war zone have been covered, 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 anti-war movement, and part to tropes trotted out in popular entertainment mediums like movies or novels, for a time was often associated with the anti-troop epithets of “baby killer” and the like. Writers like Turse argue that violence against non-combatants 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 where 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

⁷⁸ Solis, ‘Military Justice, Civilian Clemency’, pp. 70-71.

⁷⁹ One consideration in the numbers mentioned in this section is there is no way of determining in military or civilian cases how many were one victim or many, how many had other crimes committed collaterally, or any other number of variables leading to sentencing.

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, while the fact that reported violations do not tell the whole story, efforts by other writers, such as Kulik, to thoroughly research and vet stories of atrocities used in venues such as the Winter Soldier Investigation make it clear that more than a few anecdotal and published reports lack real substance.⁸⁰ In examining standing directives, procedures, and orders it is clear that, while not full-proof, efforts to both prevent and gain accountability for law of war violations existed. The question in coming years would 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 this chapter, the legal defences posed, and make-up of the defence teams should also be considered. As previously discussed, while Captain Compton successfully used a defence revolving around following the orders of a senior officer, by 1944 soldiers and Marines would not be able to argue that responsibility for the acts were not, at least in part, theirs. In the cases of Lieutenant Calley, Private Schwarz, and Private First Class Green, variations of following the orders of superiors failed to gain them acquittals. In the cases of Boyd and Herrod, they each used different defences 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, disputable, evidence of a captured American machinegun in the area of operations, to provide enough reasonable doubt to avoid prosecution. In both these failed government cases, as in Calley's My Lai trial, civilian lawyers either replaced or augmented the

⁸⁰ Kulik's *War Stories*, for example, investigates the credibility of several of Turse's sources, such as Scott Camil, Anthony Herbert and, Michael Hunter. Some of these individuals testified before the Winter Soldier Investigation-a media event sponsored by the Vietnam Veterans Against the War group in early 1971-and others were interviewed for his dissertation and book *Kill Anything That Moves*.

appointed military counsel. Lieutenant Calley's case was one of few where the presence of a civilian attorney did not materially help the defence, and this was also a factor that played into the decision to reduce the sentences of Schwarz and Green.⁸¹

Recalling what Walker Schneider called the “morally-charged connection,” during the Vietnam cases, there were more than a few citizens writing their politicians or editorializing in their local papers about the situations that these soldiers and Marines had been put in by their leadership.⁸² Many lawyers saw a direct benefit in providing pro bono defences to American servicemen accused of these crimes, who some citizens saw as being “scapegoated.”⁸³ In many cases, civilian defence teams lent the advantage of experience in capital cases to their defendant, though often lacking familiarity with military law's idiosyncrasies. The lawyers gained prestige in many cases, and though offering their services for free, often suffered less out of pocket expenses than they otherwise might have due to the donations of citizens wishing to see defendants exonerated. This was not possible during the cases at Biscari as they were carried out, as the Son Thang courts-martial were, in a war zone, albeit one 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 would be 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 Two and almost ten years of the

⁸¹ Solis, *Son Thang*, p. 266.

⁸² Schneider, ‘Skull Questions’, p. 127.

⁸³ Solis, *Son Thang*, p. 91; Peers, ‘The My Lai Inquiry’, p. 227.

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 victors will always be the side that holds the trials and assess 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 this chapter were in violation of laws of war and also of the Articles of War or the Uniform Code of Military Justice.⁸⁴ Until 1996, in the United States, there were no state or federal statutes that made war crimes punishable. This led to a legal loophole that existed for the guilty when their war crimes were discovered after discharge from the service.⁸⁵ 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 US Code, it became difficult to determine merely by the information in specifications or charges which cases were war crimes or not. Adding to the difficulty in determining the aggregate number of war crimes by U.S. personnel in any conflict is the fact that there is no reporting requirement to a central Department of Defense authority.⁸⁶ Each service kept its own records. Added to this, the problem of defining which crimes were war crimes, especially during the Vietnam conflict, was the fact that fighting occurred over the entirety of South Vietnam, into neighboring Laos and Cambodia, and in the air over North Vietnam. It involved combatants and non-combatants from even more nations. There was never a declaration of war by either the U.S. or North Vietnam, though South Vietnam

⁸⁴ 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).

⁸⁵ Solis, 'Military Justice, Civilian Clemency', p. 63.

⁸⁶ Ibid., 'Military Law, Civilian Clemency', p. 65.

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 officially admit involvement in South Vietnam. All of these variables and more made applying traditional principles of international law to the conflict very difficult.⁸⁷ Regardless, the immunity of non-combatants, either of prisoners and survivors of destroyed aircraft or ships who were removed from direct combat, or civilians, was still clearly delineated in the Hague and Geneva Conventions, and also in 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 by the services to keep efforts at disciplining these crimes out of wide public awareness, for obvious reasons. Though certain accounts of incidents within his book, *Kill Anything That Moves: The Real American War in Vietnam*, have been disputed, Nick Turse's account 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 and Army.⁸⁸ Any war crime has a detrimental effect on the discipline, readiness, and psychological health of the servicemember committing it and 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

⁸⁷ Prugh, *Law at War*, pp. 61-62.

⁸⁸ Nick Turse, 'Civilian Killings Went Unpunished', *Los Angeles Times*, August 6, 2006.

numbers of soldiers, thankfully suggests breaches committed by these ground forces are not widespread or policy-driven but are, rather, aberrant. In order 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 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 hold in high regard. 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 tested through tests during schools, through practical application during exercises, and inspected during command inspections.⁸⁹ This has been the case through the time periods of the conflicts highlighted as well, with varying levels of success. The success through the years has been impacted as much by societal influences as it has by military effort. For example, the acceptance by many during World War Two of the trophy taking, as discussed by Schneider, Harrison, and Weingartner all point to societal acceptance of the practice that 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.⁹⁰

⁸⁹ Marine Corps Order 3300.4. 'Marine Corps Law of War Program', *Headquarters, Marine Corps*, 20 October 2003; Parks, p. 20.

⁹⁰ Parks, p. 20.

During Vietnam, in addition to the entry-level and follow-on training, the 1st Marine Division's policy was that every troop receive initial training upon arrival and 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.⁹¹ Every servicemember entering Vietnam received additional training on the Geneva Convention, per Military Assistance Command, Vietnam (MACV) directives, and issued two 3-by 5-inch information cards to carry dealing with civilians and the treatment of prisoners.⁹² On the first of these cards were printed the "Nine Rules" concerning interactions with non-combatants, aimed at promoting acceptance of the U.S. forces through positive behaviours. The second bore reminders that "Mistreatment of any captive is a criminal offense."⁹³ As early as March 1966, existing MACV directives initially dealing with reporting and investigating Geneva Convention 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 against non-combatants, civilian or surrendered combatants, were war crimes.⁹⁴ A notable deficiency in the Army's execution of required pre-deployment training was underscored during the My Lai Inquiry, when Lieutenant General Peers discovered much of the 11th Brigade, of which Calley's Bravo Company was a part, were shipped to Vietnam without the required training.⁹⁵

⁹¹ Cosmas, pp. 348-349.

⁹² Solis, *Son Thang*, p. 188.

⁹³ Barnett, pp. 230-231.

⁹⁴ Prugh, *Law at War*, pp. 72-73.

⁹⁵ Peers, *The My Lai Inquiry*, p. 230.

There were clearly efforts made, though 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 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.⁹⁶ 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 Department of Defense (DoD) issued its DoD Directive 5100.77 in 1974, aligning all services' instructional responsibilities as well as the reporting, investigation, and prosecution procedures for violations.⁹⁷

When comparing the civilian reactions and military responses to the war crimes cases of World War Two and Vietnam, a number of trends become apparent. The responses were affected by how far on the range of military operations they fall from total war. In Vietnam, this affected directly how the press could cover the war, the societal attitudes about the enemy, and about crimes for which society would excuse servicemen against combatants or non-combatants in a war which did not mobilize the nation. The speed of reporting crimes initially has always reflected acknowledgement by the individual soldier or Marine that the crime was in violation to their mission, the laws, and regulations they are sworn to abide. Shifting media attitudes can play a part in publicizing a case and gaining it widespread public awareness, but that may work

⁹⁶ Peers, pp. 230-233.

⁹⁷ Parks, pp. 21-22.

against those convicted paying full measure, if they are convicted at all. Over the years, the defence of merely following a superior's orders has lost all utility to one who violates the law of war, but public opinion about the pressures those individuals were under may adversely affect prosecution or 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, the relation of the numbers known to the numbers of ground forces actively 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 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.

Chapter Three: Gender—Changing Roles and Never-ending Conflict

"We've got new hairstyles and maternity flight suits...Pregnant women are going to fight our wars. It's a mockery of the U.S. military." So pontificated host Tucker Carlson on the 9 March 2021 segment of his Fox News Channel show, attempting to demean efforts of the Department of Defense to improve quality of life and service conditions for women, as announced by President Joe Biden the day before in honor of International Women's Day.¹ One familiar with the overwhelmingly male demographics of the U.S. military might be forgiven for believing Carlson's rhetoric would go unchallenged publicly by anyone in uniform. A decade or two earlier, it may have. The military did not have a track record of engaging in discourse with any talking heads of populist media platforms. But in 2021, after five years of opening all jobs to any servicemember, regardless of gender, increasing efforts at inclusivity, leaders of the military spoke out.

The response came from all the services and from officer and enlisted ranks alike. The Army's senior enlisted soldier Sergeant Major of the Army Michael Grinston tweeted,

Women lead our most lethal units with character. They will dominate ANY future battlefield we're called to fight on. @TuckerCarlson's words are divisive, don't reflect our values. We have THE MOST professional, educated, agile, and strongest NCO Corps in the world.²

The senior enlisted leader for Space Command, Marine Corps Master Gunnery Sergeant Scott Stalker added, "I'll remind everyone that his opinion, which he has a right to, is based off of actually zero days of service in the armed forces...The bottom line is that we value women in

¹ Sean Neumann, 'Military Leaders Slam Tucker Carlson for 'Divisive' Comments About Women Service Members', *People*, 12 March 2021, <<https://people.com/politics/pentagon-and-military-members-call-out-tucker-carlson/?msclkid=c0e60249c49911ecbca9f954e966a411>> [accessed 23 April 2022].

² Haley Britsky, "'We aren't going away' — What Tucker Carlson doesn't get about women in the military', *Task & Purpose*, 11 March 2021, <<https://taskandpurpose.com/news/tucker-carlson-women-military-fox-news/>> [accessed 12 April 2022].

our armed forces.”³ General Paul Funk, Commanding General of the Army’s Training and Doctrine Command tweeted in reply that, “Thousands of women serve honorably every day around the globe. They are beacons of freedom and they prove Carlson wrong through determination and dedication. We are fortunate they serve with us.”⁴ Secretary of Defense Lloyd Austin stated Carlson’s remarks inspired “revulsion.”⁵ This vociferous defence of women serving in the armed forces represented a sea change in the attitudes of those who lead and while the culture of the forces had not necessarily kept pace with the new attitudes of the leadership, it appears to be improving.

The same discipline expected of forces to fight only lawful combatants within the constraints and restraints of international law, service regulations, and rules of engagement apply to the force as it pertains to the treatment of others within its ranks. Is the slow pace of the improvement and remaining resistance to fully accepting women and eradicating the toxic culture against them caused by the same influences which lead to violence against non-combatants? In attempting to answer this, examining how the Army and Marine Corps treat a subset of their own forces, women in uniform, is essential to understand the aspects of culture which may enable illegal behaviours toward non-combatants. Many of the same ‘symptoms’ that would become apparent during the investigation into Tailhook—insufficient or ineffective training, dehumanizing ‘others’, failures of individuals in the command hierarchy to uphold

³ John Ismay, ‘The Pentagon condemns Tucker Carlson’s sexist remarks about women in the military’, *The New York Times*, 11 March 2021, <<https://www.nytimes.com/2021/03/11/us/tucker-carlson-women-military-pentagon.html>> [accessed 19 May 2022].

⁴ Rebecca Kheel, ‘Military leaders hit Tucker Carlson over remarks on women in military’, *The Hill*, 11 March 2021, <<https://thehill.com/policy/defense/542744-military-leaders-hit-tucker-carlson-over-divisive-remarks-on-women-in-military/>> [accessed 19 May 2022].

⁵ Sebastien Roblin, ‘Women in the military are useless to Fox News’ Tucker Carlson. The Pentagon wants more’, *NBC News*, 13 March 2021, <<https://www.nbcnews.com/think/opinion/women-military-are-useless-fox-news-tucker-carlson-pentagon-wants-ncna1260958>> [accessed 19 May 2022].

existing standards or investigate allegations of wrongdoing—have already been seen in the case studies of the law of war violations covered thus far. The root cause below some of those symptoms can be the deep-seated aversion to changing the ingrained perception of gender roles. If the varying contributing factors found among these case studies are similar antipathies for different race or gender, then perhaps successful efforts to correct the deficiencies regarding gender bias may provide context or pathways to reducing violence against non-combatants.

The purpose of a nation's military is to provide a means to fight and win wars in furtherance of the interests of that nation. How a nation fights and who fights for a nation is often determined by its history, culture, and societal attitudes. In 1992, James Burk, building from the theories of both Huntington and Janowitz, wrote his own arguments, attempting to reflect a post-Cold War context, about the military's obligations to both protect the nation from its external enemies and also preserve democratic values.⁶ Just over a decade later, less than a year into the Iraq War, R. Claire Snyder took Burk's ideas and applied them to contemporary debate over gender integration of the armed forces. Leaning toward the Janowitzian tradition, her argument refuting those resistant to women's service was that as citizens, women are equal to men; they share responsibility for military service; and this is necessary to defend the U.S. from any forces that threaten to undermine its democratic values.⁷ These principles refute the longstanding tradition of military service being a patriarchal role throughout history across most cultures.

Unfortunately, there are occasions when, despite laws or regulations supporting equality for all to serve in defence of that nation, others within that establishment seek to delegitimize or

⁶ James Burk, 'Theories of Democratic Civil-Military Relations', *Armed Forces & Society*, Vol. 29, No. 1 (2002), pp. 22-23.

⁷ R. Claire Snyder, 'The Citizen-Soldier Tradition and Gender Integration of the U.S. Military', *Armed Forces & Society*, Vol. 29, No. 2 (2003), pp. 185-186.

discourage their participation through hazing, such as requiring acts of personal servitude or demeaning chores, or, often in the case of differing genders, sexual harassment, or assault. This is seen repeatedly over the last century throughout the efforts made by policymakers in the United States to de-segregate the military or to integrate women, homosexuals, or, most recently, transgender personnel into the armed services. Thus far, this dissertation seeks to answer the questions of the extent to which the military is at fault for the continued violence against non-combatants as well as what role society's attitudes play in enabling or encouraging illegal martial behaviour. To fully answer that first question, and further explore the second, it is necessary to understand whether the military's inability to eliminate violence or illegal conduct toward non-combatants is due to factors specific to military culture. This chapter examines how culture in both the military and society affect the attitudes that cause some of the abhorrent behaviours toward women and, in the next chapter, some of the same underlying biases will be examined for their role in illegal behaviour, with many strong sexual overtones, toward prisoners at Abu Ghraib.

Some of the above-mentioned behaviours, such as hazing and harassment have, throughout the last century, been ignored or excused—and even glorified in the entertainment industry—as either the “price of admission,” rites of passages, or the behaviour of the “boys club.” They were, however, always officially against regulations or unlawful and came under growing scrutiny from a society that accepted changing roles for both men and women.⁸ Joshua Goldstein's *War and Gender* explores gender roles in war and also how societal gender norms

⁸ Both the United States Army and the United States Marine Corps have regulations and official policies which prohibit discrimination because of a member's gender and both services have continually adopted new policies in line with the changing laws of Congress that have opened more opportunities for women in the military. This is in contradiction to TV comedy series like *M*A*S*H** (1972-1983) portrayals of the level of misogynistic activity was acceptable, or the portrayal of women's service in uniforms tailored to be provocative or enduring—and enjoying—unacceptable behavior or treatment, as in movies like *A Few Good Men* (1992) or *Down Periscope* (1996).

influence behaviours by men in and out of combat.⁹ As Goldstein concludes in his book though, the linking of bravery and discipline in war and manhood is found across many cultures; men use gender to encode domination, feminizing their enemies; and because of these processes see the military as a separate space from society, much as men's clubs were in England, that must be protected from feminine influence.¹⁰ These societal influences and gender norms are powerful and, when amplified by the *esprit de corps* of certain small unit culture, can become toxic towards women serving, however proficient they might be.

A culmination of the honorable service rendered by women in conflicts throughout the twentieth century and the Women's Rights Movements in the late 1960s and its later adherents set the stage for broader roles for women within the services.¹¹ However, the large-scale deployment of women to a combat zone during the 1991 Gulf War began redoubled efforts to conduct conversations and examinations of attitudes about the roles and integration of women into combat roles.¹² Thomas Draude, who served on the 1992 Presidential Commission for the Assignment of Women in the Armed Forces as a Brigadier General in the Marine Corps said, "It was Desert Storm that raised the image, the notion, the biggest realization that women could be more..."¹³

⁹ Goldstein, *War and Gender*, pp. 4-9.

¹⁰ Goldstein, p. 406.

¹¹ Beth Bailey, *America's Army*, pp. 132-133; Deborah Douglas and Lucy Young, *American Women and Flight Since 1940* (Lexington: University Press of Kentucky, 2004), pp. 160-161, 166-171. The National Organization for Women was formed in 1966 with some of their primary goals being drawing attention to women's rights and lobbying Congress for equal protections in the workplace to eliminate assumptions and unfair practices based on perceived gender roles. An early example of their targeted protests was in 1967 when they protested the *New York Times* over their practice of segregating employment ads.

¹² United States Government Accounting Office, 'Women in the Military: Deployment in the Persian Gulf War', July 1993, < <https://www.gao.gov/assets/160/153531.pdf> > [accessed 23 December 2020], pp. 2-3.

¹³ Brigadier General Thomas Draude (Ret.), interview by Scott D. Hamm, 15 January 2021, transcript and recording currently in possession of author. Hereafter referred to as Draude interview.

Despite those changing societal attitudes, the military remained a predominantly male-dominated profession. But starting in 2015, all occupational specialties were opened to women.¹⁴ The changes to policy that continued to limit the opportunities for service for the women of America, despite the relaxation of rules in 1993 allowing them to fly combat aircraft, started in earnest after revelations of scandalous behaviour toward women by Navy and Marine Corps pilots at the 1991 Tailhook Convention. This scandal's impact, coming on the heels of the U.S. military's overwhelming victory, a victory contributed to mightily by women in the service, continues to the present. It occurred just as the military enjoyed, in the wake of overwhelming victory, its highest public trust and support after the difficulties the armed forces faced transitioning from an unpopular war into an era of an all-volunteer force. The intervening years saw much self-reflection in the forces and an increase in numbers of women serving culminating in the most recent years with a truly bipartisan support for the military despite a mostly caustic relationship between U.S. political parties—at times to the detriment, due to political pressure, of the military holding its own accountable.¹⁵

There are parallels between how media, public, and political influences affected change within the military with regard to the treatment of its servicewomen as they did with military responses in cases of law of war violations examined earlier. Civilian and military reactions to the scandal that occurred in 1991 added new, intense conversations about how women were treated within the armed services to those already taking place about women's roles, spurring

¹⁴ Ashton Carter, 'Memorandum: Implementation Guidance for the Full Integration of Women in the Armed Forces,' *Department of Defense*, 3 December 2015.

¹⁵ The number of cases in which public and political pressure and influence lessens awarded punishment or alters the military disciplinary process speaks to the interest of politicians and the public alike to be seen as "supporting the troops."

action by Congress.¹⁶ These conversations and subsequent incremental actions continued for over two decades and culminated in sweeping changes to manpower management for the Army and Marine Corps during the administration of President Barack Obama. The 1991 scandal's timing could not have been worse for those desiring to maintain the status quo. Just as violations of the law of war receive widespread attention and create a groundswell of public opinion which cannot be ignored by the military, such as My Lai in the last chapter or Abu Ghraib which will be covered in the next, the ethical failures so evident in the Tailhook Scandal galvanized many groups to demand action by the military.

Background on the service of women in the Army and Marine Corps

While women had served as nurses in the U.S. Army since the founding of the Army Nurse Corps in 1901, and as part of the Signal Corps operating as bilingual telephone operators or as secretaries and administrators during World War I, numbering nearly 265,000 strong they began much wider service during World War II.¹⁷ The establishment of the Women's Army Corps gave women many of the same rights as men, and an opportunity for service within other job fields, often deploying and moving into support areas behind troops overseas.¹⁸ In June

¹⁶ William McMichael, *The Mother of All Hooks: The Story of the U.S. Navy's Tailhook Scandal* (New Brunswick: Transaction Publishers, 1997), p. 67. While often largely thought of as a Navy scandal, the aviators of the Marine Corps are instructed by schools run by the Navy and considered naval aviators, whether deployed and flying from aircraft carriers or ground bases. Of the attendees of the 35th Tailhook Symposium, there were quite a number of Marines, active, reserve, and retired, in attendance, and five of the hospitality suites which were sponsored by squadrons were specifically affiliated with Marine Corps units, four of which were active squadrons and one that had just disbanded the previous year. This incident's effects, while felt by the Marine Corps and Navy as they endured critical public scrutiny, transcended those services and impacted the whole of the Department of Defense.

¹⁷ David Segal and Mady Wechsler Segal, 'America's Military Population', *Population Bulletin* 59:4, (2004), p. 27. Since the Revolutionary War, women had sought ways to serve, either dressing up and passing themselves off as men, or stepping into the breach of service from time to time as opportunities rose, but during the Spanish American War contract nurses for the Army performed magnificently and led the Army to found the Nurse Corps to provide a permanent opportunity for women to serve in the Army. Many sources are available chronicling women's service in a variety of jobs, including at ammunition manufacturing plants as in *The U.S. Army and World War II: Selected Papers from the Army's Commemorative Conferences* edited by Judith Bellafaire.

¹⁸ 'Creation of the Women's Army Corps', *Army.mil*, <<https://www.army.mil/women/history/>> [accessed 15 January 2021].

1948, Congress passed the Women's Armed Services Integration Act, which made the Women's Army Corps, an Army branch whose authorization for service during World War II was set to expire that year, a permanent part of the Regular (Active Component) Army.¹⁹ The act additionally authorized enlistment and appointment of women into the regular components of the Air Force, Navy and Marine Corps and reserve components of all four branches.²⁰ While finally granting women permanent status in the armed forces, the act initially limited their numbers, setting maximum limits such as two percent of end strength for enlisted women and ten percent of commissioned officers for the Marine Corps.²¹

During the Korean War, many women again answered the call of their nation to service, joining the ranks of all the armed services. During the 1960s and 70s, while the Women's Rights Movement made progress in civilian society, their efforts were felt and amplified by the service rendered by women in their respective services. In 1973, with women representing approximately 2% of the Armed Forces, it ceased the draft and became an all-volunteer force (AVF), and the Army and Marine Corps accepted an increasing number of women. This increase was not foreseen by the Gates Commission, appointed by Nixon to study the effects of ceasing the draft, which did not account at all for the market-driven AVF presenting women seeking employment with new opportunity.²² In 1975, just into the services' recruiting for the all-

¹⁹ 'The Women's Armed Services Integration Act', *U.S. Capitol Visitor Center*, <https://www.visitthecapitol.gov/exhibitions/congress-and-world-wars-part-2/womens-armed-services-integration-act> [accessed December 21, 2020].

²⁰ 'Public Law 625: The Women's Armed Services Integration Act of 1948', *Marine Corps University History Division*, <<https://www.usmcu.edu/Research/Marine-Corps-History-Division/People/Women-in-the-Marine-Corps/The-Womens-Armed-Services-Integration-Act-of-1948/>> [accessed December 20, 2020].

²¹ End strength refers to the actual number of personnel authorized by Congress for service within a branch of the armed forces during any given year. With very few exceptions, services may not exceed this number.

²² Molly Clever and David R. Segal, 'After Conscriptio: The United States and the All-Volunteer Force', *Security and Peace*, 30 (2012), p. 16.

volunteer force, women made up 5% of each of the officer and enlisted ranks of the armed forces; this number would double by 1985 and continue to grow to 15% by 2009.²³

Early on, this growth represented an acceptance of the reality that by raising standards for enlistment across the service, the pool of qualified men could not be expected to fill the required number of new contracts. Later, the performance of women would garner recognition that they not only provided a large increase in qualified candidates, but of quality candidates as well. Despite the growth, while the combination of legal, judicial, and social challenges throughout the 1970s began normalizing women's roles in the armed forces, strong debate would continue, though not always at the forefront of the public sphere. The debates included the notions of citizenship and obligation, permissiveness versus professionalism, balance between opportunity for representation and need for strong national defence, and many other topics. As most of these discussions continued though, "Women in the military" added to the introduced additional conversations and concerns.²⁴

Though still prohibited by law from deploying for combat duty, many women did take part, through supporting establishment roles, in combat operations such as those in Grenada and Panama in the 1980s and early 1990s. 41,000 women then deployed for the First Persian Gulf War, 33,000 of whom were in the Army and 1,000 in the Marine Corps, which caused Congress to begin re-thinking the law regarding the assignment of women to jobs within the Department of Defense.²⁵ Despite Congress' new willingness to reevaluate women's roles in the military, the services were still very much a male dominated institution rife with misogynistic attitudes which

²³ Amanda Barroso, 'The changing profile of the U.S. military: Smaller in size, more diverse, more women in leadership', *The Pew Research Center*, 10 September 2019, <<https://www.pewresearch.org/fact-tank/2019/09/10/the-changing-profile-of-the-u-s-military/>>; Clever and Segal, p. 16.

²⁴ Bailey, pp. 133-136.

²⁵ The remaining 7,000 women served within the Navy and Air Force in support roles.

had no inclination of changing. Those attitudes, which unfortunately reflected in many ways those of society at large were part of the overall culture which celebrated the warrior's sacrifice and lifestyle with less regard for the society outside the military the warrior is engaged to protect. This disregard may account for the lack of discipline when fighting amongst the population or in following the law of war in the most scrupulous manner possible when dealing with non-combatant civilian personnel or prisoners. Following the most recent cultural shift within the land forces, from their roots at the Tailhook Scandal to present, may give insight into the obstacles to changing service culture and in reducing violence in the past.

Tailhook

The purpose of the Tailhook Association's annual convention was ostensibly to gather individuals from throughout the Navy, Marine Corps, and other interested parties to foster, encourage, develop, study, and support the aircraft carrier-borne sea-based aircraft of the United States of America and to advocate on the appropriate use of carriers and their aircraft for the nation's defence. Between 5 and 7 September 1991, aviators and other aircrew from throughout the United States and other foreign militaries, aviation industry representatives and others gathered for the Tailhook Association's 35th annual convention in Las Vegas, Nevada. Tailhook conventions started as merely a reunion for aviators, but over time added professional development activities and eventually earned support from the Navy itself, including office space for the convention organizers aboard a Naval base.²⁶ Along with the convention's stated purpose and activities, though, came a reputation for being the biggest party in Las Vegas.²⁷ While this

²⁶ Office of Inspector General. 'Report on Tailhook '91: Part 1, Review of Navy Investigations', Department of Defense, 21 September 1992, pp. 1-2, 38.

²⁷ Colonel Raymond C. Damm (Ret.), interview by Scott D. Hamm, 31 August 2020, transcript and recording currently in possession of author. Hereafter referred to as Damm interview.

hard-partying reputation had accrued over a number of years, in the eyes of Naval leadership, it did not diminish the real benefit of the convention's daily schedule.

This schedule included panels of flag and general officers sharing the vision for the future of Naval aviation, and lectures and talks given by professionals including one by the pilots who had so recently successfully engaged the Soviet-supplied Iraqi MiG-21 aircraft during the Persian Gulf War.²⁸ At night, however, convention attendees gathered in, and moved among, over a score of "hospitality suites" and throughout the hotel, particularly on the third floor, and took part in heavy drinking, raucous, and, at times, salacious behaviour. Behaviour of this sort became well-enough known six years before the scandal broke that in 1985 the Deputy Chief of Naval Operations (Air Warfare) Vice Admiral Edward H. Martin wrote a letter to the Commander, Naval Air Force, Pacific Fleet about his concerns:²⁹

The general decorum and conduct last year was far less than that expected of mature naval officers. Certain observers even described some of the activity in the hotel halls and suites as grossly appalling, "a rambunctious drunken melee." ... We can ill afford this type of behaviour and indeed must not tolerate it. The Navy, not the individual, his organization, or the Tailhook Association, is charged with the events and certainly will be cast in disreputable light... We will not condone institutionalized indiscretions.³⁰

Though the next year's convention was considerably more subdued, the drinking and rowdiness at subsequent conventions grew even more boisterous, with competitions between squadrons' suites for which one could host the most outlandish entertainment.³¹ By 1990, the behaviour easily equaled or exceeded that which had earned the admonishment in 1985. The investigation

²⁸ Flag and General officers refer to the highest officer ranks within the Navy and Marine Corps respectively, pay grades of O-7 through O-10. The panels provided a venue for much junior individuals to query the senior officers for their opinions and interpretations of policy in a non-attribution environment. Damm interview, 31 August 2020.

²⁹ The Deputy CNO for Air Warfare is the senior member of the Navy's aviation community, a three-star admiral, that advocates for its continued growth and relevance to operations and sets its policies. The Commander, Navy Air Force, Pacific is also a three-star admiral but has more operational control over the naval aviators in the Pacific Ocean-bordering areas.

³⁰ Office of Inspector General, "Report on Tailhook '91: Part 2, Events of the 35th Annual Tailhook Symposium", Department of Defense, 12 April 1993, pp. 2-3.

³¹ *Ibid.*, p. 26.

which followed the next year's convention revealed that the lewd and unlawful behaviour at the gathering was not only considered routine but also tacitly endorsed.³²

The stage was thus set for the 35th Annual Tailhook Symposium in early September 1991 with Naval leadership, industry representatives, and over 3,000 active, reserve, and retired aviators registered and a number exceeding an estimated 2,000 others in attendance.³³ It began with presentations from the Navy Safety Center on current aviation mishap trends and other presentations on emerging technologies given by industry representatives.³⁴ That evening, although manned displays and booths closed at 18:00, non-hosted displays advertising new aircraft or related programs remained accessible until 21:00. Starting soon after the official program ended at 17:30 though, many attendees began to congregate at the various hospitality suites. Among the salacious incidents considered by some previous attendees to have become "traditions," were acts of exhibitionism like "mooning" or "ball-walking," the public shaving of women's legs or pubic areas or taking shots from the navel of members of the opposite sex in the suites. These happened in tandem with excessive drinking, sometimes to the point of ingesting over ten drinks to "win" trinkets such as headbands. For some time, the third floor had become the habitual location for a number of hospitality suites and the formation of what was termed "the gauntlet." The gauntlet was a loosely formed group of men who lined the hallway outside the hospitality suites every night of the convention which would then selectively target individuals seeking to transit the hallway.³⁵

³² Norman Kempster. 'What Really Happened at Tailhook Convention: Scandal: The Pentagon Report Graphically Describes How Fraternity-style Hi-jinks Turned into Hall of Horrors', *Los Angeles Times*, 24 April 1993, <<https://www.latimes.com/archives/la-xpm-1993-04-24-mn-26672-story.html>>

³³ Office of Inspector General. Part 2, p. 113.

³⁴ *Ibid.*, pp. 101-103.

³⁵ Office of Inspector General, Part 1, p. 4.

Initially, this started as individuals slapping squadron stickers onto women passing by, often targeting their chests, crotches, and buttocks, however when the stickers ran out, it usually degenerated to groping, slapping, pinching the same areas, or grasping at, and sometimes trying to remove, clothing.³⁶ This behaviour was repeated over and over by the gauntlet members, and combined with active attempts to coax women to use the hallway. This type of group-enabled behaviour has been witnessed throughout history. S.L.A. Marshall noted the effect of similar peer-pressure in the increased prevalence of crewed-weapons teams when compared to individual soldiers in engaging the enemy in World War Two. Goldstein 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.³⁷ When one of the gauntlet members near an end of the formation would see a woman approaching, they would either call out or begin pounding their hands on the walls by way of warning. At this warning, others would quiet down and move as close to the sides of the hallway as the narrow corridor, described as six feet wide or less in most places by the Naval Investigative Service investigation, would permit, allowing the women to begin to advance through the gauntlet area before the crowd moved together to begin their harassment or assaults. Witnesses described the reactions of the women enduring this treatment as roughly split into thirds, with one third apparently making their way through consensually and not necessarily objecting to the treatment, another third obviously surprised and upset, and a last third which actively fought back at their attackers in distress.³⁸

Over the course of the three nights of the convention, there were 97 recorded assaults, with the lion's share coming in the third-floor hallway gauntlet.³⁹ The largest number of these

³⁶ Office of Inspector General, Part 2, pp. 179-248.

³⁷ Goldstein, pp. 197, 365.

³⁸ Office of Inspector General, Part 2, pp. 37-54.

³⁹ *Ibid.*, p. 55.

reported assaults occurred on the last night of the symposium, September 7th, and this was the night that Lieutenant (LT) Paula Coughlin, a U.S. Navy CH-53 heavy-lift helicopter pilot, who brought the scandal to wide attention, was herself a victim. LT Coughlin was the aide-de-camp for the Commander of Naval Air Station Patuxent, MD, and attended Tailhook in the performance of her official duties as Rear Admiral Jack Snyder's aide.⁴⁰ That evening, LT Coughlin exited an elevator onto the third floor and began to walk down the hallway searching for someone she knew. Someone in the crowded hallway yelled "Admiral's Aide," and that call was echoed by others within the gauntlet several times before she was grabbed and lifted from behind by two men and pushed forward into the gauntlet where, though a fellow officer and pilot herself, she was groped by several individuals. She eventually was able to fight her way through and into a suite where she collected herself.⁴¹ In her official statement, she reported that she first told her supervisor, Rear Admiral Snyder, by telephone and then in person the next morning at breakfast, where his only seemingly distracted reply was, "Paula, you need to stop hanging around with those guys. That's what you've got to expect on the third deck with a bunch of drunk aviators."⁴² Almost two weeks later, she met with Snyder and his Chief of Staff, and he indicated that he would call the Assistant Chief of Naval Operations (Air Warfare) Vice Admiral Dunleavy, the President of the Tailhook Association, Captain Ludwig, and his immediate supervisor, Vice Admiral Bowes. He also stated he would deliver letters from himself and Coughlin to Vice Admiral Dunleavy.

⁴⁰ The rank of lieutenant in the Navy is the paygrade O-3, while in the Marine Corps, there are two levels of lieutenants, O-1 and O-2, and O-3s are called captains. A Rear Admiral is a two-star flag officer, in the paygrade of O-8.

⁴¹ McMichael, pp. 42-44; Gregory L. Vistica, *Fall from Glory: The Men Who Sank the U.S. Navy* (New York City: Simon & Schuster, 1997), p. 329.

⁴² McMichael, p. 47.

When she found out ten days later that the letters were never forwarded, she gave a copy of hers to a member of the staff of the Chief of Naval Personnel, who passed copies on to both Dunleavy and the Vice Chief of Naval Operations, Admiral Jerome Johnson.⁴³ The early efforts to ignore the complaints regarding the harassment and assaults bore a striking resemblance to efforts in the Army to disregard reports of My Lai. By this time, the military's reputation and respect among the public had improved markedly from its nadir during the most challenging latter portion of the Vietnam War, and the thought of losing some of the hard-won esteem of the population surely drove some of the response at the highest echelon of the services. An investigation finally began on 11 October 1991, over a month after the incidents.⁴⁴

Aftermath: Investigations and Reliefs

The first investigation initiated was the Navy Investigative Service's (NIS) criminal investigation into acts such as the assaults which were considered criminal in nature.⁴⁵ On the same day this investigation was begun, by direction from the Vice Chief of Naval Operations Admiral Johnson, Captain Ludwig, the President of the Tailhook Association sent a letter to its members that at once extolled the successes of the professional education opportunities and industry engagement at the conference and condemned, albeit in terms that are only charitably labeled contrite, the destruction to hotel property and unprofessional behaviour of some attendees – including those responsible for the several assaults of which the association was aware.⁴⁶

⁴³ The Vice Chief of Naval Operations was the second-ranking member of the U.S. Navy, a four-star admiral.

⁴⁴ Office of Inspector General, Part 1, p. 52.

⁴⁵ The Naval Investigative Service (NIS) would later be re-branded as the Naval Criminal Investigative Service (NCIS) and will feature prominently again during two cases covered in chapter 5.

⁴⁶ Office of Inspector General, Part 1, p. 5.

Secretary of the Navy Henry L. Garrett, a once-enlisted sailor, turned commissioned Naval Flight Officer before his post-Navy careers, got a copy of Ludwig's letter on 28 October and on 29 October sent a letter to the Tailhook Association severing the Navy's ties with it.⁴⁷ This would include ceasing to provide the association with office spaces aboard Naval bases to plan each year's symposium that cost in excess of \$400,000 a year.⁴⁸ A week later, Rear Admiral Snyder, LT Coughlin's supervisor who had initially answered distractedly to her allegations, and then delayed taking action on her subsequent follow-up meeting, was relieved of his command.⁴⁹ While he was one of the first senior Navy leaders to feel the consequences of their blasé attitude toward the existing horrendous culture towards women, he would be far from the last. This culture, typified by behaviour that demeaned or degraded women's contribution to the service or openly questioned their suitability to serve while excusing the behaviours as "just the way men were," was not something that had been noticed and addressed due only to the Tailhook scandal. Several years before, in 1989, pre-dating the then-serving Secretary of Navy and Chief of Naval Operations, the Navy had issued a "zero-tolerance" policy on sexual harassment and assault to its sailors and officers.⁵⁰ The 22,000 man-hours-long NIS investigation would highlight several attitudes and behaviours that were less than complimentary to the Navy's professionalism. Time and again, investigators would cite witnesses who were less than entirely forthcoming or cooperative when answering questions or offering testimony.⁵¹ The investigation quickly became a matter of the purview and direction of the Commander of NIS, whose own attitudes about women in the Navy caused some skepticism regarding the investigation's thoroughness and

⁴⁷ Ibid., pp. 5-6.

⁴⁸ Office of Inspector General, Part 2, viii and Part 1, pp. 41-46.

⁴⁹ Office of Inspector General, Part 1, p. 36 (Encl 1).

⁵⁰ Office of Inspector General, Part 1, p. 50.

⁵¹ Ibid., p. 53.

completeness during a subsequent review by the Department of Defense's (DOD) IG.⁵² If Paula Coughlin had not been serving in a position which afforded her access and the ability to communicate easily with higher headquarters, or had not been herself possessing of an indomitable spirit, it is doubtful the investigations would have started, let alone been followed up and received the scrutiny which forced the DOD review. Her willingness to see through the investigation and subsequent testimony she gave ensured the outside attention from political figures and media alike which forced the Navy begin the proceedings and then release responsibility when the failings of its investigatory services became clear. Her courage was reminiscent of that of CWO Thompson at My Lai and of Ronald Ridenhour's campaign to bring My Lai to light. Like Thompson, who suffered from PTSD from his experience at My Lai, she also faced adversity following her courageous action, eventually resigning her commission. While the parallel between the Army's initial disinterest and later attempted cover-up of My Lai and the Department of the Navy's slow reaction to the revelations of Tailhook might suggest institutional inertia had not changed in the ensuing twenty plus years, a strong argument can be made that the negative cultural aspects of certain job fields and prevalent in a number of lower echelon units is at least equally likely. Once these negative aspects—whether it be a disregard for a culture like Vietnam's Mere Gook Rule or the misogyny on display at Tailhook, group dynamics often influence those with lesser self-discipline into acting in ways prejudicial to stated service values.

The same day he sent the letter to the Tailhook Association, Secretary Garrett gave instructions to his Undersecretary for Defense, Dan Howard, who would eventually replace him after his resignation, to start an additional investigation by the Navy's Inspector General (IG).

⁵² Ibid., pp. 15-19.

This inquiry would focus primarily on non-criminal aspects of the events and also the professionalism of the symposium, Navy support for Tailhook, and other regulatory abuses or violations.⁵³ While the NIS investigation consisted of many more man-hours of investigators' efforts, the IG investigation would have access to much of their findings, interviews of their over 2,000 witnesses, and reports. The DOD IG, however, found that the six people detailed to the investigation were still too few for the breadth of the case. It also found major weaknesses in the Navy IG's investigation stemming from its reluctance to interview any of the senior leadership present and failed to assign accountability in any meaningful way, again as in My Lai, to any responsible senior individuals.⁵⁴

The referenced DOD IG's review of both the Naval Investigative Service and Navy IG's investigations, which were both released during April 1992, was requested by Secretary of the Navy Garrett only after his presence became a widely reported fact in June. The DOD IG team would end up interviewing over 2,900 individuals by the time it released its report, in two parts, over the next year.⁵⁵ The first part of the report was an initial review of both the NIS and IG efforts and conclusions, released in September 1992. The second part detailed its own investigation's conclusions through the end of January 1993 and was released in April of that year. It would include detailed accounts of 100 victims, 7 of which were male, and 10 whose experiences were from previous Tailhook conventions.⁵⁶

In the aftermath of the Tailhook scandal, the Navy underwent a major shake-up among its senior leadership positions. Some of these actions were taken immediately by Secretary of the

⁵³ Office of Inspector General, Part 1, pp. 6, 52.

⁵⁴ Office of Inspector General, Part 1, pp. 7-9, 10.

⁵⁵ Office of Inspector General, Part 2, p. viii.

⁵⁶ *Ibid.*, pp. xiii, 179-248.

Navy Garrett, like the quick relief of Rear Admiral Snyder from his command at Patuxent. Other reliefs occurred incrementally as more information was revealed from the initial investigations and subsequent DOD-review. Secretary of the Navy Garrett offered his resignation on 12 June, which was initially refused by Secretary of Defense Cheney, but was then accepted on 26 June when the full scope of the omission of his presence at some of the hospitality suites became known.⁵⁷ Vice Admiral Dunleavy, the Assistant Chief of Naval Operations (Air Warfare), was retired in July of 1992 at a reduced rank, losing one of his stars and part of his pension. Admiral Kelso, the Chief of Naval Operations, weathered the initial storm of scandal, and helped to initiate new training and education targeting the Navy's toxic culture toward women, but would be forced to retire early by the Secretary of the Navy John Dalton.⁵⁸ In all, Secretary Dalton ordered administrative action for 30 other admirals who had attended Tailhook, including Kelso before he was retired.⁵⁹ Initial service-level decisions to relieve those that were slow to act followed norms associated with reliefs due to "loss of confidence in their ability to command" that are even today commonplace for poor decision-making or ethical breaks. By the time Secretary of Defense Cheney reconsidered and accepted Secretary of the Navy Garrett's resignation, the freeze of promotions Department of Navy-wide, and the rash of censures to senior leaders by Secretary of the Navy Dalton made it obvious that public and political

⁵⁷ When Secretary Garrett's resignation was accepted, he was replaced by his immediate subordinate Dan Howard. During the month of June 1992, Garrett initially denied having visited any hospitality suites. When a witness interview was made public that purported seeing him present in at least one of the suites, he issued a statement a week later claiming to have merely "grabbed a beer" in a short visit to one. His resignation proffered three days after that release was refused by Secretary of Defense Cheney, but after the Washington Post article and ABC News coverage of Paula Coughlin's interview on 24 June (viewed by the President), Cheney announced he had changed his mind and accepted the resignation. Howard served in an acting capacity until President Bush nominated Sean O'Keefe to the position. He would be followed, in the next administration, by Secretary John Dalton.

⁵⁸ Office of Inspector General, Part 2, pp. viii-ix.

⁵⁹ 'Three Navy Admirals Punished in Tailhook Scandal', *The Journal Times*, 16 October 1993, <https://journaltimes.com/news/national/three-navy-admirals-punished-in-tailhook-scandal/article_9eae9b61-469f-5abc-9892-28a36bcd0693.html>

pressure—from both the White House and the Legislature—were influencing the measures taken.

Additionally, LT Coughlin, who courageously brought the matter to public light resigned her commission, citing the assault and continued “covert attacks,” remained resolute in her belief that servicemembers of all walks should receive equitable and fair treatment.⁶⁰ Today, she serves as a member of the organization Protect Our Defenders, a 501 (c)(3) not-for-profit organization, whose mission is to support and give voice to those in uniform who have endured sexual assault by fellow uniformed personnel.⁶¹ The Senate Armed Services Committee, a congressional body charged with oversight of the military ordered holds on promotions for all officers, paygrade O-4 and above, who had been present at Tailhook until they were confident that the officers were not guilty of any untoward behaviour.⁶² This had ripple effects across the entire Marine Corps’ promotion system. Officers in wholly unrelated occupational specialties, such as the assault amphibian vehicle field, who participated in oral history interviews supporting research for this thesis waited for the freeze to be lifted and signed multiple administrative entries over the following years affirming they were not at Tailhook.⁶³

Young Marines and soldiers felt effects as well. As details of Tailhook became widely known, the entire Department of the Navy, both Navy and Marine Corps, engaged in duty stand-

⁶⁰ ‘Coughlin Resigning from Navy’, *Associated Press*, 11 February 1994, <<https://www.deseret.com/1994/2/11/19091663/coughlin-resigning-from-navy?msclkid=071ab231c63211eca20f88c561aba16e>> [accessed 13 April 2022].

⁶¹ ‘Leadership’, *Protect Our Defenders*, <<https://www.protectourdefenders.com/leadership/>> [accessed 29 December 2020].

⁶² John Lancaster. ‘Tailhook Probe Implicates 140 Officers’, *The Washington Post*, 24 April 1993, <<https://www.washingtonpost.com/archive/politics/1993/04/24/tailhook-probe-implicates-140-officers/e004554a-0440-4371-b8a9-a2ecaad05785/>>

⁶³ Colonel Brian McCrary (ret.) and LtCol Paige L. Chandler (ret), interviews by Scott D. Hamm, 31 August 2020, transcripts currently in possession of author. Hereafter referred to as McCrary or Chandler interviews.

downs to discuss sexual harassment and assault.⁶⁴ In the fall of 1992, a new integrated dispute resolution system to provide varying levels of response in an attempt to address issues at the lowest possible level.⁶⁵ While at institutional levels, the intent of the actions, like the freeze on promotions, administrative counseling and new methods to identify and address harassment, were meant to punish those guilty of unbecoming behaviour, the trickle-down effect on how men and women in the services interacted reached all the way to the most junior and guiltless as well. Recalling that time, Robin Fortner, a sergeant major who retired recently after thirty years, said the levels of distrust between men and women were amplified after the media storm surrounding Tailhook. As a junior Marine, and soon non-commissioned officer in the year following the revelations, she recalled clearly that most male Marines of the same rank and those senior to her wanted to limit contact with women for fear of saying or doing something which would impact their careers. Male Marines sought to have other women present when counseling their female subordinates and were more hesitant to either criticize them in the same way as their male counterparts or pass on experiences through mentorship. Inadvertent though it was, the ham-fisted approach the Marine Corps and Army took, helped to reinforce the divide between genders and fueled additional reticence about women's place in the service.⁶⁶ If the attitudes concerning women's service were troubled before this, the results of the scandal, on a younger generation of Marines who would normally have been expected to be influenced by gains by the Women's Rights Movement, were to retard progress in the acceptance of women.

⁶⁴ A duty stand down is a cessation of all normal operations to address entire commands on given subjects.

⁶⁵ Mary Rowe, 'The Post-Tailhook Navy Designs an Integrated Dispute Resolution System', *Negotiation Journal*, Harvard University, July 1993, <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1571-9979.1993.tb00703.x>>

⁶⁶ Sergeant Major Robin Fortner (Ret.), interview by Scott D. Hamm, 14 October 2020, transcript and recording currently in possession of author, at approx. 7:03 and 10:46. Hereafter referred to as Fortner interview.

The Presidential Commission

While the reports of the incidents at Tailhook slowly came to light and the investigation ran its course, a bi-partisan conversation about women's roles in the service and combat were already underway within the Legislative and Executive branches of the government.⁶⁷ In the Senate, Republican William Roth introduced a Senate bill to clarify women's roles. In the House, Democratic Representatives Pat Schroeder and Beverly Byron successfully convinced the House to amend the upcoming appropriations bills with changes for women's roles. Senators John Glenn and Sam Nunn then forwarded the idea of a commission to review and study the issue and the resulting National Defense Authorization Act of Fiscal Year 1992 (passed 5 December 1991) included the appropriations to create the Presidential Commission on the Assignment of Women in the Armed Forces.⁶⁸ The commission's stated purpose was to "assess the laws and policies restricting the assignment of female service members and...make findings on such matters." The 15-member panel was appointed by the President, from among public and private citizens who were distinguished in their fields and possessing "significant experience" in one or more of the Commission's areas of concern. The members came from academic institutions, civilian industry, government agencies and included active and retired military members. By statute, three of the commissioners had to be women, with a further requirement to have women in each of three representative groups—armed service member, representative of a women's issue organization, and representative of a women-in-the-armed services organization.⁶⁹ Ultimately, the Commission would include six women, four active (two women)

⁶⁷ These discussions included continuations of some older discussions about women's roles in the military that followed the advent of the AVF and the failed Equal Rights Act and also newer debates that centered on the roles women played in more recent conflicts and the change in the way combat was conducted with a more technologically dependent force.

⁶⁸ Public Law 102-190, *National Defense Authorization act for FY 1992-1993* (5 December 1991), Sections 541-549.

⁶⁹ Public Law 102-190, section 541.

and four retired (one woman) members of the armed forces, and several members from academia, governmental agencies, and the private sector representing both sides of the issue. They were given a blank cheque and told they could go where they needed to find the information they required and talk to whoever they wanted. They traveled to more than twenty installations and talked with representatives from every service and several foreign countries about their experiences. They also had many types of witnesses from outside the military come to testify, including clergy, law enforcement, academics to be as comprehensive as possible in their information.⁷⁰

The results of the Navy's investigations by the NIS and its Inspector General were both released early in the Commission's fact-finding period, and the DOD IG's release of Part 1 of their Report on Tailhook, reviewing the Navy's investigations, was released as they prepared to summarize and record their findings in preparation to vote on their recommendations. These recommendations came in the form of 17 votes ranging from whether there should be quota assigning women to specific duties to physical standards for occupations from accession on to specific votes on opening specific roles to women (combat aircraft, ground combat, combatant vessels, etc.).⁷¹ While there were views on both sides of the issue present on the Commission, the release of the interviews and detailed knowledge of the incidents at Tailhook were a "bombshell" to all the members, regardless of their initial stance.⁷² Some of the concerns they wrestled with as they framed their findings and recommendations mirrored discussion points raised during testimony before the House Armed Services Committee in 1987 on combat exclusion laws for women in the military. These included managing assignments based on the opportunity for the

⁷⁰ Draude interview, approx. 53:50.

⁷¹ 'Final Report to the President', *The Presidential Commission on Assignment of Women in the Armed Services*, 15 November 1992 (Washington DC: GPO, 1992), p. 29.

⁷² Draude interview, approx. 46:45.

“best qualified” individuals available, regardless of gender, using occupational specific performance standards—something then-existing combat exclusion policies made inherently difficult, even for jobs with very low chance for combat action.⁷³

New Rules

In the end, after reviewing the recommendations of the Commission, Secretary of Defense Les Aspin issued a memorandum to the services directing them to open more fields to women. The National Defense Authorization Act of that year included language that removed the remaining restrictions on women serving aboard combatant vessels or aircraft and directed the Department of Defense to ensure occupational performance standards were gender neutral. The next year, in 1994, Secretary Aspin rescinded the “Risk Rule,” which had been in effect since 1988 and directed the services to assign even those women in noncombat occupations based on whether the risk of exposure to direct combat, hostile fire, or capture were equal to or greater than the risks in the combat units they supported. This kept women from being co-located with combat units.⁷⁴ It was also interpreted in vastly different ways by services, even when performing similar missions.⁷⁵ In place of the Risk Rule, however, Secretary Aspin approved a new Direct Ground Combat Definition and Assignment Rule (DGCDAR), sometimes called the Direct Combat Exclusion Rule, which prohibited women from being assigned to units below the brigade level whose primary mission was to engage in direct ground combat.⁷⁶ The definition

⁷³ Martin Ferber, “Testimony to House Armed Services Committee, 19 November 1987”, General Accounting Office (Washington DC: GAO, 1987), pp. 14-15.

⁷⁴ Kristy N. Kamarck, ‘Women in Combat: Issues for Congress’, *Congressional Research Service*, 13 December 2016, <<https://fas.org/sgp/crs/natsec/R42075.pdf>>, pp. 3-4, 6. An example used in this document was a female medic could be assigned to a noncombat support unit; however, if that unit was called on to provide support to a combat unit, the risk to the medical support unit would have to be less than the risk to the combat unit for the female service member to be assigned.

⁷⁵ Ferber, pp. 4-7.

⁷⁶ Brigade-level, and their equivalent, units generally number between 3,000 and 5,000 servicemen.

applied to ground combat specifically applied to the high probability of engaging the enemy, exposure to fire, or probability of direct physical contact with the enemy's forces. It also allowed for exclusions based on lack of appropriate berthing facilities or privacy, from units doctrinally expected to collocate with ground combat units, and units performing reconnaissance and special operations missions.⁷⁷ The DGCDAR remained a central determinant in assignment policy for the Department of Defense for almost the next two decades. Its critics repeatedly pointed to it as an issue for career progression, especially promotion and retention, of high caliber women and an unnecessary hindrance to recruiting the best possible personnel in an All-Volunteer Force. DGCDAR's proponents over this period were equally repetitive in their arguments of potential effects on morale, unit cohesion, and combat effectiveness.⁷⁸ To be sure, both sides of the issue raise concerns which have merit, though until fairly recently there had been no efforts to study in a rigorous fashion what the effects of integrating women would be.

Recent Action on Integration

The conflicts in Iraq and Afghanistan, with their nonlinear battlefields and less predictable asymmetric threats, spurred new conversations within Congress and among the public about the exposure to combat women faced. When studying gender roles in historical context, Joshua Goldstein found a recurring framing of the enemy as 'the feminine' to a force's masculine persona.⁷⁹ By the 2000's, the fitness training of women was much closer to that of men, as evidenced by the rise in popularity of functional fitness and female mixed-martial arts contests. The inclusion of women officially in the table of organization of units conducting successful operations against the enemy could reduce the prevalence of framing military action

⁷⁷ Kamarck, p. 6.

⁷⁸ Ferber, pp. 3-4, 14-16.

⁷⁹ Goldstein, p. 371.

as male domination over a feminine enemy. With a less gender-centric frame of reference in thinking about the enemy, perhaps a reduction in discrimination or assault against women inside the services or female non-combatants encountered during operations could be seen.

In 2005, Representative Duncan Hunter, a former Marine with deployments to Iraq and Afghanistan, controversially introduced a bill that aimed at curtailing assignments by prohibiting women from serving in company-sized units supporting combat operations. He argued that the redesign of the Army's combat brigades, moving small support units forward just behind fighting elements violated the existing combat exclusion rules. The Army opposed this bill, arguing it "sent the wrong signal to the brave men and women fighting the Global War on Terrorism," And it was eventually defeated.⁸⁰ By 2010, Secretary of Defense Robert Gates notified Congress of the Navy's intention to reverse its policy prohibiting women's assignment aboard submarines. That same year, the Army's Chief of Staff General George Casey said, "I believe it's time we take a look what women are actually doing in Iraq and Afghanistan," when asked about his views regarding women in combat roles. The 2011 National Defense Authorization Act directed the service secretaries to conduct a review of their policies restricting assignments due to gender after the Military Leadership Diversity Commission released its findings asserting that the services' combat exclusion policies were a barrier to greater representation in the senior enlisted and general officer-level ranks.⁸¹

⁸⁰ Thomas S. Szayna and others, 'The Integration of Women and Other Excluded Groups into the US Military: The Historical Experience', *RAND Corporation*, 2015, <https://www.jstor.org/stable/10.7249/j.ctt19mddv.12?seq=1#metadata_info_tab_contents>, pp. 21-22. A former Marine veteran of both Iraq and Afghanistan, Duncan did not believe in women in combat, though his bill had the opposite of his intended effect. The conversations about what women were capable of in that day's Armed Forces contributed to the shifts in attitudes enabling full integration just over a decade later.

⁸¹ *Ibid.*, p. 22.

The final obstacles to integration, and what was hoped would be fair and equitable treatment, began to be removed in February 2012, when the Department of Defense rescinded the co-location restriction within the DGCDAR that kept women from serving in or adjacent to units having a high probability of enemy contact. This occurred after the Department reviewed all applicable laws and orders through 2011 and early 2012 to determine what changes should be made since nearly 300,000 women had deployed to serve in Iraq and Afghanistan since the start of Operations Enduring Freedom and Iraqi Freedom. Prior to this, women served for both the Army and Marine Corps in both theaters very close to, and often in, combat by serving in roles and missions characterized as activities which were not restricted. Examples of this are the Task Force Lioness and Female Engagement Teams programs, which used women's abilities to converse and interact with local women with less cultural limitations than their male counterparts, leading to the Cultural Support Teams employed by Special Operations Command.⁸² The units working with these female-Engagement Teams came to respect their capability and the increased effectiveness in the operations, however little was done to advertise this service-wide to assist in changing the culture or attitudes held by many, including the aforementioned Representative Hunter.

Around the same time that the co-location restriction was lifted, two separate lawsuits were initiated by women servicemembers and veterans against the Department of Defense challenging the DGCDAR, with one claiming that the rule limited "their current and future earnings, their potential for promotion and advancement, and their future retirement."⁸³

⁸² Gayle Lemmon, *Ashley's War: The untold story of a team of women soldiers on the Special Ops Battlefield* (New York: Harper, 2015), p. 12.

⁸³ *Ibid.*, p. 23; Craig Whitlock, 'Four female service members sue over Pentagon's combat-exclusion policy', *The Washington Post*, 27 November 2012, <https://www.washingtonpost.com/world/national-security/four-female-service-members-sue-over-pentagons-combat-exclusion-policy/2012/11/27/460cf994-38da-11e2-83f9-fb7ac9b29fad_story.html>

Additionally, Secretary of Defense Leon Panetta opened over 14,000 positions in units that had been subject to the restriction to women and ordered the services to review the remaining gender-based restrictions on service. After nine months of review, the Joint Chiefs of Staff made the recommendation to the Secretary to rescind the DGCDAR. He did this in January of 2013, while directing the services and the Special Operations Command to develop plans to implement the change including reviewing and validating all occupational standards for operational relevance. This review's deadline was the fall of 2015 with implementation to begin 1 January 2016 unless an exception to policy was submitted to the Secretary of Defense.⁸⁴

When the Secretary of Defense, Ashton Carter, declared all military specialties, without exception, would be open to women on 3 December 2015, beginning the following year, the final 222,000 positions that excluded women were available.⁸⁵ These remained closed to women since the repeal of the DGCDAR in 2013. Over those three intervening years, senior civilians and military leaders in all services studied integration and prepared for the possibility of total integration. The month before his decision, Carter received all the recommendations from the four services and the Special Operations Command. The only service requesting an exemption from total integration was the Marine Corps, and that was a partial exemption, asking only for several occupational specialties within the infantry, light armored infantry, and reconnaissance to remain closed. Additionally, they requested exception for assignment to infantry regiments and below, reconnaissance, light armored reconnaissance, and combat engineer/assault units.⁸⁶ The Marine Corps' request centered largely on data gained from its year-long study of an integrated

⁸⁴ 'Fact Sheet: Women in the Service Review Implementation', Department of Defense, <https://dod.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_WISR_FINAL.pdf, 1> [accessed 19 January 2020].

⁸⁵ Cheryl Pellerin, 'Carter Opens All Military Occupations, Positions to Women', *DOD News*, 3 December 2015, <<https://www.defense.gov/Explore/News/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women/>>

⁸⁶ 'Fact Sheet', p. 3.

unit, but the study's utility was questioned by the Secretary of the Navy despite showing results that corresponded with those of studies conducted by other nations.⁸⁷ However, when announcing his decision, Carter said because it is a joint force, "I have decided to make a decision which applies to the entire force," and granted no exemption to the new policy.⁸⁸ Each service, and particularly the Army and Marine Corps, took slightly different measures to prepare their members for full integration, reflecting the difference in service cultures. Average age and education demographics, differing mission sets, and number of fields closed to women, and previous numbers of women serving overall created the need for addressing the respective service cultures in slightly different ways across the armed forces.

The Army called its approach the Army Gender Integration Implementation Plan. It called for a "leaders first" approach based on five lines of effort: updating physical and administrative screening standards; managing talent to select, train, and promote the best qualified soldiers; building integrated units; educating soldiers and leaders and communicating how gender integration increases the readiness of the Army; and continually assessing integration strategies to successfully posture the force.⁸⁹ The "leaders first" aspect of the plan included reclassifying women officers to new branches (occupational groups such as armour, infantry, etc.) or moving them to units that were formerly male-only in their existing occupations (such as supply officers, administrators, etc.). The Army conducted several studies to prepare for integration, but its primary studies were the U.S. Army Gender Integration Study and the U.S. Army Research Institute of Environmental Medicine Task Assessment. The Training and

⁸⁷ Hope Hodge Seck, 'Mixed-gender teams come up short in Marines' infantry experiment', *Marine Corps Times*, 10 September 2015, <<https://www.marinecorpstimes.com/news/your-marine-corps/2015/09/10/mixed-gender-teams-come-up-short-in-marines-infantry-experiment/>>

⁸⁸ Pellerin. Also, the term joint force in reference to the U.S. Armed Forces denotes the concept of interdependence of all service branches to fight and win wars on behalf of the nation.

⁸⁹ 'Army Gender Integration Implementation Plan', *Army G-I*, <<https://www.army.mil/standto/archive/2016/03/10/>>

Doctrine Command conducted the Gender Integration Study, evaluating institutional and cultural factors. The Army Medical Command conducted the Medical Task Assessment to consider physical factors in integration.⁹⁰

The Marine Corps, like every service, had its own approach—the Marine Corps Force Integration Plan. This plan moved along four of its own lines of effort, including its third that created an experimental unit to apply scientific rigor to testing and evaluating the performance of integrated small units against those of all male Marines, the only service to do so.⁹¹ As its first line of effort, the Marine Corps, like the Army, sent mid- and senior enlisted leaders and officers to combat arms units that would open in advance of the younger enlisted population. Like the Army, the Marine Corps hoped that the advanced presence of these leaders would both serve to accustom the males to the change by first introducing an already highly trained woman into the unit, and also provide mentors already in place for the younger women as they arrived at their units. Its second line of effort involved sending female volunteers through the military occupational specialty (MOS)-producing schools for combat arms MOSs to gain insights into the relative propensity among new female Marines to serve in these MOSs, and to assess, for both genders, relative qualification success and injury rates and causes.⁹² The third line of effort would involve the experimental unit that will be discussed further in detail. The fourth line of effort was to open another eleven occupational fields that had previously been closed to women due to the restrictions within the DGCDAR. In the words of the Commandant of the Marine Corps, General Robert Neller, when testifying before the Senate Armed Services Committee on

⁹⁰ ‘Fact Sheet’, p. 2.

⁹¹ The term small unit refers to groups of squad, section or fireteam size having 13, 2 to 6, or 4 Marines respectively.

⁹² The ground combat MOSs that were specifically studied in the LOE-2 were infantry, artillery, tank, and amphibious vehicle MOSs. Of these, the infantry occupations were further divided by weapon systems, i.e., Riflemen, machine gunners, mortarmen, and assaultmen.

2 February 2016, “Under the guiding principles of the Secretary of Defense, we implemented a deliberate, measured, and responsible research effort to better understand the aspects of gender integration in those remaining closed MOS’s and setting the conditions for successful policy implementation. Our research was about ‘how’ to integrate, not ‘if.’”⁹³ Indeed, the Marine Corps had begun sending enlisted women through the Infantry Training Battalion’s basic courses the same month the Secretary of Defense rescinded the DGCDAR, though through a year later only around 45% of those women had graduated the schools.⁹⁴ The Marine Corps’ implementation of the plan would be broken into five phases, which began before the 2016 deadline for integration (or exemption requests). The efforts to educate the force on the benefits of integration were conducted from the top down, with commanders and senior enlisted receiving information and classes before mid-level leaders and finally the rest of the Marines. These phases were mainly planned around milestones within a normal lifecycle of service of the first women to be integrated.

Phase 1 included updating personnel assignment policies, orders and directives pertaining to integration and educating senior leaders, and developing gender-neutral occupation-specific standards which would be directly impacted by the GCEITF results. Phase 2 focused efforts on the recruiting process, such as administering a new combat Arms initial strength test, offering combat arms contracts to women, and educating the mid-level leaders of the force. Phase 3 efforts included confirming physical standard achievement or re-classifying those that could not achieve the standard during entry-level training, and double-checking standards at MOS schools.

⁹³ U.S. Government Publishing Office, ‘Senate Armed Services Committee Hearing on The Implementation of the Decision to Open All Ground Combat Units to Women’, *U.S. Senate*, 2 February 2016, <<https://www.govinfo.gov/content/pkg/CHRG-114shrg24850/html/CHRG-114shrg24850.htm>>

⁹⁴ Paul Johnson and Dr. Jane Pinelis, *The Experiment of a Lifetime* (Independently Published, Middletown, DE, 2019), pp. 5-7.

Also, educating much of the broader service began during this phase. The next phase included offering lateral moves to female Marines who had already successfully completed MOS schools for combat arms MOSs and began the assignment of leaders into the ground combat arms units, in advance of junior enlisted Marines of those MOSs. The goal was to have assignment of senior women to any unit at least 90 days prior to the assignment of the junior Marines. Phase 5 included assessing the progress of the integration, efforts to promote and retain the best qualified women in the MOSs and making policy-change recommendations to higher headquarters. Education efforts for the remainder of the force continued during this phase until completion.⁹⁵ This last phase's efforts to retain and manage the careers of women new to the fields was the hardest phase and at the time of writing this thesis is still ongoing.

The Experiment

Though a service known for its frugality, the Marine Corps devoted significant resources to its third line of effort, the Ground Combat Element Integrated Task Force (GCEITF), as the experimental unit came to be called. While the monetary cost of the experiment alone was around 36 million dollars, even more dear than the money from the budget were the roughly 400 male and female volunteer Marines, another close to 300 support Marines, gear, and equipment which were taken from operational units still responsible for their national defence missions.⁹⁶ Costly as the experiment was, the results were worthwhile to the Corps for several reasons. The physical capability to perform the tasks to standard by individual women and by integrated teams could be assessed and compared to non-integrated control groups. Additionally, and probably more importantly when considering the attitudes discussed in the Tailhook case study, the results

⁹⁵ L. C. Coleman, 'Marine Corps Integration Implementation Plan Progress Report', *Brief to DACOWITS*, 28 June 2016, <<https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/USMC%20RFI-%202%20Brief.pdf?ver=2016-06-28-142126-523>>, p. 2.

⁹⁶ Seck, 'Mixed Gender Teams'.

would contribute to proving or disproving the arguments against women which relied on unit cohesion and morale. Importantly, small unit culture could be examined and compared throughout the experiment in both integrated and non-integrated groups who were all new to the unit. These cultural attitudes could later be compared with arguments against integration.

The well-over 300 participants that were eventually picked came from over 1,700 initial volunteers. The designers of the experiment had specific needs for the ratios of infantry and non-infantry males and also of females in order to conduct the exercises with enough replication and independent repetitions.⁹⁷ The gear and equipment represented most of the weapon systems and vehicles found in a deploying battalion landing team, which is the ground element of a Marine Expeditionary Unit, including tanks, artillery, light armored vehicles, and the various other vehicles needed to maneuver and sustain those systems. The research methodology employed by the Marine Corps Operational Test and Evaluation Agency was peer reviewed by the Operations Analysis Department at George Mason University, and subject to constant scrutiny and input throughout its duration by a Red Team organized and facilitated by the Center for Strategic and International Studies. Strict adherence to the Human Rights Protection Protocols were monitored by the Marine Corps' Institutional Review Board for the experiment's human volunteers.⁹⁸ This would factor into some changes in planned experiment repetitions due to voluntary withdrawal from the unit.

For over 12 months, the volunteers (both male and female), assigned infantrymen and support personnel went through preparatory baseline instruction and eventually through exercises

⁹⁷ Paul Johnson, interview by Scott D. Hamm, 18 November 2020, transcript and recording currently in possession of author. Hereafter referred to as Johnson interview.

⁹⁸ George W. Smith, 'United States Marine Corps Assessment of Women in Service Assignments', *Memorandum for the Commandant of the Marine Corps from Force Innovation Office Director*, May 2015. <<https://wiisglobal.org/wp-content/uploads/2013/05/USMC-WISR-Documents-Not-releasable.pdf>>, p. 2.

in multiple locales—North Carolina woods, California desert, and mountainous terrain to determine what effect integrating women into the small teams and sections that comprise infantry formations would have. Specifically, the effects on missions within the closed MOSs at various levels of integration, whether and how much the effects differ by MOS, how integration affects gender distributions of fatigue and workload during tasks, and whether it was possible to isolate quantifiable physical characteristics that lead to success by task.⁹⁹ The preparatory instruction was critical. It was designed to ensure all actions were conducted by doctrine rather than individual unit standard operating procedures, as the infantrymen came from throughout the Marine Corps' 23 active and reserve infantry battalions, and the non-infantry male and almost all female volunteers would not have completed training in the associated weapon systems or practiced the tactics to that point in their careers. The women were all sent to the basic occupational schools for the MOSs in which they would be evaluated. The whole group then began training together to build familiarity with each other and with the tasks they would perform. After this period, the unit deployed and were evaluated for three months in exercises at 29 Palms, California, the Corps' premier Air Ground Task Force training center and Bridgeport, California where its mountain warfare training occurs.¹⁰⁰ The experiment designers randomized assignment to the teams and sections, as well as position within the teams and sections for the integrated units. When possible two different levels of integrated teams were run through the drills, and their results were compared with all-male baseline groups of infantrymen.¹⁰¹ After the three months of exercises, the unit returned to Camp Lejeune, North Carolina where it disbanded

⁹⁹ Marine Corps Operational Test and Evaluation Activity (MCOTEA), 'Ground Combat Element Integrated Task Force Experimental Assessment Report', *US Marine Corps*, 14 August 2015, p. 2.

¹⁰⁰ Johnson and Pinelis, pp. 64-131; MCOTEA, pp. 9-10.

¹⁰¹ Johnson interview, approx. 85:38. The difference in integration was between low density integration- a team or section with one woman, and a high-density integration, a team or section with more than one woman integrated into it.

two months later. Between the unit's return in May and 15 August when MCOTEA presented the compiled report on its findings to the Commandant of the Marine Corps to decide whether an exception would be requested, the scientists and statisticians responsible for the experiment were busy. They poured through the data, conducted outgoing surveys to compare with incoming and in-process surveys and sought to answer all the questions in the research goals.¹⁰²

The Results

The results of the GCEITF were released in a 978-page report of findings from MCOTEA in September 2015 and were both quantitative and qualitative. Speed and accuracy of squads, teams, and sections were measured, recorded, and compared in several ways. Where collective or individual standards existed, the results were compared to those, by gender for individual results, and by level of integration for collective task results. Importantly, the results were further categorized as whether any differences between the results by gender or integrated team were statistically significant enough to warrant concern.¹⁰³ The Marine Corps was most concerned not whether an integrated team was slower or if males or females were poorer with a particular weapon system or task, but whether, when compared against existing standards or against other repetitions of the tasks, the difference mattered to combat efficiency or lethality.¹⁰⁴ Taken in total, the data showed Marine teams and sections with female members performed at lower overall levels, completed tasks more slowly and had lower accuracy than the all-male

¹⁰² Johnson and Pinelis, pp. 180-215.

¹⁰³ Smith, p. 18. Within the 134 observed tasks, there were 93 which presented significant differences between integrated and all-male teams. Of these, in 88 of the tasks an all-male team was the statistically better.

¹⁰⁴ MCOTEA, pp. 15-72.

baseline teams.¹⁰⁵ Additionally, female Marines sustained injuries at a significantly higher rate and had lower levels of physical performance overall.¹⁰⁶

While the results led then-Commandant General Joseph Dunford, who would assume the position of Chairman of the Joint Chiefs of Staff, to request an exception for certain MOSs and types of units on behalf of the Marine Corps, they were not entirely negative. The results showed some areas of concern, specifically morale and unit cohesion, voiced by those against integration were less a factor than imagined, contrary to arguments made time and again in the decades of exclusionary policies. The results also brought other considerations to light which would help the Marine Corps' efforts to integrate successfully, including efforts at redesigning equipment making it function better ergonomically for women, thereby improving their performance. Maybe most importantly when thinking about the culture, according to Sergeant Major Robin Fortner who was the experimental unit's senior enlisted leader (and senior-most female):

This became bigger than gender...this was about leadership, making the (male) Marines understand women issues are your issues, just like during my years as a leader, every male issue was my issue...and those young ladies, we put them in the middle of the 2d Marine Division, they experienced bullying and other things socially, as did the men, and yet we still expected them to perform.¹⁰⁷

The GCEITF experiment was dismissed by the Secretary of the Navy as biased despite the amount of resources dedicated or screening of volunteers that preceded it. The day after the results were released, he told the Navy Times in an interview he did not see a reason for an exemption.¹⁰⁸ In an interview with National Public Radio's Tom Bowman ten days later he said:

¹⁰⁵ Seck, 'Mixed Gender Teams'. A notable exception to this was the employment of the heavy crew-served weapon system, M-2, which though the women were slower to emplace and begin employment of it, their accuracy was better than both infantry and non-infantry males.

¹⁰⁶ Ibid.

¹⁰⁷ Fortner Interview, 46:30-1:10:10.

¹⁰⁸ Seck, 'Mixed Gender Teams'.

Part of the study said that women tend not to be able to carry as heavy of a load for as long, but there are women who went through this study that could. And part of the study said that we're afraid that because women get injured more frequently, that over time women will break down more. That you will begin to lose your combat effectiveness over time. That was not shown in this study. That was an extrapolation based on injury rates, and I'm not sure that's right...It started out with a fairly large component of the men thinking this is not a good idea and women will never be able to do this. When you start out with that mindset, you almost presuppose the outcome.¹⁰⁹

During testimony about the progress of integration five months later, he was asked by the Chairman of the Senate Armed Services Committee, John McCain, how he concluded that the study was flawed if he had only received the almost 1000-page document the day before and never traveled to any of the training locales to see the training or meet the leadership or volunteers.¹¹⁰ During the testimony, Secretary Mabus responded he, "had read the conclusions that the Marines drew from the study prior to his remarks and those conclusions which were based on averages and not on individual Marines."¹¹¹

Whether Secretary of the Navy Mabus was right in his opinion of the study's merit, or whether the Marine Corps' Operational Evaluation Activity was correct in the form of its experiment matters little. Secretary of Defense Carter decided for full integration, with no exceptions. Once that happened, both the Army and Marine Corps began their implementation plans, sending women, both enlisted and officers, through their schools in the previously restricted MOSs. As of April 2020, 50 women had graduated the Army's Ranger School, one of their physically and mentally toughest, and one woman has graduated at the top of her Infantry

¹⁰⁹ Tom Bowman and Laura Wagner, 'Controversial Marine Corps Study on Gender Integration Published in Full', *National Public Radio*, 4 November 2015, <<https://www.npr.org/sections/thetwo-way/2015/11/04/454672813/controversial-marine-corps-study-on-gender-integration-published-in-full>>

¹¹⁰ U.S. Government Publishing Office.

¹¹¹ 'Hearing on Integration of Women in the Armed Forces-Armed Services Committee SD-G50,' *YouTube*, 1 February 2016, <<https://youtu.be/9drXv-IaHy8>> [accessed 12 July 2022].

Basic Officer Leaders Course class of 207 lieutenants.¹¹² By the end of 2019, there were 231 women Marines serving in previously restricted MOSs.¹¹³ Three of eleven women who attempted the Marine Corps Infantry Officer's Course graduated and in 2018, the first woman ground combat battalion commander assumed her post.¹¹⁴ Important as these milestones are in integration, the hard part remains ahead for the services. Retaining the women who have passed the schools—those that were previously screened and found above average to go to the schools and growing the number of women within the previously restricted fields is challenging. Based on individual desire and ability to meet the standards, the Force Innovation Office found it difficult to project when the numbers of women serving in the infantry would exceed what could be viewed as tokenism. Especially considering after 25 years of integration and with lower standards, the number of enlisted women in the Canadian Army's infantry has less than half a percent.¹¹⁵ Other challenges that present with the small numbers are difficulties in the assignment process to balance the number of women throughout the units when normal rotations and required collateral duties outside the MOSs are factored in. Add to that the influence of the gender norms Goldstein and other researchers have written on and small unit cultures that remain insular and the difficulty rises.

¹¹² Ellen Haring, 'Meet the quiet trailblazers', *Army Times*, 3 May 2020, <<https://www.armytimes.com/opinion/commentary/2020/05/03/meet-the-quiet-trailblazers/>>

¹¹³ Thomas Gibbons-Neff, 'The Marine Corps Battles for Its Identity, Over Women in Boot Camp', *The New York Times*, 28 April 2020, <<https://www.nytimes.com/2020/04/28/us/politics/marines-women.html#:~:text=As%20of%20late%202019%2C%20at%20least%20231%20female,of%20female%20Marines%20and%20those%20in%20ot%20her%20services>>

¹¹⁴ Philip Athey, 'Another female Marine expected to graduate from the Infantry Officer Course Friday', *Marine Corps Times*, 14 December 2020, <<https://www.marinecorpstimes.com/news/your-marine-corps/2020/12/14/another-female-marine-expected-to-graduate-from-the-infantry-officer-course/>>; Philip Athey, "'I had to be on": A look inside the career of the Corps' first female Marine ground combat battalion commander', *Marine Corps Times*, 18 June 2020, <<https://www.marinecorpstimes.com/news/your-marine-corps/2020/06/23/i-had-to-be-on-a-look-into-the-career-of-the-corps-first-female-marine-ground-combat-battalion-commander/>>

¹¹⁵ Smith, p. 6.

More effort is needed to educate the force to the benefits of integration as well as supervision to ensure members of the force whose behaviours run counter to the ethos of the Marine Corps are identified and, if necessary, removed. In 2017, a photo-sharing scandal in which a Facebook group named Marines United that shared compromising photos of female Marines and other female servicemen broke into the public consciousness. The ensuing investigation did not identify the large majority of the group's real identities or verify whether they were servicemembers, but it did cast light on a bigger problem, finding other groups with alleged ties to the other services and sites like 'Just the Tip, of the Spear' specializing in crude humor and gender-bashing.¹¹⁶

There remain other challenges for women to be accepted and for a career in the infantry to be realistic. As the GCEITF showed, there were certainly women who could physically perform to the level required. But with—on average—less lean-muscle mass, a slighter build that has cumulative effects on stride length and frequency under full loads, and less anaerobic and aerobic capacity than most men, women who choose the infantry start with a competitive disadvantage to males in merely performing to standard.¹¹⁷ In MOSs where the physical aspect of the field factors heavily into evaluations of a Marine's competence, this can have detrimental effects to retaining and advancement of women who become infantrymen. Compounding this, for women to mitigate the risks for injury associated with a slighter frame, they will need to add more muscle mass. The Marine Corps' height and weight standards are notoriously stricter than the rest of the Department of Defense, and the weights were determined from studying sailors in

¹¹⁶ 'US military nude photo sharing scandal widens beyond Marines', *BBC News*, 10 March 2017, <https://www.bbc.com/news/world-us-canada-39227547> [accessed 18 June 2022].

¹¹⁷ Smith, pp. 5, 7.

1984.¹¹⁸ This was many years before it became as common for either men or women to engage in functional fitness or sport muscular frames, and on a study sample set with much different duty requirements. With the muscle mass needed to perform in the infantry, most women will have a difficult time conforming to the height and weight standards, further jeopardizing their career advancement. In addition to gender-neutral standards for each MOS, the Marine Corps will need to consider revising its height and weight standards or add a process to allow commanders the latitude to waive the standard in a way that is less onerous than present. If the Marine Corps chooses the latter, it opens the door for criticism of commanders as different unit commanders' interpretations could lead to inequitable treatment between units inadvertently giving fuel to those who point to inequality between expectations for men and women. Added to the stress of maintaining physical standards is the unknown aspect of what the career-length physical toll will be for women and the long-term health implications.

On the positive side of the ledger, those who opposed full integration because they feared a lack of unit cohesion or lower morale saw high levels of cohesion reported throughout the surveys administered during the GCEITF. While there was a drop in the final month of the experiment, the cause could not be pinpointed, and even all-male groups suffer a decline during adversity.¹¹⁹ This indicates that the types of attitudes seen at Tailhook and among those opposing integration for reasons of its effects on morale or integration can be overcome through experience and education. Also, on tasks that involved problem-solving, integrated teams did perform better on average, reinforcing the importance of diversity of thought. Additionally, the experiment brought a thorough evaluation of existing standards for combat arms MOSs. The data

¹¹⁸ Sharon Sisbarro and others, 'The DoD's Body Composition Standards Are Harming Female Service Members', *Military.com*, 31 December 2020, <https://www.military.com/daily-news/opinions/2020/12/31/dods-body-composition-standards-are-harming-female-service-members.html?ESRC=mr_210104.nl>

¹¹⁹ MCOTEA, p. 72.

from the GCEITF was combined with the review performed at all MOS schools as part of the second line of effort in the Marine Corps' plan to establish relevant, gender-neutral standards that to be used by recruiters and manpower personnel to ensure the right jobs were available to servicemembers of either gender who could perform them.¹²⁰ Additionally, while the GCEITF's main focus was providing the answers to the research questions which gave it life, there were concurrent studies, including those done by the University of Pittsburgh's Human Performance Research Center on its personnel, allowing the Marine Corps to prescribe its development and acquisition arm, the Marine Corps Systems Command to develop body armor and other war fighting necessary gear that is built with women's bodies in mind. In addition to increasing comfort, those re-designs are intended to reduce some of the injuries of women while engaged in load-bearing movements on foot, and increase their mobility when maneuvering under fire.¹²¹

Discussion

From the Tailhook Scandal to the final opening of all occupational specialties for women there were years of effort and sacrifice by, and on behalf of, women, both in and out of the service. In the Tailhook Scandal, there are similarities with some of the already examined cases on law of war violations in the way the service institution sought to mitigate damage to its reputation for actions that were, if not encouraged, then tacitly accepted. For instance, at Biscari during World War II, Patton's initial thoughts were to mischaracterize the actions for fear of civilian reaction. And after My Lai, though WO Thompson reported what he had seen immediately, it took the outside influence of Ron Ridenhour's letter to members of Congress and Army leadership to finally see an investigation started. Once LT Coughlin took the steps to go

¹²⁰ Smith, pp. 3-4.

¹²¹ Fortner Interview, approx. 50:43 and 82:47.

around her chain of command and get her statement of the events to Navy leadership, the investigations, however flawed, by NIS and the Inspector General began. Once media and public interest was clear in both My Lai and Tailhook, political pressure from politicians and politically appointed senior leadership within the Department of Defense became vocal in calling for justice and change.

But that same pressure from the public and political spheres capable of driving change, often reflected and crystalized within media voices, seems unable to affect the entertainment industry's veneration of poor behaviour. Whether it is the portrayal of the fighter pilot-fraternity antics in movies like *Top Gun*, released in 1986; the profanity and abrasiveness of *Jarhead*, released in 2005; or the hazing of recruits and treatment of women or civilians as less worthy in films such as *Full Metal Jacket*, released in 1987, the societal impact and acceptance of the behaviours portrayed cannot be underestimated.¹²² Despite the negative reactions following Tailhook, those types of movies, or television programming like it, have never gone out of vogue and their exploitative inclusion of some salacious topics not germane to the plot are hardly ever criticized. Depictions in Hollywood on the large and small screens attempt to best their predecessors as portraying increasingly exaggerated as the business-as-usual life of a Marine or soldier. While many of these performances are caricatures of daily service life, the underlying attitudes that spawn the behaviours portrayed exist and require attention from leaders at every level. The tacit approval from society, evidenced by the popularity of the genre, rather than the rejection of the toxic aspects of the culture depicted does not help efforts to check those behaviours. Indeed, with the advent of high-level gaming consoles, it is now as easy to find

¹²² Information on release dates found on the Internet Movie Database website. *imdb.com*. [accessed 3 February 2021].

games which encourage those same types of negative treatment of women and violations of the law of war.¹²³

During the extensive interviews with victims and perpetrators at Tailhook, there was a recurring theme found in the verbal or nonverbal harassment the perpetrators used and victims endured. Much of it was about the inferiority of women. An example of the nonverbal aspect of this were the “Women are Property” t-shirts worn by some on the third floor of the hotel.¹²⁴ This same sort of dehumanization is found when researching the violations of law of war in the earlier case studies. References to the “Mere Gook Rule” to excuse attacks on the Vietnamese—both prisoners and civilians alike—or the degrading names for the enemy that come out of every war. For women servicemembers assaulted during Tailhook, the vitriol included questions about their abilities to do their jobs or serve their country to the same level. It is the same type of things said whenever a new group has integrated into the armed forces, whether racial integration during World War II, the repeal of “Don’t Ask, Don’t Tell” (DADT) that led to the opportunity to serve for those openly homosexual, and even still present during the most recent integration of women. This was despite the long, incremental strides at inclusion women went through from World War II hence. For African-Americans, those in opposition tried to question their intellectual aptitude, for the women their physical aptitude, for homosexual servicemembers their morality or mental well-being.¹²⁵

¹²³ “First person shooter” games or games like Grand Theft Auto are marketed for their ability to allow the players to do as they like. In some of these types of games, specific programming allows for verbal or physical abuse of women, or in the shooter games, the killing of surrendering enemy or use of weapons systems on characters within gameplay not allowed under real-life conventions.

¹²⁴ Office of Inspector General, Part 2, p. 85.

¹²⁵ Szayna, pp. 40-45.

In addition to the specific “weakness” that was argued before each group’s integration, there were several other arguments trotted out each time. Concern for the impact to unit cohesion or to morale and the costs associated with the changes are just some.¹²⁶ In each case, studies conclude that after high levels of opposition before integration, opposition dropped markedly after other servicemembers actually served with the newly included groups.¹²⁷ A sign of progress during the integration of women since the repeal of DADT was the assertion by the senior-most members of the branches reminding their services of the significantly less-than-expected disruptions to normal operations that followed the repeal. One variable to continue to watch is whether the development of occupation specific gender-neutral standards ensures enough high performing men and women enter into the combat arms MOSs to avert a decline in cohesion due to lack of trust or respect in ability similar to that seen after intensely physical periods like during the last month of the GCEITF. While this decline can and does happen in all-male units after experiences in which some members do not “measure up,” it could be exacerbated early in the integration process by existing attitudes resistant to integration.

Similarly, the Army and Marine Corps need to continue efforts to change the perception that this revision of policies were politically motivated ones thrust upon them to provide promotion opportunity rather than being about broadening the pool of eligible and qualified members or combat efficiency and lethality. Hampering these efforts are past discussions, interviews, and testimony before the legislative branch using career and promotion opportunity as a central rationale of the need for integration.¹²⁸ To do so, both services not only need to

¹²⁶ Seck, ‘Mixed Gender Teams’.

¹²⁷ Szayna, p. 46. Agnes Schaefer and others, ‘Implications of Integrating Women into the Marine Corps Infantry’, *RAND Corporation*, 2015, <https://www.rand.org/content/dam/rand/pubs/research_briefs/RB9800/RB9878/RAND_RB9878.pdf> p. 1.

¹²⁸ Government Accounting Office, p. 14; Kamarck, p. 10; Whitlock, ‘Four Female Servicemembers Sue’.

continue refining and maintaining gender-neutral standards that promote the highest levels of performance on the battlefield but educate its members and the public at large about these standards and their effects. Additionally, the Department of Defense should make careful consideration about its support or involvement in any entertainment medium, such as film or television, which either portrays or helps sustain the sort of toxic masculinity which breeds the attitudes so prevalent at Tailhook. While the armed forces' level of respect and admiration from the civilian population rose considerably, and remains high, after the institution of the All-Volunteer Force, the erosion of that respect is only ever a few well-publicized incidents away. For a military that is large and often engaged in responses to crises rather than taking long view approaches to solving its problems and misinterpreting or failing to learn lessons from past failings in accountability or discipline can be costly. This chapter shows that societal influences and small unit culture both play a role in failures in military discipline against non-combatant which underscores the importance of addressing the cultures within military purview as part of the solution. The next chapter, on the prisoner abuse at Abu Ghraib, will show how poorly both the societal and small unit cultures can turn a situation.

Chapter Four: Abu Ghraib—Bad Apples or Policy Fail?

Throughout the history of the U.S. military, there have been several incidents which led to public reflection and discussion about the actions of its soldiers and periods of introspection over 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.¹ 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 anti-war movement and united disparate groups within America.² 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, which had experienced rising public esteem in the decade and a half since Vietnam, flush from the recent victory of Operation Desert Storm. The Tailhook ’91 Scandal was, in the words of a member of the 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.³ The evening of 28 April 2004 was another such evening. That evening, though knowledge of the abuses of

¹ Edwin B. Moise, ‘Tet in the News’, *Vietnam*, Vol. 31, No. 5 (2019), pp. 33-34.; William Hammond, ‘The Press in Vietnam as an Agent of Defeat: A Critical Examination’, *Reviews in American History*, Vol. 17, No. 2 (1989), p. 312.

² Samuel Moyn. *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Straus, and Giroux, 2021), p. 11.

³ Draude Interview, 46:43; Jean Zimmerman, *Tailspin: Women at War in the Wake of Tailhook* (New York: Doubleday, 1995), pp. 100-101, 136-138.

detainees started trickling out in the preceding months, the weekly TV news show *60 Minutes II* aired a story detailing the scope of abuses at one prison, Abu Ghraib (also known as the Baghdad Central Confinement Facility). The story was amplified by descriptions of the physical and mental abuses and accompanied by graphic photographs causing an immediate impact. Two and a half years after the attacks of 11 September 2001, after two years of fighting in Afghanistan, and over a year in Iraq, the abuses spurred discussion and reflection over the revulsion at the acts but failed to serve as the same kind of change agent as the previously named events. Again, the effects of race and gender would be apparent, this time augmented by the lingering societal emotions over the 9/11 attacks.

The abuses occurred between October and December of 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 the mass or their exposed limbs, and even a male MP “having sex with a female detainee.”⁴ Additionally, there were psychological abuses from coerced acts, which included threats from unmuzzled working dogs, videotaping or photographing naked male and female detainees—sometimes while in arranged sexually-explicit positions or while being forced to 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.⁵ 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 Major General Antonio Taguba over

⁴ While the initial inclination is to assume the sexual intercourse between the MP and female detainee was rape, the specific language used in Major General Taguba’s investigation was as stated above, with no amplifying explanation to provide additional context.

⁵ Taguba, pp. 16-17.

the next month, the Abu Ghraib Prison Scandal became a topic of debate throughout the summer for many different news outlets.

Unlike My Lai and Vietnam however, instead of reigniting a movement that just over a year before sought to forestall and avoid war, Abu Ghraib might have instead helped to prolong the war despite prompting dialogue about the law of war and legality of different aspects of that conflict.⁶ 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. Despite the public conversation focusing on the abuse though, 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.

As in previously examined case studies, several questions are paramount. To what extent is the 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 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

⁶ Moyn, pp. 8-12, 163, 253.

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 over time from World War Two to present.⁷ With Abu Ghraib happening so soon after the beginning of the war, rather than the incidents looked at during World War Two or Vietnam, it is a safe assumption that using newly, or expediently, trained soldiers was not the issue. But the demand by Secretary of Defense Donald Rumsfeld to keep the overall numbers of troops involved lower than what the generals desired—leading to troops stretched inexcusably thin—combined with some bad planning assumptions and slackening of restrictions on interrogation for intelligence enabled by administration legal guidance, points to culpability for the incident at higher levels than merely those eventually convicted soldiers. 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.⁸ That is not to say those soldiers 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 soldier’s duty to conform to the laws of war.

Public response to Abu Ghraib, as we shall see, was visceral but unfortunately did not have the effect of forcing full accountability at levels above lower ranks. Some of the

⁷ During World War Two, 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 the Marine Corps Historical Branch publication on World War Two Ground Training. 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 pre-deployment regimes.

⁸ Tatiana Morales, ‘Rumsfeld Vs. The Generals?’ *CBS News*, 1 April 2003, <<https://www.cbsnews.com/news/rumsfeld-vs-the-generals/>> [accessed 2 October 2022].

information I present below, concerning the training of the soldiers involved and planning assumptions which helped set poor conditions, was the result of oral history interviews conducted with members of the military police unit at Abu Ghraib or those who later guarded it. It confirms assertions that the soldiers had good training, though not all the required training needed when the nature of their detainees changed, and the effect that the bad planning had on the primary unit. The incident also displays how the culture of a small group can become unaligned from an organization's stated value set, especially when given opportunity and encouragement to exceed previous restraints to their actions. While at Tailhook there was tacit acceptance, likely taken for approval, from senior levels, at Abu Ghraib, the accused were given explicit instructions to exceed regulation-mandated techniques by those senior to them in rank, albeit outside their normal chain of command.

Abu Ghraib Prison, 2003-2004

Following the invasion of Iraq and quick coalition victory from March through May 2003, the Ba'athist government of Saddam Hussein was dissolved, and the Iraqi Army likewise disbanded. These moves, along with subsequent banning of any former Ba'athist 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 this violence started, however, reports from organizations like Human Rights Watch and Amnesty International began warning of abuses taking place within American detention centers across Iraq.⁹ By November 2003, Associated Press had picked up the story, chronicling the experiences of Iraqis in facilities throughout the country, including Abu Ghraib. Though Brigadier General Janis Karpinski, the

⁹ Amnesty International Press Release. 'Iraq: Human Rights Must Be a Foundation for Rebuilding', *Amnesty International*, 20 June 2003, <<https://web.archive.org/web/20160207002301/https://www.amnesty.org/download/Documents/108000/mde141362003en.pdf>> [accessed 5 November 2021].

US Army commander of all detention facilities in Iraq, had maintained prisoners were treated humanely and fairly, AP questions submitted in reference to the story were not answered.¹⁰

In mid-January 2004, a little-noted news release by the U.S. Central Command announced an investigation into reported detainee abuse at a Coalition Forces' facility. By February, the *Washington Post* ran the news of the suspension of 17 soldiers and followed that up with a story announcing charges against 6 soldiers on 21 March.¹¹ A *New York Times* story, also on 21 March, covered the investigation into detainee abuse, dating back to November and December of about 20 detainees, and also announced a significant review of commanders' policies regarding detainees and of internal procedures of prisons in Iraq.¹² On 28 April, *60 Minutes II*, a weekly television news magazine, 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 with mentions of abuse, investigations, and charges though, it was not until the TV programme 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.¹³ On 7 May, in response to the revelations of the abuse, 110 members of Congress formally requested the Secretary of Defense have the Department of Defense Inspector General (DOD IG) supervise the investigations into abuse and other violations of the law of war at Abu Ghraib. By 13 May, the IG notified the service secretaries of the formation of a multidisciplinary team to monitor allegations of detainee

¹⁰ 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, <<http://legacy.utsandiego.com/news/world/iraq/20031101-0936-iraq-thecamps.html>> [accessed 3 November 2021].

¹¹ Taguba, p. 17; Michael Getler, 'The Images Are Getting Darker', *The Washington Post*, 9 May 2004, <<https://www.washingtonpost.com/archive/opinions/2004/05/09/the-images-are-getting-darker/815a7763-e385-4b46-a069-a53b8804d9ff/>> [accessed 5 Nov 2021].

¹² Thom Shanker, 'The Struggle for Iraq: The Military; 6 GIs in Iraq Are Charged with Abuse of Prisoners', *The New York Times*, 21 March 2004, <<https://www.nytimes.com/2004/03/21/world/struggle-for-iraq-military-6-gi-s-iraq-are-charged-with-abuse-prisoners.html>> [accessed 5 November 2021].

¹³ Rebecca Leung, 'Abuse of Iraqi POWs By GIs Probed', *60 Minutes II*, 27 April 2004, <<https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/>> [accessed 23 March 2022].

and abuse which levied reporting requirements on all the military criminal investigation organizations.¹⁴ 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.”¹⁵

How Abu Ghraib Broke, the Investigations, and Results

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 Darby was a military policeman and member of the unit responsible for detainee operations and security at the facility. Desiring to send home photos of Iraq, he borrowed a compact disk of photos from a fellow soldier, Charles 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 photos with an anonymous note and initially hoped to keep his name unknown to avoid retribution. Despite the initiation of the ensuing investigations coming from the actions of this lower-ranking soldier, Major General Taguba became convinced during his investigation that there was awareness of the abuse within higher headquarters in Iraq and elsewhere.¹⁶ While Darby’s request to remain anonymous was initially honored, he was later

¹⁴ Shelton Young, ‘Review of DOD-Directed Investigations of Detainee Abuse, Report No.6’ Deputy Inspector General for Intelligence, Department of Defense, 25 Aug 2006, <<https://irp.fas.org/agency/dod/abuse.pdf>> [accessed 19 Dec 2021], p. i.

¹⁵ Dean Bland, ‘The Abu Ghraib Scandal: Impact on the Army Profession and the Intelligence Process’, (Master thesis, US Army War College, 2005), p. 1.

¹⁶ Seymour Hersh, ‘The General’s Report’, *The New Yorker*, 18 June 2007, <<https://www.newyorker.com/magazine/2007/06/25/the-generals-report>> [accessed 7 Oct 2021], pp. 7-8.

quickly removed from Iraq after Secretary Rumsfeld publicly lauded his actions during a press conference.¹⁷

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.¹⁸ There were thirteen executive-level investigations or assessments led by general officers from the Army, National Guard, Navy, Department of Defense and even an Independent Panel to Review DOD Detention Operations chaired by the retired Secretary of Defense and Energy, James Schlesinger, of which two assessments of detainee operations preceded Darby's revelation. While not all investigations were directly related to Abu Ghraib, it is instructive to the question of how seriously the military took the revelation of the abuse 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 military to accurately assess the depth of the problem, however the limitations on scope and subject of the investigations undoubtedly hindered the government, and therefore the public, receiving a complete appraisal.

In late August through early September 2003, Major General Geoffrey Miller, who was the Commander of the Joint Task Force Guantanamo Bay, assessed the strategic interrogation of detainees in Iraq and among his recommendations were that guard force be trained to assist in setting "conditions for the successful interrogation and exploitation of internees/detainees."¹⁹

¹⁷ Dawn Bryan, 'Abu Ghraib whistleblower's ordeal', *BBC News*, 5 Aug 2007, <http://news.bbc.co.uk/1/hi/world/middle_east/6930197.stm> [accessed 21 Dec 2021].

¹⁸ Keith Rohman, 'Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study', *Penn State International Law Review*, Vol. 28 No. 1 (2009), p. 7.

¹⁹ Young, pp. 32-33; Taguba pp. 5, 8-9.

This recommendation was countered in a subsequent comprehensive assessment on detainee and corrections systems in Iraq conducted by Major General Donald Ryder, a onetime Provost Marshal General of the Army, which stated “the OEF template whereby military police actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility.”²⁰

Major General Taguba’s investigation followed these first two assessments into the operation of detention centers, but 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.²¹ During his investigation, which lasted from 19 January to 9 March 2004, he and the 23 members of his team found that, contrary to the findings and guidance in the earlier, Ryder, investigation, there had been active requests by military intelligence personnel to change facility procedures in order to “set the conditions” for interrogations.²² While certainly not a mitigating circumstance, it expands culpability for the crimes committed beyond members of the 800th MP brigade but those he felt 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 increasingly difficult for one investigator to truly outline the full scope of crimes, involvement of individuals and 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, basic standards were not met or enforced, and leaders were unable or unwilling to confront situations

²⁰ Young, pp. 32, 34; Taguba, p. 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.

²¹ Most of the soldiers who would be charged for the abuses were from the 372nd Military Police (MP) Company of the 320th MP Battalion. The 800th MP Brigade was the higher headquarters for these units and supervised all units responsible for detainee operations within Iraq at the time.

²² Taguba, pp. 6, 18; Young, pp. 32, 36-38.

of misbehaviour or misconduct.²³ While these particular issues are basic tasks to enforce good order and discipline in a unit, there are distinct parallels between those breakdowns in this case and those of My Lai and Son Thang, as well as several of the incidents detailed in the Iraq case study to come. Breakdowns of discipline unaddressed, or tacitly accepted, by leadership seems 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 MP unit and intimate a wider knowledge and lack of action about the abuses, it seemed to particularly anger Secretary Rumsfeld.²⁴ This may have been due to the report being leaked after it was submitted, giving Rumsfeld and others within the Department of Defense and the administration little time to prepare for the inevitable onslaught of questions.²⁵ Seven soldiers were charged following the release of the Taguba Report.

While Taguba and his team were carrying out their investigation, the Acting Secretary of the Army announced that he had directed the Army's Inspector General, Lieutenant General Mikolashek, to assess ongoing detainee and interrogation operations and doctrine and training of those personnel. This assessment ran for four months from February to June. The overall thrust of the findings were 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.²⁶ This

²³ Taguba, pp. 2-3.

²⁴ Young, p. 32.

²⁵ Hersh, p. 4.

²⁶ Young, pp. 32, 39-44. These roles are that of those that care for and confine the detainees (military police) and those that interrogate the detainees (military intelligence). Without the need of intelligence, some of the detainees

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. Though deficiencies were noted in some of the training, there persisted an overwhelming confidence in the ability and propensity of peers and leaders to ethically treat detainees in accordance with the applicable laws of war.²⁷ 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 IG assessment was ending and the Army Reserve IG's assessment was beginning, yet another investigation began. Major General George 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 MPs. It was made clear though, that this was individually directed, and not officially sanctioned or approved.²⁸ Because Major General Fay could only interview people subordinate in rank to himself, Lieutenant General Anthony Jones was appointed as an additional investigating officer by higher headquarters and directed to focus on whether organizations or personnel higher than the 205th MI Brigade chain of command were involved, directly or not, in

would not be in US custody, and in order to gain useful intelligence the detainees must be kept secure and healthy enough for interrogation.

²⁷ Young, pp. 32, 45-46.

²⁸ *Ibid.*, pp. 32, 47-53.

the alleged abuse at Abu Ghraib.²⁹ Following the release of the Fay Report, another 3 soldiers of the 800th MP Brigade were implicated, in addition to 27 members of the MI Brigade, including 4 civilian contractors. This report also said responsibility for the abuses went higher than the brigade levels.³⁰

In total, five senior level assessments and investigations began throughout May 2004. The Independent Panel to Review DOD Detention Operations, headed by former Defense Secretary James Schlesinger, lasted three months finishing in August 2004 and fixed some blame for creating conditions which led to brutal acts and purposeless sadism at Abu Ghraib on senior military commanders and top Pentagon officials, including Donald Rumsfeld.³¹ It was released the day before the Fay report. The Independent Panel reviewing all DOD detention operations followed immediately after the completion of a similar examination of the Navy's two facilities responsible for securing and interrogating detainees at Guantanamo, Cuba and the Naval Consolidated Brig at Charleston by the Navy's Inspector General. A second, fuller investigation, tasked Vice Admiral Albert Church with reviewing all DOD interrogation techniques from Guantanamo 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 OGAs illuminated some of the conditions that led to the abuse in Abu Ghraib as well.³² Two other reports compiled during

²⁹ Karen Greenberg and Joshua Dratel, *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), p. 988.

³⁰ Steven Komarow, '30 More Implicated in Iraq Abuse', *USA Today*, 25 August 2004, <https://usatoday30.usatoday.com/news/washington/2004-08-25-iraq-fay_x.htm> [accessed 26 Dec 2021].

³¹ Young, pp. 32, 56-57; Dave Moniz and Donna Leinwand, 'Panel: Top officials played role in prison abuse', *USA Today*, 24 August 2004, <https://usatoday30.usatoday.com/news/washington/2004-08-24-abu-ghraib-report_x.htm> [accessed 27 Dec 2021].

³² Young, pp. 32, 54-55, 64-70.

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.³³

There were two other major assessments that began during the Independent Panel to Review DOD Detention Operations' duration. One was initiated by the US Army Surgeon General to assess medical care and policies for detainees, and additionally reporting of alleged detainee abuse by medical personnel. One of the findings of this report was insufficient assets allocated for 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 FBI allegations of detainee abuse at Guantanamo Bay over the three previous years.³⁴ The revelations of abuse at Abu Ghraib occurred 60 years on from the creation of the Department of Defense, and almost two decades following the Goldwater-Nichols Act, 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 that followed with limited scopes and jurisdictions 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 seventeen soldiers, including Brigadier General Janis Karpinski, the Commanding General of the 800th Military Police Brigade, were relieved of their duties.³⁵ In the

³³ Young, pp. 32, 58-63. The JSOTF tactical interrogation facilities were often only temporary, and run by SEALs, Delta Force operators, and at the TF headquarters to quickly obtain follow-on intelligence following the capture of High Value Targets before turning custody over to a conventional detention facility.

³⁴ *Ibid.*, pp. 32, 71-77.

³⁵ Rebecca Leung, 'Abuse at Abu Ghraib', *CBS News*, 5 May 2004, <<https://www.cbsnews.com/news/abuse-at-abu-ghraib/>> [accessed 29 Dec 2021].

end, eleven soldiers were convicted of various charges. These included seven reserve military policemen and two reserve military intelligence members. Additionally, two dog handlers from the Army were charged with crimes.³⁶ 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.³⁷ 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.³⁸ A common theme among the results of the numerous assessments, investigations, and reports is a third or less of the deaths or abuse allegations (across all detention centers) that were substantiated occurred during or were related collaterally to interrogations. While in a significant number of cases, this statistic shows a troubling linkage of abuse to the relaxation of torture rules, it shows many more were seemingly abuse for abuse’s sake, and therefore, law of war violations.³⁹ The Church report also found there was an expectation by Department of Defense 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 the those charged at Abu Ghraib. Many expressed confusion regarding which rules applied and the belief that other entities had separate SOPs and approved methodologies.⁴⁰

³⁶ Komarow, ‘30 or more Implicated’; Lueng, ‘Abuse at Abu Ghraib’.

³⁷ 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.

³⁸ Young, p. 68.

³⁹ *Ibid.*, pp. 55-56, 64.

⁴⁰ Young, p. 69; Taguba, pp. 18-19.

The Schlesinger Report, as the Independent Panel came to be known, contrasted with the Church report and others, finding “There is both institutional and personal responsibility at higher levels.”⁴¹ While the Schlesinger report points toward accountability as least as high as the Secretary of Defense, Donald 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 torture allowable in the War on Terror for the Bush Administration, helping to set the stage for Abu Ghraib.⁴²

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 Darby, then a specialist in the National Guard assigned to the 372nd MP 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 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.⁴³ This was not the case, however, once he returned to the U.S., where his family and he 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 enemy of the U.S.⁴⁴

⁴¹ Young, p. 67; Moniz and Leinwand, ‘Panel Top Officials’.

⁴² Moyn, pp. 242-245.

⁴³ Bryan, ‘Abu Ghraib whistleblower’s ordeal’.

⁴⁴ Ibid.; Hanna Rosin, ‘When Joseph Comes Marching Home’, *Washington Post*, 17 May 2004, <<https://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16.html>> [accessed 29 Dec 2021]; ‘Praise For Iraq

As noted earlier, Brigadier 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.⁴⁵ While the senior officer who actually suffered repercussions from the scandal, she did not accept the punishment without sharing her views regarding further culpability further up the chain of command. Following the first court-martial for the abuses, she told the BBC in an interview that she had been made a “convenient scapegoat” for the abuse and that Lieutenant General Ricardo Sanchez, who commanded all forces in Iraq at the time, should be asked what he knew about the abuse.⁴⁶ Following the revelations of the Taguba Report, which cast doubt that the military policemen had acted without prodding from the military intelligence personnel responsible for the interrogations at the prison, Colonel Thomas Pappas received a non-judicial punishment, a General Officer Memorandum of Reprimand, and was relieved of command.⁴⁷ The fact he was punished, while most of the convicted soldiers were members of another command, is fundamentally irreconcilable with the narrative that the soldiers responsible for the abuse were just bad apples. Another figure whose actions were called into question in the Taguba investigation was Lieutenant Colonel Steven 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

Whistleblower’, *CBS News and Associated Press*, 10 May 2004, <<https://www.cbsnews.com/news/praise-for-iraq-whistleblower/>> [accessed 5 January 2022].

⁴⁵ While named in the Taguba report as culpable for lack of leadership, her demotion was technically for other charges.

⁴⁶ ‘Iraq abuse ‘ordered from the top’’, *BBC News*, 15 June 2004, <<http://news.bbc.co.uk/2/hi/americas/3806713.stm>> [accessed 1 January 2022].

⁴⁷ The relief of his command, the non-judicial punishment for dereliction of duty—and its accompanying \$8000 fine—or the General Officer Memorandum of Reprimand would each on their own be enough to terminate Colonel Pappas’ career, but with all three punishments awarded, a clear statement was made indicating his unit was equally culpable for the horrific offenses.

officer to face a court-martial over abuse), for oppressing the detainees, lying about his knowledge of the abuses and dereliction of duty.⁴⁸ These charges were dismissed though, 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.⁴⁹ Though an investigator of the violations, rather than a participant, Major General Antonio Taguba himself 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 his treatment by his seniors, Rumsfeld's remarks during Congressional testimony, and his future assignments until retirement.⁵⁰

Trials

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 warzone which restricted access by reporters to the proceedings. In choosing to conduct them there, the Army could show that they were moving quickly to address the issue once it had been brought to light in a location where Iraqi witnesses were available. In the earlier examples, the trials which proceeded more quickly after incidents 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

⁴⁸ Ann Scott Tyson, 'Army officer charged in Abu Ghraib prison abuse', *The Seattle Times*, 29 April 2006, <http://seattletimes.nwsourc.com/html/nationworld/2002960310_ghraib29.html> [accessed 20 October 2022].

⁴⁹ Josh White, 'Officer acquitted of mistreatment in Abu Ghraib case', *Washington Post*, 29 Aug 2007, <http://archive.boston.com/news/nation/articles/2007/08/29/officer_acquitted_of_mistreatment_in_abu_ghraib_case/> [accessed 3 January 2022]; Hersh, p. 7.

⁵⁰ Hersh, pp. 1-4. Unfortunately, this seems to be a pattern, as LtGen 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's book *Not a Gentleman's War*.

interpreted as an effort by the Army to seek the widest accountability, the fact that the defendants were all relatively junior would suggest full accountability was lacking. The focus on the perpetrators—most of whom were junior—with little accountability for the either apparent lack of supervision, or tacit approval, signaled by the length of time these abuses persisted suggests that the Army was content to punish those responsible for torture without taking steps to fix the policies which enabled them or enforce commanders' culpability for those under their command. If Moyn was correct in that events at Abu Ghraib shifted the attention of the national conversation away from the actual torture in the prison to what constituted torture, the lack of public attention may have encouraged the Army to complete its proceedings as quickly as possible and not pursue 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 access to media. While the first two were beneficial to the government's pursuit of accountability, the third would cause some concern and gave rise to complaints from the defence and others who argued it made it easier for these soldiers to be made scapegoats.⁵¹ Pleas by civilian attorneys to move the trials out of Iraq due to possible command influence on witnesses and inability to force witnesses in the U.S. to appear in Iraq and attempts to bar contents of some defendants' computers were all denied.⁵² Specialist Jeremy Sivits, who took the infamous photographs of the abuse, pled guilty at a special court-martial for

⁵¹ Ryan Ashley Caldwell, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (Ashgate Publishing: Surrey, UK, 2012), p. 21. Among others, Caldwell asserted that the three women especially were made scapegoats and that all suffered from being labeled early on as "rotten apples" in the media.

⁵² Fred Francis, 'Judge won't move Abu Ghraib abuse trial', *NBC News*, 23 August 2004, <<https://www.nbcnews.com/id/wbna5795685>> [accessed 24 Feb 2022].

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 plea of guilty was part of a deal and his testimony implicated at least five other soldiers, including Specialist Charles Graner, one of the soldiers charged with the most serious abuses.⁵³ While this was progress towards accountability, with the lack of real consequences for the upper-level leadership in the case, it 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, though he testified against other soldiers, including a fellow analyst, Specialist Armin Cruz.⁵⁴ 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 dropped his sentence from the potential maximum of one year in confinement.⁵⁵

The ranking military policeman charged for abuse, Staff Sergeant Ivan Frederick II pled guilty at a general court-martial to conspiracy, dereliction of duty, maltreatment of detainees, assault and committing an indecent act in exchange for other charges being dropped in October 2004. 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

⁵³ Christian Davenport, 'Accused soldier details prison abuse', *Washington Post*, 14 May 2004, <<https://archive.seattletimes.com/archive/?date=20040514&slug=sivits14>> [accessed 5 January 2022]; Phillip Carter, 'Jeremy Sivits: Fired and Demoted?' *Slate.com*, 19 May 2004, <<https://slate.com/news-and-politics/2004/05/how-does-a-court-martial-work.html>> [accessed 5 January 2022]; 'US Soldier jailed for Iraq abuse', *BBC News*, 19 May 2004, <http://news.bbc.co.uk/2/hi/middle_east/3727289.stm> [accessed 5 January 2022].

⁵⁴ Greg Miller, 'Abu Ghraib Intelligence Soldier Describes Iraq Abuse in Detail', *Los Angeles Times*, 4 Jun 2004, <<https://www.latimes.com/archives/la-xpm-2004-jun-04-fg-prison4-story.html>> [accessed 5 Jan 2022].

⁵⁵ Norimitsu Onishi, 'Military Specialist Pleads Guilty to Abuse and Is Jailed', *The New York Times*, 12 Sept 2004, <<https://www.nytimes.com/2004/09/12/world/middleeast/military-specialist-pleads-guilty-to-abuse-and-is-jailed.html>> [accessed 5 January 2022].

was lucky to receive only an eight year sentence on top of his reduction to private, forfeiture of pay, and dishonorable discharge.⁵⁶ Also in October, Specialist Megan 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.⁵⁷

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 plea and sought to fight all 10 the 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 down-graded. 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.⁵⁸ His lending of two compact disks full of pictures to Joseph Darby, when Darby was looking for photos to send home, had set in motion the investigations that finally brought the abuses to light.⁵⁹ Graner's defence 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 defence, 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 over two thirds of the incidents were not linked to interrogations, and it is

⁵⁶ 'Court-Martial Record, case of Staff Sergeant Ivan L. Frederick, II', *U.S. Army Judiciary*, 20-21 Oct 2004, <https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOD041193.pdf> [accessed 5 January 2022], pp. 2, 17-20.

⁵⁷ L. B. Edgar. 'Harman found guilty for Abu Ghraib', *Army News Service*, 19 May 2005, <<https://web.archive.org/web/20071123112051/http://www4.army.mil/news/article.php?story=7348>> [accessed 5 January 2022]. Ambuhl's dereliction in part stems from her failure to report violations of their orders.

⁵⁸ 'Graner gets 10 years for Abu Ghraib abuse', Associated Press, 6 Jan 2005, <<https://www.nbcnews.com/id/wbna6795956>> [accessed 5 January 2022].

⁵⁹ Joshua E. S. Phillips, *None of Us Were Like This Before: American Soldiers and Torture* (London: Verso Books, 2010), pp. 118-119. The first of the disks contained only photos 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.

unclear if his defence 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 Davis, a military policeman, began his trial with a defence motion to dismiss the charges due to unlawful command influence. After the judge heard and denied the motion, Davis pled guilty to three charges. During the ensuing questioning from the judge prior to sentencing beginning, when asked for the the reason why he had committed the abuse Davis said that “I lost it. It didn’t justify what I did.” His defence 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.⁶⁰ In May, Specialist Sabrina Harman, another Army Reserve military policeman, was sentenced to six months’ confinement, reduction to private, forfeiture of pay and allowances and a bad conduct discharge. The charges her panel found her guilty of were conspiracy, maltreatment, and dereliction of duty.⁶¹ While more soldiers were held accountable for Abu Ghraib than at 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.

⁶⁰ Matthew Chlosta, ‘Two more Soldiers sentenced for Abu Ghraib abuse’, *Army News Service*, 10 Feb 2005, <https://web.archive.org/web/20050915220948/http://www4.army.mil/ocpa/read.php?story_id_key=6843> [accessed 3 January 2022].

⁶¹ Edgar, ‘Harman Found Guilty’.

Perhaps the best-known face of the abuses, Private First Class Lynndie England appeared in some of the most infamous photos as in those 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 the testimony of Graner to her statements. After her subsequent trial in September, where her defence 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, and awarded a forfeiture of all pay and allowances and a dishonorable discharge. She served just under half of her sentence before being released.⁶²

The last two servicemembers that were tried in connection with Abu Ghraib were military working dog handlers. In March 2006, Sergeant Michael 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.⁶³ In May 2006, Sergeant Santos Cardona, was acquitted of all but one of the aggravated assault charges associated with using his working dog

⁶² Tony Gutierrez, ‘England sentenced to 3 years for prison abuse’, *NBC News*, 26 Sep 2005, <<https://www.nbcnews.com/id/wbna9492624>> [accessed 6 January 2022]; Liz Beavers, ‘England back in Mineral County’, *Cumberland Times-News*, 25 Mar 2007, <https://www.times-news.com/england-back-in-mineral-county/article_5919dee3-e19a-50c4-8ac8-f9c7b408c07d.html> [accessed 6 January 2022].

⁶³ Paul Corson, ‘Dog handler appeals conviction in Abu Ghraib case’, *CNN*, 8 Oct 2009, <<https://edition.cnn.com/2009/US/10/08/abu.ghraib.smith.appeal/index.html>> [accessed 5 January 2022]; ‘U.S. v. Michael J. Smith, Criminal Appeal No. 20060541’, *United States Court of Appeals for the Armed Forces*, 4 Feb 2010, p. 2.

to frighten and intimidate detainees—it eventually 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 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 Ft. Bragg, North Carolina. Afterwards, he rejoined his unit in Kuwait for a deployment into Iraq before the Army rescinded his deployment order. He was not allowed to re-enlist at his contract's expiration and left the Army in 2007 with an honorable discharge. He was killed by a roadside bomb in Afghanistan in 2009 where he was working as a contractor.⁶⁴

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, though their parent companies became the target of lawsuits. In 2013, Engility Holdings, Inc. paid out \$5.28 million for the actions of a former employee of its subsidiary, L3 Services, Inc., at Abu Ghraib.⁶⁵ Even into 2021, CACI, a contractor based in Virginia that supplied interrogators, continued its fight against another lawsuit that alleged its employees were complicit in torture.⁶⁶

While several of the eleven soldiers who were convicted appealed, there were no re-trials or substantial changes to sentences. Former Staff Sergeant Ivan Frederick's appeal arguing that

⁶⁴ Josh White, 'Abu Ghraib MP Slain in Bid for Redemption', *Washington Post*, 6 Mar 2009, <<https://www.washingtonpost.com/wp-dyn/content/article/2009/03/05/AR2009030503676.html>> [accessed 5 January 2022]; Andrea Siegel, 'Convicted reservist testifies', *Baltimore Sun*, 27 Jul 2005, <<https://www.baltimoresun.com/news/bal-te.abughraib27jul27-story.html>> [accessed 5 January 2022]; 'Soldiers convicted in Abu Ghraib scandal' *Associated Press*, 16 Oct 2006, <<https://www.baltimoresun.com/news/bal-ghraib-story.html>> [accessed 5 January 2022].

⁶⁵ Pete Yost, '\$5M paid to Iraqis over Abu Ghraib', *Associated Press*, 9 Jan 2013, <<https://apnews.com/article/41d6fbab70024ef894b3cdd3399701d9>> [accessed 6 January 2022].

⁶⁶ Matthew Barakat, 'Judge unimpressed by latest argument in Abu Ghraib case', *Seattle Times*, 10 Sep 2021, <<https://www.seattletimes.com/nation-world/nation/judge-unimpressed-by-latest-argument-in-abu-ghraib-case/>> [accessed 5 January 2022].

the denial of his request to move sentencing hearings from Iraq violated his right to be able to compel witnesses to appear, was denied.⁶⁷ The majority of the convicted served only slightly more than half of their sentences. For example, Charles Graner served 6 and a half of his 10-year sentence, Ivan Frederick served 4 of his 8 year sentence, Lynndie England served a year and 5 months of her 3 year sentence, and Sabrina Harman served about three months of her 6 month sentence.⁶⁸

Civil Reaction, Military Responses and Lessons from Abu Ghraib

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 ‘War on Terror’, into the everyday discussions and consciousness of America. Why was this such a revelation? After the decision to become an all-volunteer force following the Vietnam War, the military had re-tooled 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.⁶⁹ Throughout military actions in Grenada, Panama, and the First Gulf War, the short duration of the conflicts, lack of prolonged interaction with prisoners or non-combatants, and overall successful execution led America to move past its “Vietnam Syndrome.”⁷⁰ Several

⁶⁷ ‘U.S. v. Ivan Frederick Appeal’, United States Court of Appeals for the Armed Forces, 14 Oct 2004, p. 2.

⁶⁸ ‘Abu Ghraib abuse ringleader released’, Aljazeera, 6 Aug 2011, <<https://www.aljazeera.com/news/2011/8/6/abu-ghraib-abuse-ringleader-released>> [accessed 5 January 2022]; Beavers, ‘England back’.

⁶⁹ According to Gallup polls, in the years from 1975 until 2009, the confidence in the military as an American institution rose from 58% to 82%. There were dips in this confidence after Tailhook (from 85% immediately following the First Gulf War in February of 1991 to 69% in October of 1991), and Abu Ghraib (82% the summer of 2003 to 75% after the revelation of Abu Ghraib and the descent would continue 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, <<https://news.gallup.com/poll/1666/military-national-defense.aspx>> [accessed 17 September 2022].

⁷⁰ Though mentioned in several other sources, former Presidents Ronald 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, in speeches. George C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (New York: Oxford University Press, 2008), p. 912.

conditions helped America to be surprised by the scandal of Abu Ghraib, including the lack of attention span and national memory Kendrick Oliver discussed in his *My Lai Massacre in American History and Memory*, cited in Chapter Two.⁷¹ Added to this were the ability for America to stay disconnected with 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 Vietnam and the efforts of the Department of Defense to work closely with Hollywood to portray its soldiers in a positive light in movies from John Wayne's *The Green Berets*, even before Vietnam had ended, to Tom Cruise's *Top Gun*.

As previously noted, despite the public outcry over the behavior, the civil discourse quickly shifted from disgust at the conduct itself to disbelief that the abuses were in part made possible by a redefining of allowable treatment for detainees by the administration. As Jeremy Waldron, a noted legal scholar described, it caused a debate within America not only "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 Guantanamo Bay, Cuba 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.⁷²

⁷¹ Oliver, pp. 231-234. Oliver cited polls by the Washington Post and ABC News from 5-6 May 2004, that showed while initially a large majority 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 accused would decline with time.

⁷² Douglas V. Porpora and others, *Post-Ethical Society: The Iraq War, Abu Ghraib, and the Moral Failure of the Secular* (University of Chicago Press: Chicago, 2013), pp. 100-101.

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 or not in the heat of the moment or under stress, the conscious choice to disregard training and orders about the treatment of non-combatants or prisoners seemed to be excused. In the aftermath of Abu Ghraib, there was a predominant denouncement of the abuse itself, but the documented responses for and against the accused were rather split.⁷³ A larger conversation in the nation was of the legalization of the techniques used first at Guantanamo Bay and eventually encouraged by Major General Miller for use in exploiting interrogations for intelligence in Iraq.⁷⁴ While there were certainly public calls, including from Democratic congressman Kendrick Meek during a House Armed Services Committee hearing, for Rumsfeld to resign over the revelations of abuse, the level of complaint and frustration from the citizenry never reached a point that the administration asked for him to do so.⁷⁵ With the Presidential election approaching in November of that year, the scandal could not have come at a worse time. By May 2004, a Pew Research Center poll showed a majority of the country began to disapprove of the Bush Administration's performance after the Abu Ghraib

⁷³ Editorials against: 'Abuses at Abu Ghraib: Editorial', *The New York Times*, 1 May 2004, p. A 14; 'Abu Ghraib, Rewarded: Editorial', *The New York Times*, 22 June 2005, p. A 18; 'Findings on Abu Ghraib Prison: Sadism, 'Deviant Behavior' and a Failure of Leadership', *The New York Times*, 25 August 2004, p. A 10. Editorials/articles for: Ann Scott Tyson, 'Key General defends the 'Gitmo' way; In an interview, General Miller defends his command and addresses abuses at Abu Ghraib', *The Christian Science Monitor*, 28 June 2004, p. 1; Alberto Gonzales, 'The Rule of Law and the Rules of War', *The New York Times*, 15 May 2004, p. A 17.

⁷⁴ Taguba, pp. 19-20. Miller advocated that as at Guantanamo 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 Guantanamo Bay.

⁷⁵ Hersh, pp. 8-9.

scandal came to light.⁷⁶ 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, over 60%, believed this to be the case and accepted Administration explanations and by July, most domestic media furor had largely subsided leading to little effect on the elections four months later.⁷⁷

As we have seen, the military response included numerous investigations. These resulted in a measure of accountability at low levels, changes in both training and education and 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 pre-dated the uncovering of the Abu Ghraib abuses, over 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 the Department of Defense.

The revelations from Abu Ghraib followed other separate incidents of abuse resulting in three reserve soldiers being discharged in early January, and a battalion commander being relieved of command, given non-judicial punishment, and forced to retire after discharging his pistol near a detainee’s head in order to coerce information from him.⁷⁸ So despite this perceived overwhelming response, it was slow to start, and may not have reached the level of effort it did

⁷⁶ ‘Iraq Prison Scandal Hits Home, But Most Reject Troop Pullout’, *Pew Research Center*, 12 May 2004, <<https://www.pewresearch.org/politics/2004/05/12/iraq-prison-scandal-hits-home-but-most-reject-troop-pullout/>> [accessed 12 September 2022].

⁷⁷ Brian Drohan, ‘Abu Ghraib’, *Southern Methodist University*, 2014, <<https://cphcmp.smu.edu/2004election/abu-ghraib/>> [accessed 11 September 2022]; ‘Iraq’, *Polling Report.com*, 2015, <<https://www.pollingreport.com/iraq14.htm>> [accessed 11 September 2022]; Andrew Kohut, ‘Why the Polls Don’t Add Up’, *The New York Times*, 12 May 2004, p. A 23; Gonzales, ‘The Rule of Law and Rules of War’; Tyson, ‘Abuses at Abu Ghraib: Editorial’.

⁷⁸ Shanker, ‘Struggle for Iraq’.

had it not been for the actions of Darby. In fact, Pulitzer-prize winning journalist Charles Hanley chronicled abuses at prisons in Iraq in several articles as early as November 2003. His interviews for the article with former detainees corroborated some charges that Amnesty International made earlier still during the summer of 2003.⁷⁹ The fact that the trials moved forward quickly, and in Iraq, was initially promising, though acknowledgment of command responsibility was limited, as evidenced by the lack of punishment past the trials of the soldiers, Colonel Pappas' relief and non-judicial punishment, and Brigadier Karpinski's relief.

While the administration and armed forces may have hoped that the abuses would not be given widespread coverage before the *60 Minutes II* expose, given the relatively minor early efforts at investigating or substantiating allegations, once the genie was out of the bottle, the military was forced to display more interest and 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 non-combatants seriously, or at least worried more about other day-to-day operational concerns than that treatment. This focus on operational issues was a result, in large measure, to 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 which would be cared for by soldiers not fully-trained and exacerbated by shifting interrogation rules and murky command structures, which all affected the outcome.

With regard to other military immediate responses, changes in handling detainees everywhere were instituted quickly. At the beginning of the war, empty sandbags were used as

⁷⁹ Charles Hanley, 'Former Iraqi detainees tell of riots, punishment in the sun, good Americans and pitiless ones', *Associated Press*, 1 Nov 2003, <<http://legacy.utsandiego.com/news/world/iraq/20031101-0936-iraq-the-camps.html>> [accessed 6 January 2022]; 'Continuing failure to uphold human rights', *Amnesty International*, 22 Jul 2003, <<https://web.archive.org/web/20160207004452/http://www.amnesty.nl/nieuwsporaal/pers/continuing-failure-uphold-human-rights>> [accessed 6 January 2022].

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.⁸⁰ Additional training for military police was mandated, both refresher training for those in Iraq and by units at Forts Dix, Bliss, and Lewis preparing to deploy into the Central Command area of operations.⁸¹

Also, reorganization of units happened quickly, for instance the 372nd Company (Co) to which most of the accused military police belonged was reassigned to the 310th MP Battalion (Bn) from the 320th MP Bn who it had been assigned after moving to Abu Ghraib.⁸² This shuffling of units was a common theme in the theatre, and the 372nd Co had moved to Abu Ghraib and under the 320th MP Bn which had several soldiers relieved of duties at Camp Bucca for issues pertaining to detainee treatment. With the 320th Bn already highlighted because of previous incidents, the integration of the 372nd Co 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 merely common criminals or those guilty of minor violations of curfew and the like, and under-staffing of the prison for those

⁸⁰ This change in detainee handling SOPs was implemented in both the Army and the Marine Corps and was experienced first-hand by the author during deployments to Iraq and Afghanistan.

⁸¹ Interview with Major Warren Ferdinandsen, U.S. Army by Scott Hamm on 31 December 2021, p. 1. Notes from the interview currently in possession of author. Hereafter referred to as Ferdinandsen interview. Major Ferdinandsen was a prior-enlisted reserve officer mobilized for duty with the 800th MP 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 first-hand experience with the training the unit received before and during deployment.

⁸² *Ibid.*, p. 2.

large numbers. According to Fletcher Pearson, the senior enlisted member of a company-sized 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 thing outside Abu Ghraib and back up to TQ.”⁸³ After the abuses came to light, additional units were moved into Abu Ghraib to improve the security posture and staffing problems.⁸⁴ 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 in this dissertation, like harming non-combatants or enemy prisoners of war enroute to detention centers, the military had policies and training regimes in place due to past violations. In this case, the training protocols prescribed by the Army for its mobilizing 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 Department of Defense Inspector General’s report noted that the 200th MP Brigade did not receive Internment/Resettlement training before or during the deployment which would have been much more relevant.⁸⁵ According to the 800th MP Brigade’s Engineer Officer, besides classes on

⁸³ Interview with Sergeant Major Fletcher Pearson, U.S. Marine Corps (Ret.) by Scott Hamm on 7 August 2022, p. 4. Transcription from the interview currently in possession of author. Hereafter referred to as Pearson interview. Sergeant Major 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.

⁸⁴ Ferdinandsen interview, p. 2.

⁸⁵ Young, p. 37; Taguba, pp. 2, 37.

handling of enemy prisoners or war, it 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.”⁸⁶ Additionally, with the exception of the prison at Guantanamo 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.⁸⁷ 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.⁸⁸

Additionally, much of the planning before the war was done based on assumptions which proved wrong. Namely that, as in the First Gulf War, Kuwait would allow the construction of large confinement facilities that would allow detainees to be removed from the battle space and put in facilities where units were solely focused on security within rather than inward and outward security to ensure safety from attack.⁸⁹ The speed of the 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 efforts since Vietnam, proven successful during the First Gulf War, toward reducing violence against non-combatants—in this case prisoners. 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 MP Brigade

⁸⁶ Ferdinandsen interview, p. 1.

⁸⁷ Taguba, pp. 19-20.

⁸⁸ Rohman, p. 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.

⁸⁹ Though both Amnesty International and Human Rights Watch watched the situation in Kuwait and Iraq closely, publishing various reports during the Gulf War (Operation Desert Storm), no reports from either concerning POW abuse similar to Operation Iraqi Freedom were found.

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 itself had been a notorious Saddam-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.⁹⁰

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 which were not organically her own and being under-staffed for the sheer total of detainees and facilities to man which stretched from Kuwait to Northern Iraq.⁹¹ According to Ferdinandsen,

A key thing to remember is that the units arriving in theater and falling under the 800th MP Brigade except for the Headquarters and Headquarters Company (HHC), 310th MP Battalion (BN) were not organic units normally... The only Battalion that trained and mobilized together was the 724th MP BN. The HHC, 223rd, 267th, and 822nd MP Companies all arrived at Fort Dix and trained at the same time and integrated well. The HHC and 822nd were Army Reserve. The 223rd and 267th were National Guard.⁹²

Several of her decisions, however, added friction to the environment in which the soldiers found themselves performing their duties. Among these was leaving the battalion commander of the 320th MP Battalion in place after several of his soldiers were found guilty and discharged over incidents of abuse in May 2003. Already considered the weakest leader among Karpinski's subordinate unit commanders, the 320th'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

⁹⁰ Ferdinandsen interview, p. 3.

⁹¹ 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.

⁹² Ferdinandsen interview, p. 1.

MP Brigade's purview.⁹³ Additionally, though FRAGO 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 policemen from disregarding their standard operating procedures. The chain of command within the MP battalion should have reinforced those procedures and made clear how the command relationship functioned. As it were, many soldiers interviewed by Major General Taguba and the Criminal Investigation Division spoke to confusion arising from the convoluted command relationships.⁹⁴

The Department of Defense 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 fundamental 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.⁹⁵ Part of the reason for accountability coming 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, in order 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 MP Brigade, ensuring it would focus on the military policemen who actually committed the abuse, but not focused on the causation or impetus for the abuse. Even in the cases where wide-enough scope was assigned, the reliance on previous investigations produced relatively little new information that could be used to determine

⁹³ Taguba, pp. 39-40.

⁹⁴ Ferdinandsen interview, p. 3.

⁹⁵ Young, pp. i-iii.

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.⁹⁶ 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 which the prosecution of only the enlisted soldiers was liable to.

To the question of whether the military has done enough to curtail violations, the answer is mixed. While the Army maintains a command structure and policies and requires training which should ensure that if abuses do occur, they would certainly be exceptions perpetrated by individuals acting outside 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 in previous chapters with Thompson, Ridenhour, and Coughlin, to bring the matter to the attention of higher headquarters. While one could argue that these were the acts of individuals acting in compliance with their personal moral code, the fact that in three of those cases the individuals took the matter to their chain of command, rather than an outside agency, suggests there is a belief that the acts were not to be condoned.

How have the U.S. efforts at humanely securing prisoners or detainees changed? Over time, the ways individuals the armed forces have detained are secured has changed, but many challenges have endured. For instance, during World War Two, planners anticipated 60,000 prisoners in the 90 days following D-Day, however almost 200,000 prisoners were captured.

⁹⁶ Rohman, pp. 11-22.

Learning from the drain in manpower to secure prisoners in earlier conflicts, during Vietnam, the U.S. 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 U.S. 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.⁹⁷ In both Iraq and Afghanistan, the legal status of those detained—even combatants—meant that the situation was more confusing than earlier conflicts. Adding to the complexity of the various types of detainees was the much larger than anticipated number of detainees. In every conflict, lack of cultural understanding impeded operations.⁹⁸ If there is a trend in the planning for POWs and detainees in the last 80 years of conflict, it is the difficulty in correctly estimating the resources that would be required, many times due to underestimating the numbers of detainees to be cared for. 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 U.S. would call the War on Terror, those who were captured and deemed to have either credible intelligence or real culpability were transferred to sites like Guantanamo Bay. But during Operation Iraqi Freedom, the sheer volume made processing and further transferring detainees to these secure sites a slower process. The unanticipated volume of detainees combined with the lack of realistic planning to create a perfect storm of understaffed detention centers lacking proper supervision with too many, and varying kinds of detainees—

⁹⁷ Caldwell, pp. 52, 55-56.

⁹⁸ Megan Williams, 'Detainee Operations: Units Face Dual Imperatives of Security and Sustainment', *Army.mil*, 22 Jul 2020, <https://www.army.mil/article/237337/detainee_operations_units_face_dual_imperatives_of_security_and_sustainment> [accessed 6 January 2022]; Cheryl Bernard and others, *The Battle Behind the Wire: U.S. Prisoner and Detainee Operations from World War II to Iraq* (RAND Corporation: Santa Monica, 2011), p.33, <<https://www.jstor.org/stable/10.7249/mg934osd.12>> [accessed 6 January 2022].

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 across Iraq in 2003 and 2004, the 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 offers a case study on Specialist Darby’s actions as an example for 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.⁹⁹

The question of whether public or political pressures affected military efforts has several facets, including the efforts made to treat its detainees properly or investigate allegations, its 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 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 the perception of the Army’s sensitivity. While there was evidence of interest from the U.S. lawmakers in addressing culpability for the abuses, much of the reported conversations were

⁹⁹ ‘SPC Joe Darby’ *Center for the Army Profession and Leadership*, 28 Oct 2021, <<https://capl.army.mil/case-studies/wcs-single.php?id=66&title=spc-joe-darby>> [accessed 6 January 2022].

quite partisan in nature until the results from reports began to become public. At that point there was a plain bipartisan dissatisfaction with efforts at determining blame. Lindsey Graham, a conservative Republican, stated, “This is not a few bad apples. This is a system failure, a massive failure.” And the ranking House Democrat on the Appropriations Subcommittee, David Obey, 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.”¹⁰⁰ 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.”¹⁰¹ These new interpretations led directly to the military intelligence personnel at Abu Ghraib feeling comfortable in encouraging/ordering military police personnel to “set conditions” for successful interrogations by using techniques recognizable as torture or abuse.¹⁰²

Because of the increasing effect of contemporary media’s 24-hour news cycle and prevalence of social media on the development of Americans’ opinions, an examination of how partisan-leaning newspapers described and reported on the abuse is instructive. While a holistic look of the potential scope of the problem, based on widespread allegations, was reported in 42% of secular Left offerings, it was covered in only 14% of secular Right platforms.¹⁰³ The idea of the abuses being the result of a few bad apples was not subscribed to in Left-leaning articles but

¹⁰⁰ Rohman, pp. 10-11.

¹⁰¹ Greenberg, pp. xvii-xviii.

¹⁰² Greenberg, pp. 1034-1038.

¹⁰³ In this source, Porpora’s *Post-Ethical Society*, the Left offerings are represented by news programs like *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 current Republican administration, such as *Fox News*.

described in 22% of Right venues. Discussion of the role of the Administration occurred in 55% of Left-leaning publications, but only 19% of Right offerings.¹⁰⁴ This illustrates a problem that would only worsen with time. Americans, in the age of easy access to platforms that reinforce and cater to their religious or political leanings, can, and often do, turn to reporting which confirms their own beliefs. 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 the early 70's. Others saw larger forces at work or dissimilarities that made the comparison moot. Among those that argue against the Zimbardo 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 Zimbardo experiment. Further, Caldwell highlights how the junior soldiers were held accountable with less rigor

¹⁰⁴ Porpora, pp. 103-105.

applied to investigations higher up the chain of command or authority.¹⁰⁵ The gender framing of the situation cannot be dismissed, as much literature, like Goldstein's *War and Gender*, is now available pertaining to the effects gender roles play in the decision-making and actions by individuals during combat. As in the last chapter, there was evidence that lingering biases when evaluating the roles of soldiers of differing genders played a large part in effective assignments of soldiers 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.

With Abu Ghraib the subject of much discussion throughout 2004, and with an election approaching, the political impact of the story was not lost on journalists or campaign advisers. While early in the year, veteran attacks against John Kerry's military records favored the incumbent Bush Administration, as more information about the Abu Ghraib investigations became public knowledge, the President found himself 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 re-defining acceptable interrogation practices.¹⁰⁶ This led to the President to say, among other things, "The acts are abhorrent. It's a stain on our country's honor and our country's reputation."¹⁰⁷ Bush later urged Rumsfeld to make sure any guilty soldiers are punished for the "shameful and appalling acts."¹⁰⁸ Those remarks and others by high level officials in the Pentagon and Department of Defense were cited in a motion to dismiss the case against Charles Graner due to unlawful command influence. Though the judge

¹⁰⁵ Caldwell, pp. 33-48, 70-73.

¹⁰⁶ Jill Lawrence, 'Abu Ghraib probes shift public focus', *USA Today*, 24 Aug 2004, <https://usatoday30.usatoday.com/news/washington/2004-08-24-prison-probe_x.htm> [accessed 5 January 2022].

¹⁰⁷ 'Bush 'sorry' for abuse of Iraqi prisoners', *CNN News*, 7 May 2004, <<https://www.cnn.com/2004/ALLPOLITICS/05/07/bush.apology/index.html>> [accessed 6 January 2022].

¹⁰⁸ 'Graner gets 10 years'.

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.¹⁰⁹ While the undue influence was cited by lawyers as being prejudicial to their defence in this case, just under 15 years later, President Trump's commentary on the case of a 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 hard labor for 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.¹¹⁰

Despite the discussions of torture, law of war, human rights, and a stained national honor throughout the summer 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% 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 half of those openly discussed whether the Administration should be held accountable.¹¹¹ While moral emotions like outrage, disgust,

¹⁰⁹ 'Bush comments prejudice Abu Ghraib trial, soldier claims' *The Irish Times*, 6 Dec 2004, <<https://www.irishtimes.com/news/bush-comments-prejudice-abu-ghraib-trial-soldier-claims-1.996316>> [accessed 6 January 2022].

¹¹⁰ Adam Zagorin, 'An Abu Ghraib Offender's Return to Iraq Is Stopped', *Time*, 2 Nov. 2006, <<http://content.time.com/time/world/article/0,8599,1554326,00.html>> [accessed 6 January 2022].

¹¹¹ Porpora, pp. 102-105.

horror, and shame were stirred by the scandal, efforts made to keep accountability down with low-ranking soldiers may have, in fact, worked to keep Abu Ghraib from acting as the incendiary event that could act to reignite an anti-war 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, 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 harkens back to that described for World War II.¹¹² 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” no matter of personal feelings about the war. That charged connection and 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? Though 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 Department of Defense, planning for detainees and prisoners was inadequate—just as it had been in World War II and Vietnam. Additionally, failure to be clear in the expectation that non-DOD entities using

¹¹² Walker Schneider, ‘Skull Questions: The Public Discussion of American Human Trophy Collection During World War II’, *Penn History Review* 25, No.2 (2019), p. 127.

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 Department of Defense and Army share in fault for multiple investigations with too narrow a scope or for not accounting for the negative influence that having to possibly implicate the chain of command would have on witness testimony. At the service level, the Army's system of consolidating disparate units under a single functional headquarters, and in this case one 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 pre-deployment training was not relevant. At many of those levels of the chain of command, there existed confusion in supported and supporting relationships within the facilities, lack of proper supervision and enforcement of standard policies and discipline.¹¹³

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 discipline for their actions and loyalty to peers within the group rather than to their professional obligations. While there is much fault to be laid at 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. While examining the case study on Tailhook, and even during the experiment the Marine Corps conducted on integration, it became evident that solutions may need to be focused on conduct and attitudes resident in the cultures of

¹¹³ The concept of supported and supporting units are used by the Army and Marine Corps to designate which units have authority for decisions or priority for resources or support in specific cases.

small units or occupational specialties. Abu Ghraib provides an example of what can happen when no attention is paid to cultures and practices to these small units or sub-groups within specialties which may deviate from the prescribed procedures. As in My Lai, Son Thang, and at Tailhook the system—command climate or culture of an organization or occupational specialty—mattered at Abu Ghraib.

Chapter Five: Iraq, A New Generation of Crimes

Ten days shy of thirty years from its final troops leaving Vietnam, the United States invaded Iraq where it would fight another protracted counterinsurgency conflict.¹ Spending the intervening years refusing to acknowledge the possibility of fighting in another unpopular war against an enemy that moved among the population, military leaders shaping strategy instead focused 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 First Gulf War, which seemed to vindicate, and further entrench, those that advocated preparing for conventional fights instead of a repeat of Vietnam's counter insurgency 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.² There were clear improvements after Vietnam and through the First Gulf War in how the 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 adherence toward the institutional preference of preparing for conventional conflict, little was done to prepare those same forces for the stressors the fight in Iraq of the 2000's entailed until that conflict was underway.

¹ The last US troops left Vietnam on March 29, 1973. The US led invasion of Iraq during Operation Iraqi Freedom began 19 March 2003.

² Mark Berger and others, 'Déjà vu All Over Again: Counterinsurgency and the 'American Way of War'', *Intelligence and National Security*, Vol. 22, No. 6 (2007), p. 912; Andrew Wiest, 'The U.S. Failed to Learn the Lesson Vietnam. Will it Learn from Afghanistan?', *The Washington Post*, 16 August 2021, <<https://www.washingtonpost.com/outlook/2021/08/16/us-failed-learn-lesson-vietnam-will-it-learn-afghanistan/>> [accessed 29 Sep 2022].

After the collapse of the Soviet Union, the U.S. Marine Corps and Army continued to train its forces to conduct missions along the range of military operations in their doctrinally prescribed units using the techniques developed throughout the twentieth century and honed during the Cold War.³ 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.⁴ So, following the success of the invasion by US, UK, 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's forces discarding their uniforms to conduct an irregular war, the US found itself, due to its own failings of policy, with an insurgency on its hands after major combat operations ceased in May.⁵ Though initially calling the insurgency, between 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.⁶ 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 a mere 120 miles of each other.

³ Discussed earlier, this continuum of conflict moves from total war on one end, bringing to bear all the instruments of power available to a nation, to limited engagements and the use of only selected means at a nation's disposal.

⁴ Stephen Hosmer, 'RAND Report: The Army's Role in Counterinsurgency and Insurgency', *RAND Corporation*, November 1990, pp. 30-32; Alan J. Vick and others, *Air Power in the New Counterinsurgency Era: The Strategic Importance of USAF Advisory and Assistance Missions* (Santa Monica: RAND Corporation, 2006), pp. 27-28.

⁵ 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.

⁶ 'Elements of 'Civil War' in Iraq', *BBC News*, 2 February 2007, <http://news.bbc.co.uk/2/hi/middle_east/6324767.stm> [accessed 17 April 2021].

As in Chapters One and Two that discuss the violations that occurred during World War II and Vietnam, the three incidents in Iraq each included several key factors and themes that have been noted repeatedly. In all three cases, two of which showed clear evidence of methodical planning and intent, and one characterized by overkill in the immediate aftermath of an attack, leadership was either lacking, or toxic. Probably described best by a member of the platoon responsible for the unlawful killing of Hashim Awad at Hamdania, is the influence ineffective leadership at the lowest levels has on events described in this thesis,

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?⁷

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

In all the cases, 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, the main perpetrator or planner of the incident was described as someone who looked to prove themselves, either on their first combat deployment or because they were trying to measure up to others in the unit who were more respected. Finally, in two of the three cases, as in three other previously discussed cases, there was resistance further up the chain of command

⁷ Anonymous interview with member of the Pendleton 8's Hamdania platoon.

to the idea that their Marines or soldiers could be responsible for crimes. This resulted in either delays in investigating the facts or in apparent efforts at a coverup. When contemplating the parallels throughout the previous cases we examined and those found in this chapter, this resistance, or blind spot, helps to understand the outcome of all the noted trends despite ongoing efforts to reduce violations.

When researching the case studies of this dissertation, time and again at the moment violations occur, the hierarchical structure of the military works against the discipline required in urgent situations. That is, those best equipped, due to experience and age, to temper the responses of soldiers are removed from the critical point by other duties. The junior soldier or Marine, often still developing cognitively and emotionally, is at the crucial point of battle where they are most likely to encounter combatants or non-combatants 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 to 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 efforts and sacrifices are viewed as inadequate. Moreover, today these junior men and women are much more likely to be subject to the effects of the First-Person Shooter video games, on which ongoing studies suggest early and continuous exposure to violence may lead to aggression, behavioural problems and possible desensitization to violence, and post-9/11 popular culture of movies often using stereotyped Arab villains.⁸

⁸ Claire McCarthy, MD, 'Dangers of Virtual Violence', *Harvard Health Publishing*, 6 October 2021 <https://www.health.harvard.edu/blog/protecting-children-dangers-virtual-violence-2016080210036> [accessed 12 December 2022]; Jack G. Shaheen, *Guilty: Hollywood's Verdict on Arabs after 9/11* (Northampton, Mass.: Interlink Publishing, 2012).

On the other hand, the careerist commanders and more senior enlisted, who subscribe more to the professional standards 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 duties overseeing larger elements or coordinating support for those engaged. What's more, the appreciation, or love, of their service gained from prolonged immersion in the culture may cause a blind spot to the potential for actions of their subordinates which 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 attempt cover-ups, as seen in several of the cases thus far.

All three cases garnered attention in the civilian press once they came to light and elicited an initial outcry from the public. While many saw the incidents as sad reminders of the horrors that civilians endure when war is carried out in their neighborhood, others—for and against the war—additionally saw an opportunity to use the cases to support their argument 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 U.S. should not be there. Those for it pointed to the unfortunate actions of these units as at least partially caused by being stretched thin and thus argued a larger commitment was necessary. The member of the Hamdania platoon described the stress the company's large area of operations posed for the unit,

The Op-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.⁹

⁹ Anonymous, member of 2nd platoon, K Company 3rd Battalion, 5th Marine Regiment still on active duty and interviewed under agreement of anonymity. A group of Marines of that platoon were responsible for killing a non-combatant at Hamdania and referred to by the press as the Pendleton 8, interview by Scott D. Hamm, 13 December

No matter the argument though, and in contrast to Vietnam, even when the war's legitimacy was questioned, critical remarks by politicians or media personalities were qualified with sentiments supporting the troops—there remained signs of the “morally-charged connection.” In two of the case studies, we once again see sentences from military courts 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 Abu Ghraib case and the three to be examined in this chapter, strengthened by the outrage over the 11 September 2001 attacks? Such feelings could be responsible for a dampening effect to public disappointment or outrage over law of war violations.

A difficulty of trying war crimes in the past, the jurisdictional limits of the UCMJ, was made easier in Iraq. On several occasions, such as My Lai, soldiers or Marines left the service after fulfilling their obligated service times and before a crime was suspected or discovered. The passage of the 1996 War Crimes Act, and the later Military Extraterritorial Jurisdiction Act (MEJA) in 2005, finally closed several important loopholes in the United States 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 particularly key in prosecuting one of the perpetrators of the Mahmudiyah Massacre examined in this chapter.

2022, transcript currently in possession of author. Hereafter referred to as Anonymous interview with member of Pendleton 8's Hamdania platoon.

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 fifteen months.¹⁰ 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 the trial for an allegation located in a foreign land, with investigations to be conducted, foreign witnesses to be transported, housed, et cetera, for an outcome which could have little guarantee. Additionally, the requirement to prove 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 existing War Crimes Act.¹¹

Passed in 2000, but not enacted until 2005, the Military Extraterritorial Jurisdiction Act 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.¹² This closed the loopholes for not only servicemembers who had exceeded their

¹⁰ Though the number of soldiers was put at 22 in the federal court case of *Calley v. 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.

¹¹ 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.

¹² ‘H.R. 3380 – Military Extraterritorial Jurisdiction Act of 2000’, *106th Congress, Congress.gov*. <<https://www.congress.gov/bill/106th-congress/house-bill/3380#:~:text=Military%20Extraterritorial%20Jurisdiction%20Act%20of%202000%20-%20Amends,maritime%20and%20territorial%20jurisdiction%20of%20the%20United%20States>> [accessed 12 Feb 2022].

obligated service time and were discharged, but contractors, and civilians stationed with the military but immune from prosecution due to Status of Forces Agreements with host countries.¹³

Haditha, 19 November 2005

On the morning of 19 November 2005, Sergeant Frank Wuterich, the squad leader for 1st squad, 3rd platoon of 3rd battalion, 1st Marine Regiment (3/1)'s Company K, and his men were ordered to conduct a routine resupply mission of Marines at a traffic control point some five miles 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 3/1 arrived in Haditha in September of 2005, the Marine Corps had been given overall control of the restive Al Anbar Province. At the time, 3/1 was staffed with 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 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.¹⁴ 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 in order to provide some semblance of force protection to assault elements.¹⁵

¹³ 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, family, or contractors, will be prosecuted. Most often, these agreements allow the U.S. to retain the right to try individuals, however they allow the country the ability to expel individuals.

¹⁴ Francesca Landis, 'Marine Captain Awarded Purple Heart for Actions in Fallujah, 16 Years Later', *Leatherneck Magazine*, Vol. 104 Iss. 5 (2021).

¹⁵ Urban combat is generally recognized as the most dangerous situation a fighting man can find himself in. With threats coming from within building, hidden among the population, rooftops, and even from sub-terranean quarters, the general rule of thumb says that the more aggressive the action, the safer for the assaulting troops.

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. Several days earlier, came warnings that new insurgents from Syria had been infiltrating the area with indications the new insurgents were traveling in a white sedan, the most common of cars 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 IED strike or small ancillary attack.¹⁶ 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 06:30.¹⁷

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) began their return trip just after 07:00, by a different route, to base. As the last vehicle in the convoy, each carrying three Marines, turned on to well-travelled road just minutes from the base, a large improvised explosive device (IED) was detonated by remote control. The blast threw the vehicle into the air, cutting the driver in half and ejecting another of the Marines. The subsequent actions would go from being a proper reaction to an IED strike—seeking to secure the site, render aid to the injured, and attempt to locate the responsible parties—to an hours-long series of actions resulting in the murder of innocent civilians.

¹⁶ Kenneth Englade, *Meltdown in Haditha: The Killing of 24 Iraqi Civilians by US Marines and the Failure of Military Justice* (Jefferson, NC: McFarland & Co., 2015), p. 26.

¹⁷ Immediate action drills are set responses rehearsed repeatedly by units to ingrain in the members a sort of muscle memory to respond without hesitation in the aftermath of some sort of ambush, attack, or other enemy contact.

Upon the explosion, a Marine in Wuterich's HMMWV immediately 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, was lying in the street, pinned under one of the armored doors.¹⁸ 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 Dela Cruz, rushed toward them also firing into them as they fell, performing what were called “dead checks” before urinating on one of the bodies.¹⁹

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 3rd platoon, Second Lieutenant William Kallop was, like Wuterich, on his first

¹⁸ 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 a back seat and turret as most HMMWV were equipped with. 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.

¹⁹ 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 fire fight 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.

combat deployment. He requested an update, and after receiving one from Wuterich and Corporal 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 “shoot first and ask questions later.”²⁰ As the group arrived at the first dwelling, called House 1 in the subsequent investigation, without receiving fire, they gathered near the entrance and executed a dynamic entry.²¹ 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 with a fragmentation grenade thrown in to disable anyone inside. They found an open door at the back of the house which they took to mean 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.²² They cleared the rest of the building, again using grenades and rifle fire before entering the rooms, and then returned to the

²⁰ LtCol Paul Ware, ‘Investigating Officer’s Report’, 2 October 2007.

²¹ In a dynamic entry, 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.

²² Ware, 2.

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 thirty or so minutes since the IED had detonated, Wuterich and his Marines had killed 20 Iraqis. Five from the unmarked taxi that had approached right after the blast, and another fifteen in the two houses, seven in the first and eight 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 woman and her months-old baby escaped through the back door of House 1, and three children 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?”²³ Unfortunately, as Kallop returned to the site of the blast, he was immediately ordered to take his force just over a mile 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.²⁴ 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, ordering him on to the Palm Groves as well, effectively surrendering the opportunity for a senior officer to see the scene in the immediate aftermath.²⁵

²³ Tony Perry, ‘Details Emerge of a Deadly Day in Haditha’, *Los Angeles Times*, 2 July 2007. <<https://www.latimes.com/archives/la-xpm-2007-jul-02-fg-haditha2-story.html>> [accessed 2 May 2021]. Depending on the account read, the Marine accompanying Kallop was either a member of the quick reaction force who was equally surprised at the scene or Corporal Salinas, one of the Marines who had cleared the house with Wuterich.

²⁴ Englade, p. 26.

²⁵ Englade, p. 25.

While the events near the Palm Grove would stretch over the next six hours, Kallop was sent back to the blast site in anticipation of a possible follow-on. During this time the company commander and his men found several IEDs in the Palm Grove and engaged in a firefight with the insurgents before pinning them down into a building later leveled with two bombs from support aircraft and tanks. Eight hours after the initial IED blast (sometime after 15:00), 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 him to take a couple Marines to investigate. The first house they entered had nothing but women and children, and when asked where the men were, they signaled to the building close behind theirs. Wuterich left one Marine in that building and proceeded into the next one. They entered an empty room, but as the other Marine, Lance Corporal Sharrat, glanced into the next room, he observed a man with an AK-47. 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 Sharrat began shooting him as well until out of ammunition. He then called out to Wuterich, who raced in past him and began firing his M-16 at two other men in the room. Upon searching the building, they found a suitcase with Jordanian passports, as well as a wad of Jordanian and Syrian currency, which they put, along with the two rifles, into an explosive ordnance disposal vehicle that had brought a team to inspect the blast site.²⁶

Two hours after the engagement at the Palm Grove ended, the battalion’s commander and senior enlisted Marine, Lieutenant Colonel Jeffrey Chessani and Sergeant Major Edward Sax, left their combat operations center to inspect the Palm Grove site. They stayed for nearly three

²⁶ William Kallop, Interview with Colonel Gregory Watt, 21 February 2006. <<http://warchronicle.com/TheyAreNotKillers/Documents/WattReport/DefendOurMarines-LtKallopStatementWattsInvestigationFeb06.htm>> [accessed 6 May 2021].

hours, leaving well after 19:00. 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. Though 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.²⁷ 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.²⁸

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 the 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 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 which included erroneous numbers of insurgents and civilians killed.²⁹ The reporting processes which 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.³⁰

²⁷ Englade, pp. 27-30.

²⁸ Major General Eldon Bargewell, US Army, "Bargewell Report", Multi-National Force-Iraq Headquarters, 15 June 2006, p. 6.

²⁹ Bargewell, pp. 31-32.

³⁰ *Ibid.*, p. iii.

In a parallel to Son Thang, the day after the incident, two residents of Haditha went 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, both orally and in writing, that the incident be investigated, angering Chessani.³¹ 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.³² 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 up, and the payments were made—an early missed opportunity for accountability despite the faulty reporting.³³ Another missed opportunity had occurred on 22 November, when the Marines' Division Commander Major General Huck visited the blast site but after receiving a briefing, using the same faulty early reported information, left without inspecting the scene.³⁴

How Haditha Broke, the Investigation, and Results

While working on a broad story concerning the total numbers of civilians killed in Iraq by US troops, *Time* reporter Tim McGirk received a video taken by an Iraqi with a human rights group that had been visiting relatives in Haditha the morning of November 19th and had subsequently videoed 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 Multi-National Force-West (MNF-W). Though the officer dismissed both McGirk's and another *Time*

³¹ 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.

³² Bargewell, p. 4.

³³ *Ibid.*, p. 8.

³⁴ Englade, p. 35.

reporter's concerns and questions, he did forward the information down the chain of command. Chessani would eventually reply again with details from the original faulty report. While McGirk intended to travel to Haditha to interview the Marines, 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 3/1. This panel was comprised of Chessani, the CO of 3/1; his executive officer Major Kevin Gonzalez; Captain Lucas McConnell and First Lieutenant Adam Mathes, the commanders of the company and platoon under which Wuterich's squad was assigned.³⁵ 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.³⁶ Examples of the memo'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.

...

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 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."³⁷

McGirk, unsatisfied by the assistance he was receiving from the chain of command from the Marine Division down, sent a copy of the video to the public affairs officer for the Multi-National Corps-Iraq, whose commander, Lieutenant General Chiarelli (US Army), had

³⁵ Paul von Zielbauer, 'A Marine Tutorial on Media "Spin"', *The New York Times*, 24 June 2007, <<https://www.nytimes.com/2007/06/24/weekinreview/24word.html?ref=weekinreview>> [accessed 6 October 2022].

³⁶ John McChesney, 'Marine Officers Strategized Their Haditha Responses', *NPR*, 12 June 2007, <<https://www.npr.org/templates/story/story.php?storyId=10964980>> [accessed 4 May 2021].

³⁷ Zielbauer, 'A Marine Tutorial'.

responsibility for the Marines among his other forces.³⁸ Chiarelli queried his senior Marine commander, Major General Zilmer, at MNF-W who had only been in Iraq ten 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 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 with varying scope and jurisdiction, Chiarelli initiated separate investigations into the matter; the second was Major General Bargewell's investigation into the reporting, training, and command climate.³⁹

Around the same time Major General Bargewell was starting 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 non-criminal fact-finding inquiries and brought the men responsible no real support for their effort, but NCIS would field the largest contingent of its force to investigate an incident since the 1987 spying-for-the-Soviets scandal by Marine Corps Sergeant Clayton Lonetree. Due to the strict parameters of his AR 15-6, and NCIS's desire to keep witness testimony from being influenced by other sources as they investigated, Bargewell and his aides would have access to the information NCIS developed to aid their effort. Over the next week, both *Time* and CNN would begin covering the emerging story, and by the end of May, the Marine Corps' credibility would take another blow as

³⁸ Tim McGirk and Aparisim Ghosh, 'One Morning in Haditha', *TIME Magazine*, Vol. 167, Iss. 13, 27 March 2006, p. 34.

³⁹ Englade, pp. 40-45.

allegations of the assassination of an Iraqi man by a squad of Marines began to be reported [Hamdaniya].⁴⁰

Over the next several months, as members of both bodies of Congress wrangled over whether or not 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 started to leak details about the report's condemnation for failures by Marine leaders to investigate the events that day.⁴¹ Bargewell's report was a fraction of the length of the NCIS's 3500 page investigation. At just over 100 pages, it was blunt in its assessments that, despite there being no indication of a large-scale cover up having 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 the platoon had made some erroneous reports, the multiple sets of photographs which had subsequently circulated within the company raising awareness of civilian deaths, and the *Time* reporter's allegations of wrongful killings of non-combatants.⁴²

Equally damning to the Corps was Bargewell's assessment that the command climate within 3/1 and higher may well have contributed to the lack of interest in pursuing an

⁴⁰ Englade, pp. 45-46.

⁴¹ Eric Schmitt and David Cloud, 'General Faults Marine Response to Iraq Killings', *New York Times*, 8 July 2006, <<https://www.nytimes.com/2006/07/08/world/middleeast/08haditha.html>> [accessed 6 May 2021].

⁴² Bargewell, pp. 17-18.

investigation, if not the reckless application of rules of engagement, which he had found to have been taught properly before the deployment.⁴³ Though Bargewell's AR-15 had no criminal jurisdiction, he did assert that an investigation into whether the negligence was willful and deliberate enough to warrant criminal charges was warranted.⁴⁴ NCIS released their preliminary report six weeks after Bargewell forwarded his to Chiarelli in mid-June. Finally, on 21 December 2007, the Marine Corps announced charges being preferred against eight Marines, four officers and four enlisted men, which would require Article 32 hearings.⁴⁵ The officers were the battalion commander, Lieutenant Colonel Chessani; the company commander, Captain McConnell; the battalion staff judge advocate, Captain Stone; and the commander of the Human Exploitation Team assigned to Kilo Company, 1st Lieutenant Grayson. The enlisted Marines were the squad leader, Staff Sergeant Wuterich, who was promoted in January 2006 before the incident began to receive any real notice; and three of his Marines, Sergeant Dela Cruz, Lance Corporals Sharratt and 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 Mendoza, who had both been involved in the clearing of those houses.⁴⁶ All three—Kallop, Salinas, and Mendoza—would receive immunity and testify during the hearings and trials.

Hearings

The first Article 32 hearing to be conducted, in May 2007, was for Captain Stone, the battalion's lawyer during their deployment, for failing to follow a lawful order—failing to call for an investigation—and dereliction of duty. The maximum sentences could result in over two

⁴³ Bargewell, pp. 19-21.

⁴⁴ Englade, pp. 77, 83; Bargewell, p. 66.

⁴⁵ 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.

⁴⁶ Englade, pp. 62-64.

and a half years' imprisonment.⁴⁷ 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 over the previous months concerning insurgent activity. However, the company's senior enlisted Marine, 1stSgt Espinosa testified he enquired why no investigation had yet been undertaken and was told battalion was taking care of it. He left the country for emergency leave and upon returning assumed an investigation had been completed.⁴⁸ After the hearing was complete, the investigating officer recommended to the convening authority that although the Captain could have argued for an investigation more forcefully, the lack of action was not criminal and recommended dispensing with the incident with non-judicial punishment.⁴⁹ 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."⁵⁰

Starting three weeks after Captain Stone's hearing, the next Article 32 hearing was that of Lieutenant Colonel Chessani, the battalion commander of 3/1 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 McDonnell, were relieved just after the battalion returned from deployment.⁵¹ He was charged with two counts of dereliction of duty that together could bring a maximum of 12

⁴⁷ Rick Rogers, 'Hearing Will Determine Whether a Captain is Tried,' *San Diego Union Tribune*, 10 May 2007.

⁴⁸ Englade, 38.

⁴⁹ Martha Neil, 'Marine Lawyer Cleared in Haditha Case,' *ABA Journal*, 9 August 2007, <https://www.abajournal.com/news/article/marine_lawyer_cleared_in_haditha_case> [accessed 12 Jan 2023]. Non-judicial punishment is an administrative punishment which, 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.

⁵⁰ Tim Sumner quoting James Mattis, 'Two Haditha Marines cleared; still no apology from John Murtha', *9/11 Families for a Strong America*, 10 August 2007, <<https://911familiesforamerica.org/two-haditha-marines-cleared-still-no-apology-from-john-murtha/>> [accessed 9 May 2021].

⁵¹ Adam Tanner, 'Two Marines Face Haditha Courts Martial', *Reuters*, 20 October 2007, <<https://911familiesforamerica.org/two-haditha-marines-cleared-still-no-apology-from-john-murtha/>> [accessed 8 May 2021].

months in prison.⁵² Many of the witnesses called by the defence 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 IO for Chessani's hearing, not a lawyer but a seasoned infantry officer and former commander himself, turned in a recommendation that was critical of Chessani's choices and judgement, calling for a 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 IO'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 IO said translated to giving the facts in the report a "gold standard" stamp.⁵³ Despite a blistering, twenty-two page rebuttal of the IO'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.

The third officer accused, Captain Lucas McConnell, received word on 18 September 2007 that the convening authority, Lieutenant General James 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.⁵⁴

The hearing for the final officer in the case, 1st 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 of 2007. Accused of three counts of false official statements, obstructing justice, and trying to get discharged from the

⁵² Englade, p. 63.

⁵³ Ibid., pp. 110-111.

⁵⁴ Ibid., p. 115.

Marine Corps illegally, he faced at maximum a thirty-year sentence if convicted. Grayson had turned down an offer to accept a non-judicial 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.⁵⁵ In this particular case, the IO 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. Unlike the others, he chose not to speak on his own behalf. By far one of the briefest hearings, and with the shortest IO report (at three pages) to the convening authority, now Lieutenant General Helland who had replaced Mattis, delivered on 3 December 2007, his charges were referred to court martial on 1 January 2008.⁵⁶ Two of the four officers originally charged would go to trial.

For the enlisted Marines who had charges preferred, results were mixed. Those of Sergeant Dele 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."⁵⁷ This was despite his admissions during the NCIS investigation that he and Wuterich had discussed lying about events to investigators four times.

⁵⁵ In the military, often non-judicial punishment will be offered to an accused in a low-level case in order 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 service member's right to refuse this type of punishment and instead request a trial by their peers—a court martial.

⁵⁶ Englade, pp. 148-153.

⁵⁷ Marty Graham, 'Haditha Killing charges dropped against Marine', *Reuters*, 17 April 2007, <<https://www.reuters.com/article/us-usa-haditha-marine-idUSN1743197820070417>> [accessed 21 April 2021].

Lance Corporal Sharratt, like Dele Cruz and the also-charged Tatum, was a combat veteran and had experienced remarkably violent urban combat of 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 4.⁵⁸ The charges against him would be difficult to prove, 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 IO submitted his report. While offering that making the offenses non-capital could be an option, he 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 in the same briefing in which the charges against Captain Stone were dropped.⁵⁹

Lance Corporal Tatum's hearing began ten days after the IO in Sharratt's case delivered his report on 16 July. Just as he shared a history of fighting in the same platoon over the previous two deployments, he shared the same IO for his hearing. While the prosecution would certainly have studied the report for clues to the IO'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

⁵⁸ Englade, pp. 64, 118.

⁵⁹ Dan Whitcomb. "Charges dropped against 2 Marines in Haditha Case." *Reuters*, 9 August 2007. <<https://www.reuters.com/article/us-usa-marine-haditha-idUSN0921973920070809>> [accessed 21 April 2021].

assault and aggravated assault, a count of reckless endangerment, two counts of unpremeditated murder and four counts of negligent homicide, and he faced life sentences for the murders or up to thirty years for the other charges.⁶⁰ Like Sharratt, much of the witness testimony against him came from NCIS agents that 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 non-combatants.⁶¹

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.⁶² The IO’s report which he delivered August 23rd, again included two options for the convening authority. His primary recommendation was to dismiss the charges as, while Tatum had definitely killed the people in both House 1 and 2, there was a lack of evidence to conclusively determine he did so in violation of the rules of engagement.⁶³ The other option the IO 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

⁶⁰ Englade, pp. 129, 64.

⁶¹ Ibid., pp. 129-132.

⁶² Ibid., p. 132.

⁶³ 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 to whether or not hostile intent was lacking, as several Marines had reported being fired at from the vicinity and the others testified to the sound of an AK-47 being prepared to fire as they entered.

second option Mattis referred charges to court-martial for two counts of involuntary manslaughter, and one count each of reckless endangerment and aggravated assault.⁶⁴

The most visible and recognizable of all the Haditha defendants, partly self-made, was Staff Sergeant Wuterich. As the squad leader that 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, he 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 would admit 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 they were not making the Marines available to the media. After reviewing the aired interview though, the prosecutors mused that it was a possibility he may have made damning admissions in the unused footage, thus beginning long procedures to acquire access to that footage and delaying his trial for years.⁶⁵

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 fate. Since Sharratt's charges had been dismissed,

⁶⁴ Englade, pp. 133-135.

⁶⁵ Rick Rogers, 'Corps subpoenas outtakes from '60 Minutes' interviews', *San Diego Union-Tribune*, 1 February 2008, <<https://freerepublic.com/focus/f-news/1963604/posts>> [accessed 22 April 2021].

Wuterich's prosecutors dropped the charge against him for murder in the case of the fourth brother in House 4.⁶⁶ Called again to testify against Wuterich were Mendoza and Dela Cruz, members of his squad and 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 pre-deployment training. The hearing lasted only three days and ended 6 September. The report from the IO, the same one as Sharratt and Tatum, was delivered less than a month later. Again, the IO believed the government failed to provide enough evidence to prove the capital charges of murder and recommended lesser charges be referred to court martial. The convening authority, by this time Lieutenant General Helland, eventually forwarded up 9 counts of voluntary manslaughter, 2 counts of aggravated assault, 3 counts of willful dereliction of duty, and 1 count of obstruction of justice some 25 months after the incident occurred.⁶⁷

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 non-combatants, because they 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 Dele 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 of the squad, otherwise his collateral admissions of guilt would have seen him punished for at least other UCMJ violations. While there are many details to hearings and trials presented throughout the case studies we have examined, they are crucial to understanding the limitations of the UCMJ in prosecuting these types of crimes. Lastly, despite

⁶⁶ Englade, p. 137; Michelle Singer, 'The Killings in Haditha', *60 Minutes and CBS News*, 15 March 2007, <<https://www.cbsnews.com/news/the-killings-in-haditha/>> [accessed 28 September 2022].

⁶⁷ Englade, pp. 136-141, 145-147.

Mattis' dismissal of charges in a few of the cases, his decision to proceed in Tatum's trial suggests he possessed a desire to gain accountability. All of this bears consideration as we examine the outcomes of the trials that followed.

Trials

In early 2008, the team of prosecutors the convening authority had appointed released their proposed trial calendar that began with Staff Sergeant Wuterich's trial to be held 28 February and followed once a month by 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 2 and a half years.⁶⁸

Lance Corporal Tatum appeared on 28 March only to have the charges dismissed and immunity granted in exchange for testifying in the remaining trials.⁶⁹ He would not be considered a very cooperative witness for the prosecution, as he had to be ordered to speak to the prosecutors.⁷⁰ 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 immunity for witnesses was exchanged for testimony was necessary.⁷¹

⁶⁸ Englade, pp. 155-157.

⁶⁹ Tony Perry, 'Charges Against Third Marine Dropped in Massacre of Civilians', *Los Angeles Times*, 29 March 2008, <<https://www.sfgate.com/nation/article/Charges-against-third-Marine-dropped-in-massacre-3289913.php>> [accessed 18 May 2021].

⁷⁰ Englade, p. 205.

⁷¹ The author had several conversations with Gary Solis, a former military prosecutor, and author of one of the best 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 non-judicial punishment when possible.

From the start, the trial of Lieutenant Colonel Chessani became an up-hill battle. Early in the proceeding, the prosecution had to respond to allegations of unlawful command influence, which for a military court martial could destroy a case.⁷² 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 defence, 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’ direction for a time).⁷³ The crux of the matter was that Mattis, dual-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. He did not dismiss the charges with prejudice, which allowed the prosecution to re-prefer the charges under a different command free of the alleged command influence.

After spending months attempting an appeal on this point failed, the prosecution decided to move the case, in June 2009, to the purview of the 3-star general in charge of the Marine Corps Combat Development Command, which oversees everything from training and education for the Marine Corps to force requirements development and validation. After three months’ deliberation, the new convening authority determined there would be little chance of a successful prosecution starting back from the beginning even longer after the incident and dismissed the criminal charges. Despite the reprieve from a criminal trial, Chessani would go before a board of

⁷² The interest or actions taken to intervene or influence a case by a commander has been deemed unlawful and upheld time and again by the highest appeals courts available to members of the armed services. 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 UCI can be grounds to have a case thrown out.

⁷³ 4-star general officers are rarely called to give testimony in any sort of case, so Mattis’ testimony and the aggressive way the defense challenged his decisions was quite extraordinary.

inquiry to determine if he would be allowed to retire as a lieutenant colonel or demoted to major for the failings during his command. During this proceeding he was much more vociferous in his own defence and questioned 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 2011.⁷⁴

Wuterich would come 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, to include General Mattis, the lawyer for Wuterich, who had 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.⁷⁵ Before they could get to the 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 process. This prompted Wuterich's lawyer to attempt a similar tack in August, as one of his originally assigned military lawyers separated, and though 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

⁷⁴ Englade, pp. 186-191.

⁷⁵ Mark Walker, 'Haditha's last defendant', *North County Times*, 20 February 2010, <<https://freerepublic.com/focus/f-news/2456004/posts>> [accessed 22 May 2021]; Englade, pp. 193-194.

months to get a decision and then, over a year's worth of appeals later, Wuterich's defence was told it needed to be ready for trial.⁷⁶

Finally, on 5 January 2012—four years after he had been charged—Wuterich's court-martial began. Though the prosecution called many witnesses in the first ten days, including Tatum, Dela Cruz and other immunized members of 3/1, plus NCIS agents who had investigated, the case seemed to be in trouble. Following an un-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 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.⁷⁷ The Corps would dismiss him with a discharge one level below its best "Honorable" characterization a month later.⁷⁸

⁷⁶ Englade, pp. 195-199.

⁷⁷ 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 why a Marine with twelve years exited the Corps at its junior-most grade.

⁷⁸ The actual discharge was a General under Honorable Conditions which only reduces benefits from the Veterans Administration in limited ways.

In all six Article 32 hearings and the four trials that followed, the defence 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 legal defence experience. This meant that often, the defence 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 non-combatants 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, opposed to the 25 months alone from incident to referral of all charges to court martial following Article 32 hearing for the Haditha case. Another murder case committed by Marines against an Iraqi in Hamdania in April 2006 saw prosecution of seven Marines and one Navy corpsman begin five months after the incident and conclude with eight convictions less than ten months later.⁷⁹ 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.

Public Reaction

When the real details started to emerge about the Haditha incident, it was the 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 the killed, which included an disproportionate number of women and children.⁸⁰ A conservative news watchdog organization published results of a study in June that compared the 99 stories on cable network news shows

⁷⁹ Paul von Zielbauer, 'Marine Corps Squad Leader is Guilty of unpremeditated Murder in Killing of an Iraqi Man', *The New York Times*, 3 August 2007, p. A-10.

⁸⁰ McGirk, 'One Morning in Haditha', p.34.

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.⁸¹ Much of the coverage came in fits and starts after the initial spate of coverage until Democratic Representative Murtha, a former Marine himself who had been calling for the removal of troops from Iraq since November of 2005, began to make charges of a cover-up despite the findings of the Bargewell report.⁸² During these months, until the following year, public opinion was mainly characterized by shock and disappointment in the conduct of the Marines.⁸³ In March 2007, just months before the Article 32 hearings were set to begin, *60 Minutes* aired their 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 defence could have hoped. It shifted the public opinion to see the squad as merely "trying to do their job," and victims of an aggressive, liberal media to label them as cold-blooded killers while ignoring their version of what happened. Donations for their court costs from viewers impressed by his unflustered performance in the face of the investigators questions and a more pronounced defence of the squad members in the public sphere followed.⁸⁴

In addition to the hearings and trials that followed, their guilt and innocence were being argued in editorial sections in print and cable shows all over the country. This occurred in the halls of Congress as well, where law makers 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.

⁸¹ 'Hyped Haditha 'Massacre,' But Little Interest in Marine's Version', *Media Research Center*, 13 June 2006, <<https://www.mrc.org/biasalerts/hyped-haditha-massacre-little-interest-marines-version-6132006>> [accessed 20 May 2021].

⁸² Englade, pp. 48-65.

⁸³ NBC News/Wall Street Journal polling data from study # 6063 from 9-12 June 2006 showed that a majority of Americans thought the incident would cause a setback with the U.S.'s relationship with the Muslim world and those involved should be reprimanded or held criminally responsible.

⁸⁴ Englade, p. 74.

This parallels much of the same ebb and flow of feelings which occurred after My Lai came to light, showing an initial revulsion at the loss of discipline or actions of the servicemen 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 over the public perception effects of the Haditha incident on its recruiting efforts, but equally concerning was the possible impact to funding due to the loss of prestige within the halls of Congress.

While civilian lawyers had joined a majority of the defence teams in previous case studies we have explored, by the time of the cases in Iraq it became even more prevalent, with every member of the Haditha accused having some form of civilian representation, often with military law experience themselves, in addition to government appointed counsel. This provided a two-fold advantage to the defences—their 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 their familiarity with the military legal system’s many additional constraints and levers to provide options for a defence. This includes using allegations of unlawful command influence to seek dismissal, or at times delay for more time. Time itself was also a weapon wielded by the defence. 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 in a high-profile case, many times a service limit cannot, which, in the case of Haditha, was shown by Wuterich’s original judge retiring and members of his defence team moving on to civilian life.⁸⁵ Additionally, Wuterich had three different convening authorities hold responsibility for his trial over the years it took to hold.

⁸⁵ One member of Wuterich’s legal team would remain attached to his defense after separating from the military as a partner to his primary attorney, thought 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 Sergeant Hutchins tried in the Hamdania case.

Military Response

Though 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 pre-deployment training and 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 3/1 following Haditha, on the other hand claimed that there were effective classes given and the Marines understood the implications non-combatant 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 were 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 portraying non-combatants were added to all pre-deployment exercises.⁸⁶

The charges levied against Captain Stone, the lawyer attached to 3/1 as part of the program ensuring commanders had 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 3/1 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

⁸⁶ Prior to deployment, Marines were given class seats for a percentage of each unit to go through language and culture training developed by the 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 29 Palms, California and in small unit training at their home stations were tested in scenarios with Arabic-speaking role players representing both combatants and non-combatants to prepare Marines for quickly evolving situations in urban terrain.

lawyers to deploying combat units much earlier in their pre-deployment training. This gave the lawyer a chance to make in-roads within the unit, giving the required law of war classes, offering legal interpretations and opinions on training scenario results, and gaining credibility with the commanders and rest of the staff.

Lessons from Haditha

There were several circumstances from the incident at Haditha that mirrored earlier cases discussed from World War II and Vietnam. 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 IED blast, had not deployed to combat before this tour, and his assignment to a unit like 3rd 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 leading many highly experienced Marines. This mirrored the men of Patton’s Army who were going into their first action in Sicily and would commit crimes at Biscari and 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’ torn body and the demolished HMMWV as he arrived.⁸⁷ Terrazas had been a highly popular member of not only the squad, but of 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

⁸⁷ Englade, p. 21.

squad who 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. Though Bargewell found the unit had sufficient pre-deployment 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.⁸⁸ 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 men, 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 ambivalent and almost negative. Views of non-combatant casualties as the “cost of doing business” or the result of the type of warfare the insurgents were choosing by members throughout the command were noted during Bargewell's investigation.⁸⁹ 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

⁸⁸ Bargewell, pp. 18, 21.

⁸⁹ Englade, pp. 18, 22.

to be protecting, the lack of interest following an incident with Haditha's high number of casualties showed similar apathy.

Mahmudiyah, 12 March 2006⁹⁰

Arriving in Iraq at nearly the same time as the Marines of 3/1, the soldiers of the Army's 1st Battalion, 502nd Infantry Regiment took over an area of operations to the south of Baghdad in an area known as the "Triangle of Death."⁹¹ Part of the 2nd Brigade Combat Team of the 101st Airborne Division, they were coming in for 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 had endured over two dozen casualties in the three short months while responsible for the area before it was relocated to the south near Nasiriyah, a much quieter area.⁹² During the transfer of authority between the units, as members of each conducted ride-along convoys and patrols together to raise the 502nd's situational awareness and

⁹⁰ Like My Lai and Son Thang, the Mahmudiyah Massacre, as it is known in most print and online forums, is mis-named. While the headquarters of the battalion from which the soldiers responsible came 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 murder of her and her family actually took place in a slightly more rural area of the battalion's area, in Yusufiyah six miles to the west. The name Mahmudiyah is retained in this dissertation in order to facilitate any additional research a reader may desire to undertake in the future. FOIA requests were submitted in March 2021 to the Army's Judge Advocate General Corps, for court transcripts, and to CID, for a copy of their investigation, were submitted 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's *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* 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 in large measure along with newspaper reports until the official Army transcripts are received. As Mr. Frederick is deceased, a request to his wife to access any notes and transcripts he left behind was not answered. It is troubling and unthinkable how any group could get to the point of moral destitution that a crime such as this could be planned and executed. Only the necessary details were used for the study to avoid seeming gratuitous in including the horrific details.

⁹¹ The majority of the 502nd left Fort Campbell in Kentucky in late September and arrived in Iraq in early October 2005.

⁹² Monte Morin, '48th Nears End of Tough Tour in Iraq', *Stars and Stripes*, 26 March 2006, <<https://www.stripes.com/news/48th-bct-nears-end-of-tough-tour-in-iraq-1.46785>>

understanding of the battlespace, the men of the 502nd quickly gained the perception that after taking a large number of casualties early on in their fight, the 48th began to cede terrain to the enemy's initiative. An example of this was the quick determination to label roads "black,"—that is closed to friendly forces traffic—after IEDs exploded killing a number of "48th men" on those roads.⁹³

While the 502nd knew they were going to deploy to Iraq for their entire pre-deployment cycle of training, the specific area was changed just two months before their deployment. Rather than the convoy security mission they 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.⁹⁴ Each of the battalion's companies began to familiarize themselves to the individual areas of responsibility. Bravo Company, considered well-led during the pre-deployment training, received an especially restive area, and its 1st platoon would suffer 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 mid-level leaders.

Among the leaders in 1st platoon that embraced their interaction with the population as essential to success was Sergeant Casica, 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

⁹³ Kunk interview with Jim Frederick. Jim Frederick, *Blackhearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* (New York, NY: Broadway Paperbacks, 2010), p. 64

⁹⁴ Frederick, pp. 28-38.

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.”⁹⁵ He spent his time reinforcing to his squad mates 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 abuse of his son, and Private Steven 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 stream included hate-filled diatribes about race, religion, or proclaiming his willingness to kill anyone his superiors ordered him to.⁹⁶ By 2006, the Army granted waivers to one out of five new recruits because of criminal records, which, combined with an exodus of mid-level 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.⁹⁷ Helping to push the Army toward granting these waivers was the administration’s decisions to go to war with less forces than desired by the military leadership and 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.

⁹⁵ Ibid., pp. 67-68

⁹⁶ Frederick, p. 71.

⁹⁷ Andrew Tilghman, ‘The Army’s Other Crisis’, *Washington Monthly*, 1 December 2007, <<https://washingtonmonthly.com/2007/12/01/the-armys-other-crisis-2/>> [accessed 27 May 2021].

Two months into the deployment, the company had already taken a high number of casualties and killed, including two platoon commanders and the company's senior enlisted soldier. In December though, Casica and another soldier were killed at a vehicle checkpoint by an Iraqi man that 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 non-combatants in any sort of sympathetic light. As in the Vietnam case studies and Haditha, an apathy regarding the fate of non-combatants 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. Her notes included observations of abnormal eye contact and anger, and that he expressed homicidal ideations, especially thoughts about killing Iraqi civilians. Though she would report 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.⁹⁸ Over 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 front-line units already lacking leaders further undermanned.

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 Lauzier had left for his mid-tour leave with the platoon distributed among several traffic control points (TCPs) spread out within Bravo Company's area. The bare minimum of 6 soldiers were

⁹⁸ Frederick, pp. 157-158.

left to man TCP #2. Leading this group was Specialist 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 Barker and Green—both of whom were a handful even for experienced and confident leaders—Privates First Class Spielman, Howard, and Private Scheller. Both Howard and Scheller were new to the unit, arriving after the deployment began, and Spielman was a 21-year-old that had been with the unit from the beginning of the deployment but was still relatively new to the Army.⁹⁹ Over the previous few months, drinking alcohol procured and sold by the Iraqi Army that operated with them had become almost common-place among members of the platoon—contrary to General Order #1 for all forces deployed to Iraq prohibiting any consumption of alcohol. 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 talk turned dark.¹⁰⁰ 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 young woman 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

⁹⁹ Spielman was one of the frequent guests of Sgt Casica’s house before deployment and viewed him as a role model.

¹⁰⁰ 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 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 man 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 is so short of a squad that it could hardly be called such and had been left in place for over two weeks.

TCP with a radio in case anyone approached their position, and while they tried to call the group back several times, they were unsuccessful.¹⁰¹

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 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 had 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 took Abeer to the living room.¹⁰²

As 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 AK jammed. He switched to his shot gun and shot the man once in the head and twice in the body before turning on the little girl running toward a corner. He un-jammed 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

¹⁰¹ Frederick, pp. 258-262.

¹⁰² Frederick, pp. 254-265.

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 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.¹⁰³

An hour or so later, there was a knock on the door of Fakriah’s cousin, Abu Muhammad, who lived about a mile away, and her neighbor alerted him to something amiss, telling him to “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, began to attempt 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 Sgt Tony Yribe, who on his second deployment to Iraq was now callous to the violence but found a shotgun shell which he thought was curious.

¹⁰³ ‘Soldier Weeps Describing Role in Rape and killings in Iraq’, *New York Times*, 22 February 2007, <<https://www.nytimes.com/2007/02/22/world/middleeast/22confess.html>> [accessed 22 May 2021].

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 didn't report the encounter. Yribe went back to Green later, though 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 evaluation was deemed to have a pre-existing social disorder and separated from the Army.¹⁰⁴

How Mahmudiyah Broke

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.¹⁰⁵ Not until months later, on June 16th, 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

¹⁰⁴ Brett Barrouquere, 'Ex-soldier trial for rape, murder in Iraq opens', *The San Diego Union-Tribune*, 27 April 2009, <<https://www.sandiegouniontribune.com/sdut-us-iraq-rape-slaying-042709-2009apr27-story.html>> [accessed 24 July 2022]; Frederick, pp. 279-281.

¹⁰⁵ 'Pentagon: Violence in Iraq Rising', *CBS News*, 3 September 2006, <<https://www.cbsnews.com/news/pentagon-violence-in-iraq-rising/>> [accessed 22 July 2022]. 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, Jim 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, p. 272.

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 and began investigating on his own over the following days. Feigning he knew more than he did, he engaged Howard in a conversation on the 19th about all the terrible things they had seen in Iraq and learned of the involvement of the others. On the 23rd, he tried to get assistance from outside the chain of command by talking to a Staff Sergeant from Combat Stress 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 June 24th.¹⁰⁶

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 US 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, Privates First Class Spielman and Howard were all charged with counts of rape and murder.¹⁰⁷ Sergeant Yribe 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

¹⁰⁶ Frederick, pp. 317-321.

¹⁰⁷ 'Iraq rape soldier given life sentence', *The Guardian*, 17 November 2006, <<https://www.theguardian.com/world/2006/nov/17/iraq.usa1>> [accessed 27 May 2021].

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.

Hearings

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 members, including Cortez, Barker, and Green. In August, at the Article 32 hearing on the cases for 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.¹⁰⁸ Major General Thomas Turner, 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.¹⁰⁹ Sergeant Yribe would be offered immunity from prosecution for the dereliction of duty charge in exchange for his testimony against Barker and others. His plea included being separated from the Army with an Other than Honorable Characterization of service in lieu of prosecution.¹¹⁰

¹⁰⁸ Paul von Zielbauer, 'Investigator Recommends Courts-Martial for 4 soldiers', *New York Times*, 4 September 2006, <https://www.nytimes.com/2006/09/04/world/middleeast/04abuse.html?_r=1&oref=slogin&pagew> [accessed 28 May 2021].

¹⁰⁹ 'Four U.S. soldiers charged with rape and murder', *CNN*, 18 October 2006, <<https://www.cnn.com/2006/LAW/10/18/soldiers.court/index.html>> [accessed 24 May 2021].

¹¹⁰ Frederick, p. 369. An "Other than Honorable" discharge is the lowest of two General Characterization discharges and though not punitive, its award fails to qualify the service member for many of the benefits normally given to veterans, including the GI Bill for college and access to affordable home loans.

Trials

In November 2006, Barker pleaded 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.¹¹¹ 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."¹¹²

In February 2007, as part of a plea agreement, Cortez pleaded guilty to four counts of felony murder, rape and conspiracy to rape and was issued the sentence of 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 and a dishonorable discharge.¹¹³

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 behaviour and time already served in pre-trial confinement.¹¹⁴ While Howard was originally charged with more serious crimes, testimony by the others who pleaded guilty to murder and rape reassured

¹¹¹ 'Black Hearts Case Study: The Yusufiyah Crimes, Iraq, March 12, 2006', *Center for the Army Profession and Leadership*, 4 March 2021, <<https://capl.army.mil/case-studies/wcs-single.php?id=78&title=black-hearts-yusufiyah-iraq>> [accessed 2 June 2021]. The U.S. Disciplinary Barracks is a euphemism for prison, 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.

¹¹² Paul von Zielbauer, 'Soldier to Plead Guilty in Iraq Rape and Killings', *New York Times*, 15 November 2006, <<https://www.nytimes.com/2006/11/15/washington/15plea.html>> [accessed 29 May 2021].

¹¹³ 'Soldier gets 100 years in prison in rape, 4 slayings', *Los Angeles Times*, 23 February 2007, <<https://www.latimes.com / archives/la-xpm-2007-feb-23-na-iraqrape23-story.html>> [accessed 26 May 2021]. A dishonorable discharge is one of two punitive discharges and the lowest discharge characterization given by the Army.

¹¹⁴ 'Black Hearts Case Study'.

prosecutors that he did not have previous knowledge of the groups' intent to rape and murder when they left him and Scheller at the traffic control point.¹¹⁵

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 of either the rape or murders, was finally tried in August. There were many inconsistencies in 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.¹¹⁶ Though 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 90 years in prison after being found guilty of rape, conspiracy to rape, housebreaking with the intent to rape, and four counts of felony murder.¹¹⁷

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 US servicemembers. Once the military contacted the FBI, they tracked Green down 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 which prevented contractors and family members of servicemen

¹¹⁵ Cindy Horswell, 'Iraq war rape trial has soldier's fate on hold'. *Houston Chronicle*, 19 March 2007, <<https://www.chron.com/news/nation-world/article/Iraq-war-rape-trial-has-soldier-s-fate-on-hold-1543896.php>> [accessed 29 May 2021].

¹¹⁶ Frederick, pp. 358-359.

¹¹⁷ Horswell; 'Black Hearts Case Study', Like the Barker and Cortez, he was eligible for parole after 10 years.

stationed overseas from being prosecuted.¹¹⁸ 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.¹¹⁹

In addition to the public defenders assigned to the case, another former Marine lawyer joined Green's defence 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."¹²⁰

The defence twice offered for Green to plead guilty to remove the possibility of the death penalty, but the Justice Department declined both offers. The defence 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 defence, they tried to put the Army on trial in the court of public opinion for the failings of leadership that missed the red flags of Green's behaviours throughout the 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.¹²¹ After

¹¹⁸ The Military Extraterritorial Jurisdiction Act, enacted in 2005, was the long awaited correction to the initial omission by lawmakers of a means to prosecute grave breaches to the Geneva Convention. It had been sought by the military to close a loophole in which servicemembers who had finished their contractual obligations, and civilians employed by the Department of Defense, 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 where an apparently guilty individual was freed due to lack of jurisdiction finally spurred action by Congress to pass MEJA. Solis, *The Law of Armed Conflict*, pp. 89-90.

¹¹⁹ Frederick, p. 359.

¹²⁰ 'Gag requested in Iraq rape-murder case', *CNN*, 11 July 2006, <<https://www.cnn.com/2006/LAW/07/11/gag.order/index.html>> [accessed 4 June 2021].

¹²¹ Frederick, pp. 359-361.

several weeks of trial, the jury found Green guilty of every count of conspiracy, rape, and murder. The jury, however, could not come to a unanimous decision regarding sentencing him to death, splitting on the decision six against six. Members of the 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.¹²² Green died by his own hand, after hanging himself in his Arizona prison cell in February 2014.¹²³

Public Reaction and Military Response

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 in 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 did spark immediate conversation about the prevalence of mental illness or personality disorders in the armed forces.¹²⁴ Though the outcry was not as strong, 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 in order to report what he knew, he resorted to announcing, “Let me say one word,... Haditha,” to

¹²² Frederick, pp. 361-363.

¹²³ Steve Almasy, ‘Former Soldier at Center of Murder of Iraqi Family Dies After Suicide Attempt’, *CNN*, 18 February 2014, <<https://www.cnn.com/2014/02/18/us/soldier-steven-green-suicide/index.html>> [accessed 23 May 2021].

¹²⁴ Benedict Carey, ‘When the Personality Order Wears Camouflage’, *New York Times*, 9 July 2006, <<https://www.nytimes.com/2006/07/09/weekinreview/09carey.html>> [accessed 31 May 2021].

communicate the serious need for an expedited meeting.¹²⁵ Though the battalion commander resisted the idea his 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.

Though the Army did not initially widely publicize the events or highlight the lessons to be learned from the tragedy, 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 findings in several facets of their training and education continuum. As early as 9 September 2011, the Center for the Army Leadership used the killings as a case study to highlight the positive ethics that drove Private First Class Watt and Sergeant Diem to report their peers when the information came to light.¹²⁶ At the United States 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 Professional Ethic with special emphasis placed on the failings of several levels of command and supervision that led to the events.¹²⁷ Though specific reviews of the manpower of the 502nd were done to determine causes for casualties among soldiers as a part of the AR-15 investigations, the crime 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 502nd.¹²⁸

¹²⁵ Frederick, p. 320, from interviews with Sergeant First Class Fenlason and Captain Goodwin.

¹²⁶ 'Black Hearts Case Study'

¹²⁷ John H. Cushman, LtGen (Ret.), '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', 2 June 2011, <<https://www.west-point.org/publications/cushman/BlackHeartsCase.pdf>> [accessed 18 May 20021]. The Army merged the Center for the Army Professional 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. The Black Hearts case study currently resides on CAPL's website.

¹²⁸ AR-15 into casualties.

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.¹²⁹ The success in prosecuting those involved in the murder of the Janabis even after a notable delay between the rape-murders and the 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 taking the death penalty off 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 Vietnam for which there are existing numbers, or to the eventual results of the Haditha and Hamdania trials.¹³⁰ 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.

Lessons From Mahmudiyah

The massacre of the Janabi family, though conceived in a drunken state, was pre-meditated murder, not an over-zealous 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 started again with an absence of combat-experienced leadership at a critical juncture. This absence caused an immature leader, Cortez, to be persuaded over the course of a morning spent drinking against regulations to commit rape and murder. As the senior

¹²⁹ Marc Cooper, 'AR-15 investigation: Quality of Mental Health Care Provided in Iraq Theater of Operations', *U. S. Army*, 26 July 2006.

¹³⁰ Gary Solis, 'Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam', *Transnational Law and Contemporary Problems*, Spring 2000, p. 12.

man present, the fact 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 non-commissioned officer. He should not have been in a leadership position. Had his squad leader and platoon commander both not been away on mid-tour leave, he would not. 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.¹³¹

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 number of casualties in leadership positions, with platoon-level officers and senior NCOs responsible for discipline in the ranks lost early in the deployment at an alarmingly high rate, and among close friends of the perpetrators—a circumstance that again mirrors 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.¹³²

An additional cause for this particular small group to suffer from a break down 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.¹³³ Because the war's duration was longer than originally planned for, and the administration was not eager to use even more of the existing reserve capacity—which would signal greater impact to daily

¹³¹ Frederick, p. 232.

¹³² Frederick, pp. 143, 265.

¹³³ Andrew Tilghman, 'The Army's Other Crisis', *Washington Monthly*, 1 December 2007, <<https://washingtonmonthly.com/2007/12/01/the-armys-other-crisis-2/>> [accessed 27 May 2021].

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 over twenty-five years, the services had reached a state where their standards ensured that they could meet their pre-war 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 Lt. Calley at My Lai and Schwarz at Son Thang, had the services' pre-war standards been observed, it is probable that neither Green nor Barker would have been in the Army.¹³⁴

Some of the command's failings were out of their control due to factors such as the lack of preparation for the area of operations they would occupy—their assignment changed just weeks before their deployment—and the imbalance between their unit size and the large area of operations in a particularly restive area.¹³⁵ The lack of preparation for the area and fight they would face mirrored My Lai and Haditha for different reasons, and the lack of manpower was an unfortunate by-product of the Department of Defense's early efforts to fight the war with as small a manpower footprint as possible.¹³⁶ Other failings rested squarely on the command. Even

¹³⁴ Frederick, p. 71. Both soldiers had a combination of instances of gang affiliation, drug use and brushes with the law in their past which would have been disqualifying in most cases, and Green received a “moral waiver” to join.

¹³⁵ 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 which 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 502nd. 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.

¹³⁶ ‘Powell: I Wanted More Troops in Iraq’, *CBS News*, 30 April 2006, <<https://www.cbsnews.com/news/powell-i-wanted-more-troops-in-iraq/>> [accessed 23 September 2022]. Despite Secretary of State Colin Powell's, a former Chairman of the Joint Chiefs of Staff, recommendation for more troops during the invasion, Rumsfeld and the General in charge of planning the invasion, Tommy Franks, decided the smaller footprint was adequate. This was due to some poor planning assumptions, and a different aftermath for 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 which killed their squad-mate.

when the loosening moral restraints became evident to front-line leaders and admitted by Green himself when he sought help from the deployed psychiatric professionals, the command did not mandate continued counseling and re-evaluation for Green and later disregarded the medical opinion of the Combat Stress doctors to temporarily remove some personnel from the fight.¹³⁷ Also, the lack of trust by the men at the platoon and company levels for superiors in higher headquarters, or anyone outside their immediate circles or sharing their experiences, were classic examples of the shrinkage of moral horizons that make the commission of war crimes more likely.¹³⁸ 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.¹³⁹ 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 frontline combat before a break, and American policy during that war was to leave them engaged no longer than 80 days. Over the last few decades, however, soldiers and Marines during Vietnam and later conflicts could expect to spend considerably longer thanks to improvements in combat logistics. The capacity to support combat operations finally outstripped the emotional and physical capacity of soldiers to endure it.¹⁴⁰

¹³⁷ Josh White, ‘Death Sought for Ex-GI in Slayings, Rape in Iraq’, *Washington Post*, 4 July 2007, <<https://www.washingtonpost.com/wp-dyn/content/article/2007/07/03/AR2007070302104.html>> [accessed 31 May 2021].

¹³⁸ Jonathan Shay, *Achilles in Vietnam* (New York: Scribner, 1994), pp. 12-13, 23-25.

¹³⁹ Shay, p. 12.

¹⁴⁰ Frank Grossman, *On Killing* (New York: Back Bay Books, 1995), p. 44.

Hamdania, 26 April 2006

The night's mission was to conduct a deliberate ambush aimed at interdicting insurgent emplacement of improvised explosive devices (IEDs).¹⁴¹ Kilo Company's 2nd platoon prepared for the night's 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. The squad had been stopped at their second ambush site on the patrol by their squad leader, Sergeant Lawrence Hutchins III, who briefed them on his plan to eliminate a high-value target, Saleh Khaleb Gowad al-Zobai, known to live in the area. As it happened, they were witnessed nearing al Zobai's house by a neighbor and instead selected a random man, from a nearby house, whom they kidnapped and murdered.¹⁴²

Arriving in Iraq in late-December 2006 and early-January 2007, the 3rd Battalion, 5th Marine Regiment's Company K (Kilo Company) operated in an area near Abu Ghraib to the west of Baghdad.¹⁴³ As discussed in previous case studies, this period of the war was marked by escalating insurgent attacks against coalition—US and Iraqi army and police—forces. These attacks manifested in a high number of IED attacks and with them, many casualties. In the weeks before April 26th, 3/5's units had been conducting aggressive operations to counter the IED activity in the area, particularly targeting operations to identify and detain individuals known to

¹⁴¹ R. H. Troidl, "United States of America v. Lawrence G. Hutchins III Case # 200800393." *United States Navy-Marine Corps Court of Criminal Appeals*, 29 January 2018, p. 3.

¹⁴² Trent Thomas written statement to NCIS on 16 May 2006, p. 4. This was the second of two statements initially obtained by NCIS from the members of the squad during their investigation immediately following the incident. Hereafter referred to as "Thomas NCIS interview on 16 May 2006." This was his second interview with NCIS after being detained for his alleged part in the killing on 26 April. The differences between the two interviews are marked and believed to be caused by the resignation at the second interview that the investigation was going to uncover the truth.

¹⁴³ Patrick G. Looney, LtCol, USMC, 'Command Chronology for period of 1 July- 31 December 2005', *Headquarters, Marine Corps*, 3 January 2006. Accessed at Marine Corps University, History Division Archives.

emplace IEDs. During this time, on 10 April, the 1st squad, the focus of this case study, was also engaged in a patrol that violated orders pertaining to the interactions with non-combatants.

According to Corporal Trent Thomas' testimony to 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 rough them up for speaking ill of and failing to cooperate with US forces.¹⁴⁴ Despite the encounter on 10 April, the unit had maintained good relations with the majority of the population, and they helped identify the fake sheik's influence.¹⁴⁵ During the trials that followed the investigations into the April 26th murder, enough evidence was uncovered to also seek charges against a lieutenant with 3/5 for his knowledge and actions when interrogating the individual for intelligence about insurgent activity in the area.¹⁴⁶ 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 his unit's control.¹⁴⁷ Among the Marines present during the assaults on the Iraqis detained during this mission were Sergeant Lawrence Hutchins III, Corporal Thomas, and Lance Corporal Jerry Shumate.¹⁴⁸ All three were charged for assault as this incident came to light during the investigation.¹⁴⁹ Evident in several

¹⁴⁴ Thomas NCIS interview on 16 May 2006, p. 1.

¹⁴⁵ Anonymous interview with member of the Pendleton 8's Hamdania platoon.

¹⁴⁶ Mark Walker, 'Officer Charged in Hamdania Assault Case', *San Diego Union-Tribune*, 17 August 2006, <<https://www.sandiegouniontribune.com/sdut-officer-charged-in-hamdania-assault-case-2006aug17-story.html>> [accessed 18 July 2021].

¹⁴⁷ Mark Walker, 'Criminal Charges Dropped Against Officer in Hamdania Case', *San Diego Union-Tribune*, 2 May 2007, <<https://www.sandiegouniontribune.com/sdut-criminal-charges-dropped-against-officer-in-2007may02-story.html>> [accessed 22 July 2021]. The use of non-judicial punishment means that though 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.

¹⁴⁸ Thomas NCIS interview on 16 May 2006, p. 1.

¹⁴⁹ Daniel Strumpf, 'Officer Could be Tied to Camp Pendleton War Crimes Case', *Voice of San Diego*, 10 August 2006, <<https://www.voiceofsandiego.org/topics/government/officer-could-be-tied-to-camp-pendleton-war-crimes-case/>> [accessed 2 August 2021].

other of the cases examined in this dissertation, like My Lai, Son Thang, and Mahmudiyah, 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'. After being inserted by vehicles, he 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.¹⁵⁰ Al-Zobai was known to live in the area, and Hutchins assigned tasks throughout the squad which included obtaining a shovel and AK-47 rifle to plant at the scene giving the appearance that an armed insurgent was emplacing an IED.¹⁵¹ In the event al-Zobai was not home, they would seek out another man in the area. Though 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.¹⁵²

After sitting in the ambush position for several hours, at around 02:00 on 26 April, four members of the squad, Thomas, Corporal Marshall Magincalda, Lance Corporal Robert Pennington, and corpsman Petty Officer Third Class Melson Bacos, set out from the position to obtain a rifle and shovel. While Thomas and Magincalda entered a house they picked at random

¹⁵⁰ Mark Walker, 'Jodka sentenced to 18 months for his role in Hamdania killing', *The San Diego Union Tribune*, 16 November 2006, <<https://www.sandiegouniontribune.com/sdut-jodka-sentenced-to-18-months-for-his-role-in-2006nov16-story.html>> [accessed 7 August 2021].

¹⁵¹ Troidl, pp. 3-4.

¹⁵² Thomas NCIS interview on 16 May 2006, p. 3.

to get an AK-47, one of the two others who were providing security grabbed a shovel from the yard.¹⁵³ As they approached al-Zobai's house they believed they had been seen by a female neighbor so instead picked a random house in the neighborhood from which to grab a military-aged male. Finding the door open, Corporal 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 and forced him outside and then 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.¹⁵⁴

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 in to headquarters that they were observing an armed insurgent digging to emplace an IED near their ambush site and request permission to engage.¹⁵⁵ Once Hutchins fired the first shot and the rest of the squad began firing, he ordered them to move forward, staying on line. As they neared the man, Hutchins ordered the squad to cease firing and then moved in close to check on the man. He found that he was still alive and only wounded once—whether this was due to poor

¹⁵³ Ibid, p. 3; 'Report of Investigation. Identifier: 08MAY06-MEJB-0357-7HMA-C', *Naval Criminal Investigative Service*, 17 Oct 2007, Accessed 3 Jun 2021 through Freedom of Information Act Request 5720 2021-004738, p. 2. Hereafter referred to as "Investigative Report." This copy of the Hamdania Investigation was heavily redacted, but using juror notes from Corporal Thomas' court martial, and records from the Armed Forces Court or Appeals, much of the information was readily interpreted. Hereafter referred to as "Report of Investigation."

¹⁵⁴ Thomas NCIS interview on 16 May 2006, pp. 3-4.

¹⁵⁵ Troidl, p. 4.

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. While Hutchins told Bacos to shoot the man again in his face with his pistol to obscure his identity, Bacos refused.¹⁵⁶ Bacos did bring the casings he had caught in his backpack and poured them into the hole where they dumped Awad’s body and rifle.¹⁵⁷ The quick reaction force that responded to their contact arrived and took photos of the scene for routine after action reports to higher headquarters, and Hutchins completed a post-contact story board for submission which outlined their contact, describing it as a wholly justified shooting.¹⁵⁸

How Hamdania Broke, the Investigation, and Results

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.¹⁵⁹ By 8 May, NCIS started to interview many of the squad members of 1st squad. In his initial written statement, like many of his co-perpetrators, 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 the 25-26th that had not fired their weapons at Awad.¹⁶⁰

¹⁵⁶ Thomas NCIS interview on 16 May 2006, pp. 4-5.

¹⁵⁷ Sergeant Major Justin LeHew (Ret.), interview by Scott D. Hamm, 17 March 2021, transcript and recording currently in possession of author. Hereafter referred to as LeHew 2nd interview. At 36:30.

¹⁵⁸ Thomas NCIS interview on 16 May 2006, p. 4; Lawrence Hutchins III, ‘Story board of shooting on the morning of the 26th’, *Company K, 3rd Battalion, 5th Marines*, 28 April 2006. Entered into evidence during Thomas Court Martial as Enclosure A to Exhibit 9.

¹⁵⁹ “Report of Investigation,” pp. 2-3.

¹⁶⁰ Trent Thomas written statement to NCIS on 8 May 2006, p. 2. This was the first of two statements initially obtained by NCIS from the members of the squad during their investigation immediately following the incident.

NCIS's 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, where an autopsy was performed by a member of the Office of the Armed Forces Medical Examiner's staff. The autopsy catalogued a total of 11 gunshot wounds, though signs of his wrists and ankles being bound were not present due to the degree of decomposition.¹⁶¹

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 re-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 non-combatant.¹⁶² Following these subsequent interviews, the members of the squad were returned to the United States, where they were confined in the brig at their base, Camp Pendleton, California on 24 May 2006.¹⁶³ In Iraq and at various laboratories around the world, the investigation and examination of evidence continued. On 21

Hereafter referred to as "Thomas NCIS interview on 8 May 2006." Due to the false statements in this initial interview, Corporal Thomas would be charged with UCMJ Article 107, False Official Statements.

¹⁶¹ Scott Luzi, Commander USNR, 'Autopsy Examination Report #06-0476, Awad, Hashim Ibrahim', *Armed Forces Institute of Pathology*, 6 July 2006, 2-5, p. 15.

¹⁶² Thomas NCIS interview on 16 May 2006, p. 3.

¹⁶³ Report of Investigation, p. 3; Teri Figueroa and Mark Walker, 'The 'Pendleton 8': A look at the 7 Marines and Navy corpsman charged in Hamdania incident', *San Diego Union-Tribune*, 23 July 2006, <https://www.sandiegouniontribune.com/sdut-the-pendleton-8-a-look-at-the-7-marines-and-navy-2006jul23-story.html>. Accessed 31 July 2021.

June, all seven Marines and the corpsman of the squad were charged with, among other things, the murder of Awad.¹⁶⁴

Hearings

The Article 32 hearings for the Marines began on August 30, starting with Corporal Marshall Magincalda and Private First Class John Jodka.¹⁶⁵ As in other of the 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 she 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 hearings, Representative Murtha from Pennsylvania 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.¹⁶⁶ 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 Hutchins' conviction at his first court martial would be used by those

¹⁶⁴ "Timeline: Investigating Hamdania." *National Public Radio Online*, 30 August 2006. <<https://www.npr.org/templates/story/story.php?storyId=5501954>> [accessed 4 August 2021].

¹⁶⁵ Melissa Block and John McChesney, 'Hamdania Hearings Begin for Two Marines', *National Public Radio*, 30 August 2006, Transcript at <<https://www.npr.org/templates/story/story.php?storyId=5738223>> [accessed 31 July 2021]; Strumpf.

¹⁶⁶ Rick Amato, 'Inside the Camp Pendleton8', *Townhall*, 31 August 2006, <<https://townhall.com/columnists/rickamato/2006/08/31/inside-the-camp-pendleton-8-n1338405>> [accessed 4 August 2021].

defending Staff Sergeant Wuterich. That attempt would be unsuccessful for Wuterich's team but contributed to the much delayed trial process.¹⁶⁷

Trials

Compared to the other two case studies in this chapter, the accused from 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 of 2007. Sergeant Hutchins legal status would continue to change for years as his lawyers were successful in having him re-tried another three times before he finally rested all appeals.

The first of the accused scheduled to be brought to trial was the corpsman, Melvin Bacos. Just before his proceeding, the prosecution announced 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 one year of his ten-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, and his answer was, "I wanted to be part of the team."¹⁶⁸ 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 strengthen 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

¹⁶⁷ 'Marine's defense to seek dismissal of Haditha killings case because of loss of military lawyer', *Associated Press*, 8 January 2015, < <https://www.foxnews.com/us/marines-defense-to-seek-dismissal-of-haditha-killings-case-because-of-loss-of-military-lawyer>> [accessed 5 August 2021]

¹⁶⁸ Melissa Block and John McChesney, 'Navy Medic Describes Civilian's Death in Iraq', *National Public Radio*, 6 October 2006, Transcript at <<https://www.npr.org/templates/story/story.php?storyId=6211231>> [accessed 6 August 2021]; and John McChesney, 'Navy Medic Testifies About Hamdania Killing' *National Public Radio*, 7 October 2006, Transcript at <<https://www.npr.org/templates/story/story.php?storyId=6215761>> [accessed 6 August 2021].

was the effect of command climate, just as in earlier cases like My Lai where Captain Medina and others added to the already tense climate in the unit by promising an opportunity revenge for comrades previously lost the day before that operation. In the case of 3/5 during Hamdania, a member of the platoon said frustration at the pressure for results no matter the means influenced the actions of platoon,

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 Phan and Sgt 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.¹⁶⁹

Also in October, Private First Class John Jodka III, 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. Within a week’s span during November, the three were each sentenced for their roles and gave testimony regarding the crime.¹⁷⁰ 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 defence maintained, in a parallel to Green’s case at Son Thang, he was a new Marine that was failed by his leadership, specifically the squad leader, Hutchins.¹⁷¹ On 16 November, Jackson attended his sentencing hearing for his guilty pleas to the same charges. Though 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

¹⁶⁹ Anonymous interview with member of the Pendleton 8’s Hamdania platoon.

¹⁷⁰ Walker, ‘Jodka sentenced to 18 months for his role in Hamdania killing’.

¹⁷¹ Ibid.

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 defence laid much of the responsibility at Hutchins' feet.¹⁷² 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 8-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, would be suppressed wrapped up the same day.¹⁷³ 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 who evidence showed took a lead in planting evidence near Awad's body. Though 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 would serve 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 particularly tough urban fight during the previous deployment, had changed him.¹⁷⁴

¹⁷² Associated Press, 'Another Marine Sentenced to 21 Months in Prison for Iraqi Slaying in Hamdania', *Fox News*, 17 November 2006, <<https://www.foxnews.com/story/another-marine-sentenced-to-21-months-in-prison-for-iraqi-slaying-in-hamdania>> [accessed 7 August 2021].

¹⁷³ Mark Walker, 'Shumate sentenced to 21 months in Hamdania killing', *The San Diego Union-Tribune*, 22 November 2006, <<https://www.sandiegouniontribune.com/sdut-shumate-sentenced-to-21-months-in-hamdania-killing-2006nov22-story.html>> [accessed 7 August 2021].

¹⁷⁴ Mark Walker, 'Pennington gets 8 years in Hamdania killing', *The San Diego Union-Tribune*, 18 February 2007, <<https://www.sandiegouniontribune.com/sdut-pennington-gets-8-years-in-hamdania-killing-2007feb18-story.html>>

Though Corporal Trent Thomas had originally also agreed to plead guilty like the four Marines and sailor before him, he withdrew his guilty plea, was re-issued charges the same day Pennington was sentenced, and instead went to a court-martial.¹⁷⁵ His was the first case to go through a full court-martial, and the panel included a large number of combat veterans. According to Sergeant Major Justin LeHew, who was a member of the panel, during the panel-selection phase the Marines sought by the convening authority, Lieutenant General Mattis, were, “...well respected, highly kinetic combat leaders, and also people who had a stable, non-judgmental head on their shoulders...”¹⁷⁶ 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.¹⁷⁷

As was his right, Thomas had requested enlisted representation during his trial, and the convening documents show seven of the fourteen members eligible for the panel were in the enlisted pay grades of E-6 to E-8.¹⁷⁸ Thomas was on his third deployment to Iraq, having been injured on his second, and intended to re-enlist before the accusations following this incident. He was tried for helping kidnap Awad, murder for his role in shooting Awad, larceny,

[accessed 8 August 2021]; Tony Perry, ‘Mukilteo Marine gets 8 years in brig’, *The Seattle Times*, 18 February 2007, <<https://www.seattletimes.com/seattle-news/mukilteo-marine-gets-8-years-in-brig/>> [accessed 9 August 2021]; ‘Fifth Marine pleads guilty in Hamdania killing’, *Reuters*, 13 February 2007, <<https://www.reuters.com/article/us-iraq-marines-idUSN1320422520070213>> [accessed 8 August 2021].

¹⁷⁵ Reuters, ‘Fifth Marine’.

¹⁷⁶ LeHew, 2nd interview at 1:18.

¹⁷⁷ ‘Marine to serve no time in Iraqi killings case’, *Fox News*, 20 November 2015, <<https://www.foxnews.com/us/marine-to-serve-no-time-in-iraqi-killings-case>> [accessed 21 July 2022].

¹⁷⁸ James Mattis, ‘General Court-Martial Convening Order Serial Number MCC1-07A’, *US Marine Forces Central Command*, 6 July 2007, Copy obtained from Sergeant Major 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 non-commissioned officers that 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.

housebreaking, making false official statements, and conspiracy to commit all the aforementioned crimes.¹⁷⁹ While his defence lawyers did not dispute any of the testimony heard in other cases to date, or that Thomas took part, they did argue he was compelled to do so because of the orders of his squad leader during a combat operation and that he had experienced over twenty explosions during three deployments to Iraq which may have contributed to his judgment being clouded.¹⁸⁰ This strategy harkens back to the first case examined in this dissertation, at Biscari, Sicily, and was no more successful than any of the other attempts using this defence since the changes to the articles of war during the World War Two.

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' sentence was announced. These two were junior in rank to Thomas, and both sentenced to 21 months of confinement for their roles in the crime, Mattis did not feel allowing them to remain confined when a senior Marine was free after his trial.¹⁸¹

¹⁷⁹ Teri Figueroa and Mark Walker, 'The Pendleton 8: A look at the 7 Marines and Navy Corpsman charged in Hamdania Incident', *The San Diego Union-Tribune*, 22 July 2006, <<https://freerepublic.com/focus/f-news/1670877/posts>> [accessed 5 September 2021].

¹⁸⁰ Marty Graham, 'Court-martial opens for Marine in Haditha case' *Reuters*, 9 July 2007, <<https://www.reuters.com/article/idUSN09293266>> [accessed 29 August 2021]; Allison Hoffman, 'Marine Convicted of Conspiracy (Corporal Trent Thomas)' *Associated Press*, 18 July 2007, <<https://freerepublic.com/focus/f-news/1868051/posts>> [accessed 29 August 2021].

¹⁸¹ Rick Rogers, 'General cuts sentences of two imprisoned Marines (Hamdania)', *The San Diego Union-Tribune*, 7 August 2007, <<https://freerepublic.com/focus/f-news/1877930/posts>> [accessed 28 August 2021].

Corporal Marshall Magincalda began his trial in late September and also sought to use his post-traumatic stress diagnosis following three tours in Iraq as part of his defence. His panel, like Thomas', consisted of several enlisted Marines in addition to officers. After a several-day trial, he was convicted of larceny, housebreaking, and conspiracy to commit the same litany of offenses as Thomas. During sentencing, he was sentenced to time already served (448 days confinement), and reduction to private, but no punitive discharge.¹⁸²

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 just a day longer but would end considerably differently. Though Sergeant Hutchins' 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, though in this case, Awad's name was dropped from the charge due to assertions by Hutchins' lawyers that the identification of the victim was suspect. Additionally, he was convicted of larceny and making false official statements, though he was found not guilty of charges of kidnapping, housebreaking, assault, and obstruction of justice.¹⁸³ He was sentenced to a dishonorable discharge, reduction to private, reprimand, and confinement of 15 years in prison instead of the possibility of life, though that was later reduced to 11 years and the reprimand withheld by the convening authority.

¹⁸² Tony Perry, 'Marines sentenced in plot to kidnap, kill an Iraqi man', Los Angeles Times, 4 August 2007, <[https:// www.sfgate.com/news/article/Marines-sentenced-in-plot-to-kidnap-kill-an-2512463.php](https://www.sfgate.com/news/article/Marines-sentenced-in-plot-to-kidnap-kill-an-2512463.php)> [accessed 28 August 2007].

¹⁸³ Zielbauer, 'Marine is Guilty of Unpremeditated Murder'.

The guilty ruling and sentence was later set aside by the Navy Marine Corps Court of Criminal Appeals (CCCA) in April 2010, due to an improper severance of his attorney-client relationship after one of his government-appointed military lawyers left the service.¹⁸⁴ After the Judge Advocate General of the Navy certified to The United States 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 CCCA in January 2011. The CAAF found the lower court’s decision to be incorrect and remanded the case to the CCCA to correct its ruling, which it did by March 2012, sending Hutchins back to prison to complete his original sentence minus a 251 day 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 re-trial.¹⁸⁵ In 2014, after multiple appeals by the government, it was decided to try the case once again and, in 2015, he was re-tried for the crimes he was originally convicted of in 2007 and re-convicted and returned to confinement to serve the remaining four-plus years from his original sentence.¹⁸⁶

Civilian Reaction and Military Response

When news of Hamdania broke in early June, 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

¹⁸⁴ Troidl, p. 13.

¹⁸⁵ Kevin A. Ohlson, ‘United States of America v. Lawrence G. Hutchins III Case # 18-0234’, *United States Court of Appeals for the Armed Forces*, 29 January 2019, pp. 2-7.

¹⁸⁶ Ohlson, p. 7; Gretel Kovach, ‘Marine on trial again in slaying in Iraq’, *The San Diego Union-Tribune*, 9 June 2015, <<https://www.sandiegouniontribune.com/military/sdut-hutchins-retrial-iraq-murder-2015jun09-story.html>> [accessed 17 September 2021].

not care about non-combatant casualties or victims in this case.¹⁸⁷ During the summer, articles concerning Hamdania and Haditha referenced each other or Mahmudiyah.¹⁸⁸ 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, but others gave back-handed excuses as they used the cases to condemn the wars in Iraq and Afghanistan themselves. A 9-12 June 2006 poll by NBC News and *The Wall Street Journal* showed that while 57 percent of those polled believed the incidents like Haditha to be isolated, 32 percent thought it may be common. The same poll showed only 33 percent of respondents thought they should be handled as criminal activity, with another 8 percent unsure.¹⁸⁹ This seems to reinforce the idea of the “palpable morally charged connection to the American GIs,” discussed earlier when examining the collection of trophies during World War II, held by the majority of the population.¹⁹⁰ It may also reflect the effects of a steady increase in esteem and trust, as demonstrated by polls by Gallup and others, that the American people held the military after the rise of the all-volunteer force.

While the civilian responses condemned the behaviours of the individuals, the rapid initiation of the investigation during this case seemed to forestall any additional demonization in

¹⁸⁷ Tony Perry, ‘Murder Charges Likely for Marines in Iraq Death’, *Los Angeles Times*, 2 June 2006, <<http://www.latimes.com/news/nationworld/nation/la-fg-marines2jun02%2C0%2C7403695.story?coll=la-home-headlines>> [accessed 23 September 2022].

¹⁸⁸ Alfonso Serrano, ‘U.S. Marine Convicted in Iraqi Man’s Death’, *CBS News*, 18 July 2007, <<https://www.cbsnews.com/news/us-marine-convicted-in-iraqi-mans-death/>> [accessed 10 September 2021]; Julian Barnes, ‘U.S. Sees Possible Links Between Incidents in Iraq’, *Los Angeles Times*, 5 July 2006. These are just two examples of how reporting on each new allegation of violation referenced the others.

¹⁸⁹ ‘Study #6063’, *NBC News/Wall Street Journal* Survey, 9-12 June 2006, <<https://www.wsj.com/public/resources/documents/poll20060615.pdf>> [accessed 23 September 2022], pp. 24-25.

¹⁹⁰ Schneider, ‘Skull Questions’, p. 128.

the press of the Marine Corps or assertion that they were continuing to take violations involving non-combatants lightly. While the public release of the damning Bargewell Report concerning Haditha would occur later in the summer, Marine commanders in Iraq knew his 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.¹⁹¹ Whether the speed merely reflects better opportunity to address violations due to the quick reporting of Awad's family and turning over of information from the Iraqi police to the Marines, or a hyper-awareness and desire to undue damage to its reputation following Haditha and the looming Bargewell Report 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 to a press pool at the Pentagon, stressing the failure of the Marines in both cases to uphold Marine standards, and the seriousness with which the Marine Corps was taking both investigations.¹⁹² 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 portray 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. Though when released, Bargewell's Report found pre-deployment training in the law of war adequate, more money was spent on civilian role players 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

¹⁹¹ Gayle S. Putrich, 'Massacre Fallout', *Marine Corps Times*, 5 June 2006.

¹⁹² Michael Haggee, Commandant of the Marine Corps, 'Transcript of DOD Operational Update Brief on Iraq', Department of Defense, 7 June 2006.

eyes of evaluators and senior officers and noncommissioned officers. While training of this kind had already been instituted at the central pre-deployment training site, the additional funds allocated meant training at home bases also increased in realism and effectiveness.¹⁹³

Lessons from Hamdania

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.

Interestingly, only the three senior members of the squad took their chance with a trial without making a plea deal. It is unclear whether this showed a belief that they could win an acquittal in front of a sympathetic jury—both Thomas and Magincalda were on their third deployment and had been previously injured in combat and may have believed this might earn them some measure of reprieve—or if their defence lawyers persuaded them that passing responsibility higher 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 defence. In the

¹⁹³ The author of this paper was a beneficiary of this additional funding when his infantry company was afforded extra training opportunities at Camp Lejeune, North Carolina with Arabic-speaking role players and special effects companies to enhance training realism prior to deploying to Iraq in September 2006.

case of Thomas and Magincalda, they pointed toward Hutchins, and in his case, Hutchins pointed further up the chain of command. The rest of the members all plead guilty in exchange for lesser charges or reduced sentencing guarantees. The government offered plea deals to the other five and, unlike Haditha, received testimony that strengthened their cases.

Discussion

Like Son Thang during Vietnam, the short timespan between the crime and the beginning of the investigation for Hamdania 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 proved the case 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, though much less time would be served. Haditha saw all but one case miss 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 saw sentences that were all for 15 years or less, 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. In Hamdania, there were a total of four 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 Haditha and Hamdania, did not necessarily mean they thought they had a weak case, but “they

wanted to have it bulletproof. And they didn't want to do the work..."¹⁹⁴ According to the book *The Chickenshit Club*, by Jessie Eisinger, about the failure of the Department of Justice and Securities Exchange Commission to prosecute cases against financial institutions and their leaders, this reflects a broader trend in the U.S. legal system. 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."¹⁹⁵ Effective preparation of prosecutorial evidence involves questioning and re-questioning 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, the attractiveness of getting witness testimony in exchange for plea deals or immunity may look 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 this chapter were significantly less than what the members of the court martial panels had voted. 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 essentially ineffectual. In Hamdania, as in Haditha and during Herrod's—the nominal leader at Son Thang—case, the defences sought to

¹⁹⁴ Gary Solis, interview by Scott D. Hamm, 26 May 2021, transcript and recording currently in possession of author. Hereafter referred to as Solis 2nd interview. At :49.

¹⁹⁵ Solis 2nd interview, At 2:30-2:50.

include as many combat veterans as possible in the hopes their familiarity with the chaotic nature 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 his words, he did this out of fairness to the junior Marines considering the disparity between the sentences. He was also the convening authority which dismissed the charges against some of the most junior accused from Haditha, though he did press forward with Tatum's prosecution.¹⁹⁶ The idea of pursuing equity in sentencing was not new. At Biscari, it caused Eisenhower to remit Sergeant West's unexecuted portion of his sentence, partially due to the disparity in outcomes between his and Captain Compton's trial. In the Son Thang case, the idea caused the convening authority to reduce the sentences of Schwarz and Green after two others, including the group's leader, were acquitted. In explaining his actions in a profile piece in *The New Yorker*, following his selection as President 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." He went on to say, "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."¹⁹⁷ 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. The Secretary of the Navy, Ray Mabus, learning of the Marines' continued service in 2010 due to Mattis' actions agreed, saying, "I was stunned to

¹⁹⁶ Jim Mattis and Bing West, *Call Sign Chaos* (New York: Random House, 2019), pp. 166-167.

¹⁹⁷ Dexter Filkins, 'James Mattis, A Warrior in Washington', *The New Yorker*, 22 May 2017, <<https://www.newyorker.com/magazine/2017/05/29/james-mattis-a-warrior-in-washington>> [accessed 11 September 2021].

learn these guys were still in the Marines...They had taken part in the murder, and nothing had been done.” Mabus ordered them discharged.¹⁹⁸

Hamdania differed from the other two cases in this chapter in a couple ways: the speed with which it progressed from investigation to trial, excepting the several repeated tries to finalize Hutchins’ initial conviction, and the clearly premeditated nature of the crime. While Hutchins’ drama would play out over almost a decade, seeing him incarcerated and released multiple times before his final appeal failed, from the crime until the last of the initial trials was a mere 16 months and netted convictions in all 8 cases. The first trial for Haditha, the investigation for which began in two months prior to the crime in Hamdania, did not occur until after all eight initial trials for Hamdania were complete. Staff Sergeant Wuterich, the accused at the very center of that case, would not be tried for six years after the Haditha massacre occurred. While the Army’s trials for Mahmudiyah started out quickly, owing to the need to try him in Federal Court because of Green’s release from the Army, it was two and a half years before Green would be convicted and sentenced.

A reason for both the higher conviction rate of Hamdania over Haditha and speedier process was the more efficient use of plea agreements than the high number of immunity grants issued during Haditha. Despite the prosecution’s liberal use of immunity in Haditha to obtain testimony against those that 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 defence counterparts.¹⁹⁹

¹⁹⁸ Filkins

¹⁹⁹ Solis 2nd Interview.

The second way Hamdania differed was that although Haditha can be partially explained by the chaos following the IED attack on the convoy, and at Mahmudiyah, the perpetrators were impaired by alcohol, this crime was different. It was a plan presented by a squad leader to his squad during the conduct of a patrol, where all participants were sober, and while they were not in contact—premeditated and deliberate. Despite the frustration felt at seeing the primary target of Hutchins’ plan released multiple times, those Marines knew better and could have refused to participate. While it is nearly impossible to determine what exact factors drove each of the members of the squad to remain silent and participate, though poor leadership and command climate certainly contributed, it is evident that group dynamics overcame training and personal values.²⁰⁰

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 this chapter? 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 Theatre of war, and Vietnam. Whether it is the portrayal of the enemy as a savage in popular media 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 11 September 2001, public culture and transcripts of the trial proceedings reveal the probability of a racial component.²⁰¹ The same sense described by

²⁰⁰ The Bargewell Report identified pre-deployment law of war, to include treatment of non-combatants, training as adequate, and several of the members of the squad expressed remorse and guilt about their actions during their hearings and trials.

²⁰¹ Curt Anderson, ‘FBI: Hate Crimes vs. Muslims Rise’, *Associated Press*, 25 November 2002, <<https://apnews.com/article/5e249fb6e4dc184720e3428c9d0bd046>> [accessed 23 July 2022]; ‘FBI Crime press release for 2001’, *Federal Bureau of Investigation*, 25 October 2004, <<https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-releases-crime-statistics-for-2003>> [accessed 23 July 2022]. World War Two and Vietnam case studies we have 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.

Harrison that enemies (and by extension their societies) that do not look similar are “distant enemies” and not worthy of the same level of respect can explain the lack of outcry.²⁰² 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. Though the American people may feel the connection to the military mentioned earlier, Samuel Moyn points out aptly 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 voice heard.²⁰³ 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 this chapter, 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.²⁰⁴

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

²⁰² Harrison, pp. 818-819.

²⁰³ Samuel Moyn, *Humane: How the United States Abandoned Peace and reinvented War* (New York: Farrar, Straus, and Giroux, 2021), pp. 207-208.

²⁰⁴ ‘Americans Open to Dissenting Views on the War on Terror’, *Pew Research Center*, 4 October 2001, <<https://www.pewresearch.org/politics/2001/10/04/americans-open-to-dissenting-views-on-the-war-on-terrorism/>> [accessed 23 Aug 2022]. This poll by Pew Research Center three weeks after 9/11 showed 87% of polled individuals felt anger over the attacks. ‘Two Decades Later, the Enduring Legacy of 9/11’, *Pew Research Center*, 2 September 2021, <<https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/>> [accessed 23 Aug 2022]. In this article, 2001 poll showed Americans were worried the administration would not initiate action against the perpetrators fast enough. Polling data from 2008 showed that at that point 61% of Americans still felt troops should remain in Afghanistan (the initial military target following 9/11) until the situation was stabilized.

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.²⁰⁵ During the pre-deployment 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 civilians are present in addition to enemy forces. This indicates that the services took seriously the need to educate its 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 were re-learned from Vietnam, including the previously mentioned tendency for unit commanders to have blind spots regarding the potential for crimes by their subordinates which increases the chances of ineffective investigations or risk for 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 standards for recruiting for the services, and especially waiving convictions that point to moral turpitude or addiction, will result in personnel who may more easily succumb to fatigue and stress and fail to uphold service values. Finally, Hamdania and Haditha, like the earlier cases examined, showed

²⁰⁵ 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 pre-deployment training. Additionally, the Marine Corps deployed staff judge advocates with infantry battalions and major commands to provide follow-on training in addition to providing advice to commanders.

the lack of experience in these types of cases for military prosecutors makes their job of getting accountability much more difficult when facing more experienced and savvy civilian attorneys.

Evaluating the post-incident policy and training initiatives, added to pre-existing training and education protocols suggest the military did take the obligations to enforce the laws of war seriously. The situation the military found itself in 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 the Saddam Hussein 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 men and kept their focus external on the threats at hand. Small unit discipline will always be handled by the officers and noncommissioned officers closest to the men, but commanders at the company level and higher have an additional duty to continuously evaluate and address the mental and ethical health of their units. This systemic breakdown, in addition to the blind spots addressed previously, and perhaps the effects of large numbers of young men and women swelling the ranks post-9/11 with a self-described need to avenge those attacks all worked against the reforms instituted by the military from Vietnam onward.

Just as in the other chapters of this dissertation, the public reaction—or military's fear of it—combined with the military's desire to get ahead of any fall out and dampen any effects to recruiting efforts. It also caused changes in the two services, most notably in their approach to training units before their deployments and augmentation of commanders' staffs with lawyers.

Epilogue

Seventeen years on from the last episode examined by these case studies, conflict across 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. The U.S. conflicts against the Taliban and Al Qaeda were replaced with one against ISIS and continuing actions in the Horn of Africa and in the Sahel. In fighting near Mosul, in 2017, U.S. Navy SEALs called in airstrikes on a building, destroying it. One of the ISIS fighters, though wounded, lived and was taken prisoner only to later die. In the trial that followed, Chief Petty Officer Eddie 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 photos he had taken showing him posing near the body holding a knife, and the testimony of a fellow SEAL. He was placed in pre-trial confinement after sending threatening texts to the sailors who had testified against him that were deemed attempts at obstruction of evidence.¹ Though this investigation began over a year after the incident, it progressed normally enough until the pre-trial confinement. Nearly twenty congressmen requested the Secretary of the Navy to review the confinement. At this point President Trump ordered Gallagher transferred to “less restrictive confinement,” the first time since Nixon likewise assisted Lieutenant Calley of My Lai that a President intervened in a soldier’s confinement.² The President’s involvement did not end there.

¹ David Martin, ‘Eddie Gallagher, Navy SEAL acquitted of stabbing wounded ISIS prisoner to death, tells his story’, *60 Minutes/CBS News*, 1 March 2020, < <https://www.cbsnews.com/news/eddie-gallagher-navy-seal-isis-prisoner-60-minutes-interview-2020-03-01/>> [accessed 2 February 2023]

² Charles Lane, ‘Opinion Trump’s war-crime pardons could be his most Nixonian moment yet’, *The Washington Post*, 20 May 2019, < https://www.washingtonpost.com/opinions/trumps-war-crime-pardons-could-be-his-most-nixonian-moment-yet/2019/05/20/c212d954-7b19-11e9-8bb7-0fc796cf2ec0_story.html> [accessed 2 February 2023]; Ed Kilgore, ‘Will Trump Go Nixonian With Clemency for War Criminals?’, *New York Magazine*, 20 May 2019, <https://nymag.com/intelligencer/2019/05/will-trump-go-nixonian-with-clemency-for-war-criminals.html> [accessed 2 February 2023]

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 which were not dismissed during pre-trial proceedings. The lone offense for which he was found guilty was taking a photo with an enemy casualty, which garnered punishment consisting of a reduction of one pay grade and confinement for four months.³ 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 immunity helped undermine the case when the SEAL who initially related seeing Gallagher stab the prisoner instead testified 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 defence teams again outmanoeuvring the prosecution efforts. Still, on 29 October, when Chief of Naval Operations Admiral Michael 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, and his family utilized 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 ensuing debacle led to the Secretary of the Navy's forced-resignation and finally Gallagher's retirement.⁴

While law of war violations occurred after the four case studies of Chapters Four and Five, few incidents rose to the notoriety of those early-war examples due in large part to better

³ The counts for which he 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 confinement.

⁴ George Petras, Timeline: How Trump intervened in the Navy SEAL Eddie Gallagher's war crimes case', *USA Today*, 27 November 2019, < <https://www.usatoday.com/in-depth/news/politics/2019/11/27/timeline-gallahers-war-crimes-trump-intervention/4305986002/>> [accessed 2 February 2023]

response by the military. Even so, later law of war violations, like those Gallagher had been charged with, occasionally became the focus of public debate and dialogue due to political intervention. Also, in November 2019, for instance, in addition to restoring Gallagher's rank just after Veteran's Day, President Donald Trump issued pardons for two Army officers, one already convicted for ordering his men to shoot at civilians, and another preparing for his own murder trial.⁵ These incidents shared many aspects with the cases we have discussed and underscores the continuing difficulty in eradicating law of war violations.⁶

In the introduction of this dissertation, I put forth my main research question: to what extent is the military responsible for the continued violence against non-combatants and what else shapes military responses to law of war violations? Through the cases examined from World War Two 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 non-combatants. Due to the remaining room for improvement, it is obvious the military bears a large measure of responsibility for the continuing persistence of incidents of violence against non-combatants.

Clearly, among the most important reasons for the continuation of violations is the difficulty in their prosecution within the existing system minimizing deterrence. The mere existence of international laws is not enough to prevent atrocities or guarantee humane treatment of non-combatants. Societies and their military leaders must enhance the prohibition of

⁵ Richard Gonzales, 'Trump Pardons 2 Service Members Accused of War Crimes and Restores Another's Rank', *NPR*, 15 November 2019, <<https://www.npr.org/2019/11/15/780029994/trump-pardons-2-service-members-accused-of-war-crimes-and-restores-anothers-rank>> [accessed 13 December 2022].

⁶ Dave Philipps, 'Trump's Pardons for Servicemen Raise Fears That Laws of War Are History', *The New York Times*, 22 November 2019, <<https://www.nytimes.com/2019/11/16/us/trump-pardon-military.html>> [accessed 12 Feb 2022].

international laws with a lack of acceptance and 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 extreme circumstances which often precede such atrocities.⁷ Most of the 1949 Convention 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—for over 40 years, until it eventually passed additional legislation covering civilians with the War Crimes Act of 1996 and the Military Extraterritorial Jurisdiction Act in 2000.

The first obstacle to prosecuting war crimes by the UCMJ stems, as demonstrated through multiple case studies, from the nature of the environment 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. Other times 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, surroundings, or in some cases to the victims or remains of victims themselves. In the cases of My Lai (Chapter Two), where the Army's initial attempt to cover up the atrocity delayed investigation, and in Mahmudiyah (Chapter Five), where the perpetrators

⁷ This is especially true in the case of International Law which has no enforcement agency of its own and relies on States to enforce the laws on their citizenry. The lack of acceptance of a society is also very important, as societal attitudes greatly influence the conduct of a state's soldiers.

took measures to redirect culpability to insurgents hiding the need for investigation, the sites would not be 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 especially 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 bring justice in these situations is often low. The case studies from the Iraq War in Chapters Four and Five demonstrate this in 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 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 are prosecuted under the UCMJ's punitive articles, prosecution is handled by teams of prosecutors of the various services to which the alleged perpetrator is affiliated. Many of these prosecutors have very little in the way of real trial experience in cases as complicated as most law of war violations prove to be.⁸ 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 over 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 defence 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 for the Haditha case study, where 17 grants of immunity were handed out with zero convictions resulting.⁹ While there are options to mitigate this experience/talent gap, they are all resource intensive and, in Gary Solis' opinion, "would require legislative support to overcome the resource and inter-service bickering over organizational and courtroom issues."¹⁰

⁸ Gary Solis, 'Is Military Justice Just', *Los Angeles Times*, 10 September 2007, <<https://www.latimes.com/archives/la-xpm-2007-sep-10-oe-solis10-story.html>> [accessed 11 Feb 2022]; Solis, 'There Are No Accurate War Crime Numbers'.

⁹ Gary Solis, 'Losing Haditha', unpublished paper sent to author in an email dated 14 Dec 2020 subsequent to interview about the Haditha trial. Copy of email retained by author.

¹⁰ Email from Gary Solis to the author dated 19 January 2023 in response to a question about the feasibility of a multi-service team dedicated to prosecution of law of war violations. Email retained by the author.

Prosecuting any crime in court can be difficult, but within the military system there lies an additional tool defence teams may use to cause reasonable doubt among courts-martial panels or cause the military judge to take action to throw out the case and cause a different convening authority to start the entire process over. This tool is a motion by the defence that asserts the existence of “undue command influence” by someone higher in the chain of command. 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 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 on) can be replicated after charges are brought again by a different—often senior—convening authority, as seen in the Haditha case. While an obstacle to obtaining accountability, the protection against undue command influence is one of the few protections servicemembers enjoy in a hierarchical system, though recent legislation, discussed later in this chapter, 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. They 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 service where the results may be dismissed on technicalities, or the sentence may be 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 Donald

Trump pardoned an Army first lieutenant convicted of ordering the shooting of a group of Afghan civilians, and another soldier 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.¹¹ 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 of the military concerning adjudication and punishment cannot be understated, though they normally begin after the application of the UCMJ.

The Uniform Code of Military Justice, the system of adjudicating infractions which 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 dissertation, I had discounted the importance of the UCMJ's role in the continuation of violence against non-combatants. 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 Vietnam. But, it has not been particularly successful when dealing with law of war violations.¹² 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 its 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 to Congress have little hope for change. That the

¹¹ Philipps, 'Trump's Pardons for Servicemen Raise Fears', Intercession on behalf of service members by prominent members of the government is not new, in 1901, Supreme Court Justice H.B. Brown, wrote a letter to Secretary of War Elihu Root urging leniency on behalf of a soldier who murdered a Filipino civilian.

¹² Law of War violation often are charged as the same serious offenses as assaults and murders, which the UCMJ most often handles successfully, but bring added complexity due to many factors, including their commission during combat operations, in environments difficult to investigate; victims and witnesses of different cultures or nationalities necessitating interpreters; and more. This produces the inefficiency in prosecuting law of war violations under the UCMJ.

military has not sought a surer means of holding its soldiers accountable in any of its constant updates to the US 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 to military justice in the form of pressure to mitigate or, in the case of the Presidential pardons earlier mentioned, complete circumvention of punishment. In a Western military where 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 is the repeated failure, as evidenced in almost every case examined in this thesis, 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.¹³ Whether the reluctance to pursue 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 Mattis' sentencing approval actions with both Haditha and Hamdania, 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 Two, a second

¹³ Solis, 'Is Military Justice Just?'

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 are crucial, both in modelling proper behaviour by authority figures, and supporting and reinforcing the ideals and requirements learned in the aforementioned training and education. Consider the repeated trends 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 incident, and in situations where there was either a lack of mid-level supervision, i.e., 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 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?¹⁴

The presence of one, or several, of these trends 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 non-combatants due to good leadership. Several or all these trends were noted in My Lai, Son Thang, Abu Ghraib, Haditha, Mahmudiyah, and Hamdania and unfortunately such intervention was lacking. Absent a concerted effort throughout the chain of command to not only remain vigilant to the situations and types of stressors that have repeatedly been identified here,

¹⁴ Anonymous interview with member of the Pendleton 8's Hamdania platoon.

but to commit to taking 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, front-line leadership will continue as the most prevalent 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 defence of their Marines, as happened at Son Thang. It was highlighted by Major General Taguba's criticism in his investigation of Brigadier General Karpinski's lack of recognition of the part that poor supervision played at Abu Ghraib.¹⁵ During periods of conflict where the government did not seek full mobilization of its reserves, often to limit impact on daily life for the majority of Americans, 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 lowering of certain enlistment requirements during the Iraq War, as seen specifically in the Mahmudiyah case study, but which was felt across the services. It was also exacerbated after the 11 September 2001 attacks when the American public, and many new recruits to the Army and Marine Corps, harboured desire for revenge against Al Qaeda and Islamic extremists.¹⁶ This desire often led to prejudicial behaviour against any Muslim, rather than just extremists. The results were that the introduction of soldiers not meeting the usual moral or mental standards or who are negatively influenced by societal

¹⁵ Seymour Hersh, 'Torture at Abu Ghraib', *The New Yorker*, 30 April 2004', <<https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>> [accessed 11 July 2022].

¹⁶ Peter Aitken, '9/11 Had the Biggest Effect on Military Recruiting Since Pearl Harbor', *Fox News*, 7 September 2021, <<https://www.foxnews.com/us/9-11-military-recruiting>> [accessed 13 December 2022].

biases changed the dynamic within units which should have signalled 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. This did not always happen.

Two final shortcomings worth mentioning are systemic within the judicial system of the armed forces. One is the lack, over many years, of standardization in reporting and tracking law of war violations among the services. This, combined with the earlier mentioned problem of these violations being prosecuted with the same UCMJ articles as non-law of war crimes, makes any meaningful attempt to accurately depict and characterize the true scope of violence against non-combatants nigh impossible. The second is that for most military prosecutors, there is a sore 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 the judge advocate career field.¹⁷ The consequence of this is the disparity in experience between military prosecutor and civilian/military defence teams seen time and again in the cases examined. This has finally been addressed in the Fiscal Year 2022 National Defense Authorization Act, tasking services to provide special trial counsels for high profile cases which will be addressed at length later in this chapter.

Against the above listed shortcomings, the Army and Marine Corps have made efforts to reduce violence against non-combatants from the time of the baseline cases of World War Two. Those improvements started with the revision of the *Rules of Land Warfare* in 1944, to reject the defence of obedience to a superior's orders in trials prosecuting war crimes.¹⁸ After My Lai and

¹⁷ These billets include tours serving in prosecution, defence, family law, and command advisory billets just to name a few.

¹⁸ Gary Solis, 'Obedience of Orders and the Law of War: Judicial Application in American Forums', *15th American University International Law Review* (New York: Cambridge University Press, 2003), p. 510.

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 Vietnam, and again in the earliest periods of the Iraq War, the instruction of these classes by non-unit personnel was recognized as being less than effective, and staff judge advocates were soon assigned to combat units early in pre-deployment training. The purpose of this was for them to become recognized members of the commander's staff so their remarks and instruction would bear more consideration than that of a stranger's. Training was also improved through the realistic use of role players portraying civilian non-combatants—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-don't shoot scenarios, and situations where the proper engagement of the non-combatants was essential to mission success. While additional law of war violations have occurred, measures to reduce them and change to the internal military culture that helps excuse them also continue to emerge.

In 2016, the Secretary of Defense moved to fully integrate the military, opening all previously restricted jobs to women. In Chapter Three, the counterproductive and harmful effects the then-current height and weight restrictions caused to female servicemembers' efforts at building enough muscle to perform adequately in expanded roles were detailed. These were changed in January 2023 after a multi-year effort including a lengthy study and feedback from multiple sources, including the 2015 experiment. This is a positive step for several reasons, including providing the ranks of the All-Volunteer Force a larger pool of citizens possessing higher physical and moral qualifications. It may also help improve the diversity of thought and eliminate detrimental attitudes within the military culture, such as depicted by the "boys will be boys" attitudes discussed in Chapter Three that view the women serving as inferior to their male

counterparts. Also helpful in both building a stronger, integrated military, and reducing potential violence against non-combatants 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 Austin III issued a memorandum directing a plan for mitigation of civilian harm be developed for review within 90 days.¹⁹ Among other initiatives, the plan would provide for a centre of excellence to expedite and institutionalize the knowledge of, practices, and tools for preventing and mitigating civilian harm and develop standardized civilian harm operational reporting processes for the entire Department of Defense. The Department of Defense Civilian Protection Center of Excellence will be fully staffed by 2025, addressing the mitigation and reporting techniques for civilian non-combatant casualties across the U.S. services.²⁰

Without acknowledging the improvements since World War Two or continuing to investigate for other culpable parties, it might be easy to conclude, as the author Nick Turse asserted, that the military does not recognize the protections non-combatants should be afforded. However, through the research of this dissertation, two other parties' culpability become evident—the government and the American public itself. It is also evident that, in many cases,

¹⁹ Lloyd J. Austin III, 'Memorandum on Improving Civilian Mitigation and Harm', *Department of Defense*, 27 January 2022, <<https://media.defense.gov/2022/Jan/27/2002928875/-1/-1/1/DEPARTMENT%20OF%20DEFENSE%20RELEASES%20MEMORANDUM%20ON%20IMPROVING%20CIVILIAN%20HARM%20MITIGATION%20AND%20RESPONSE.PDF>> [accessed 13 December 2022].

²⁰ 'DOD releases Memorandum', *Department of Defense*, <https://www.defense.gov/News/Releases/Release/Article/2914764/departments-of-defense-releases-memorandum-on-improving-civilian-harm-mitigation/> [accessed 27 November 2022].

military responses to law of war violations are in anticipation of the reactions of the government and public.

The government bears the responsibility of making the laws of the land, including those which comply with international treaties and conventions to which the U.S. is a signatory, and for raising the forces for national defence. Within its responsibility of raising forces for national defence resides the requirement to ensure the existence of a legal system which 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 do so and augmented with several stop-gap federal laws. This failure to both advance and ratify legislation designed specifically to address law of war violations or, if content to rely on the UCMJ, ensuring 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 by either military personnel or the ever-increasingly present civilian defence contractors, would remove the possibility of undue command influence from proceedings and close that loophole. Moreover, changes to legal directives regarding what techniques were authorized while conducting interrogations 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 Military Extraterritorial Jurisdiction Act in 2000, the time elapsed the requirement for these pieces of legislation became obvious 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 is still denying, and fighting, its liability for its interrogators' actions at Abu Ghraib in their case which began in 2008.²¹

²¹ Barakat, 'Judge Unimpressed'.

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 the how a crime is charged under the UCMJ and who would bear responsibility for prosecution. A new article, 24a, of the UCMJ designate “covered offenses” which will be tried by Special Trial Counsels (STCs). 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.²² The STCs would be senior lawyers outside the chain of command who would be authorized binding decisions on whether to prosecute, even against a commander’s wishes. This could potentially work to diminish the impact of leaders’ blind spots and the utility ‘undue command influence’ serves as a tool for defence lawyers. The final push for these changes, called for since 2013 by one member of congress, which will affect law of war violation prosecutions, was tied to the sexual assault and murder of an Army Specialist Vanessa Guillen. 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 non-combatants including those discussed in the last four chapters. Despite the positive steps, many lawyers in and out of the military believe more change is needed.

Additionally, in raising forces for national defence, 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, until the recent initiatives of Secretary Austin, of standardized tracking and reporting of violence against non-combatants. It also accounts for

²² Rachel VanLandingham, “FY22 NDAA: A Missed Opportunity to Improve Military Justice”, Just Security, 8 December 2021, <<https://www.justsecurity.org/79481/ndaa-a-missed-opportunity/>> [accessed 3 February 2023]

Congress's lack of demand for the Department of Defense to show that the responsibility truly stops at the low levels prosecutions heretofore have targeted. 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 when mentioning 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 last shortcoming the government must account for is its role in preparations for military action, for instance 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. This lack of whole-of-government approach to planning set some of the conditions which made the abuses at Abu Ghraib possible. Additionally, when military advice on subjects such as troop strength required to accomplish the aims outlined by the government leadership, fighting without the overwhelming military force so essential to what Russell Weigley labelled the "American Way of War," the troop formations may quickly become task saturated. When fighting any conflict, but especially in counterinsurgency fights like Vietnam and Iraq, 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 over-reactions when responding to an elusive enemy fighting from within the civilian populace. This was the case in many of the incidents examined and described in detail during the interview with the platoon-member from the Hamdania case study. Combined with the previously mentioned lowering of standards and failing to call up the reserves it becomes evident that both civilian and military officials have

ceded public opinion and considerations precedence over minimizing the risk of law of war violations.

The public exerts much stronger influence on the continued violence against non-combatants than it seems many acknowledge, though its influence against violence, through expressions of disgust or intolerance for it, were less than anticipated when beginning the research for this project. 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 the media. In Vietnam, some of the preconceptions were shaped by the pulp magazines that helped socialize the violence against women and duplicity of the enemy's civilians.²³ Following the 11 September 2001 attacks on New York and Washington D.C., the naturally strong inclination, in the wake of the attacks, 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—as in interrogations—served to loosen restrictions and roll back advances in following the law of war the military had instituted from Vietnam hence. Initial instruction and training upon enlistment can do only so much to inculcate these soldiers into the professional ethic of the armed forces in the short time between training and deployment to combat that was standard at the time. 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 pressure was repeatedly brought to bear 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

²³ Daddis, 9.

this apathy, seen again and again in the case studies examined, was racial bias, which in the cases explored, also led to lower regard for the enemy, and by extension its society, by the soldiers.

The racist undertones from World War Two in the media and entertainment industry of the day 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, where the images of masculinity were confirmed by defeating the often-caricatured enemy served to amplify the attitudes in mainstream mediums. 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 Theatres clearly displays those actions deemed acceptable against a non-White foe from Japan were not accepted against White foes from Italy and Germany. It is likely that had *Life* magazine printed a picture of a young, blonde, woman with a German or Italian skull on her desk, its editors would have received many more negative responses than it did for its picture with 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" as an ill-informed insult, among others, for enemy soldiers or civilians in Iraq are later manifestations of these racial attitudes.

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 Two.²⁴ This connection and the belief that fighting a war against a "savage" foe required savage acts, thereby absolving the U.S.

²⁴ Schneider, 'Skull Questions', p. 127.

soldiers of any moral or legal restraints helped preserve the “noble” quality of the Good War.²⁵ This connection, born from the view that the soldiers were manifestations of the United States’ virtues and superior morality was bolstered by wartime propaganda. Though 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 remain strong, as evidenced through polling concerning trust and respect for various government institutions until a recent drop in the wake of increasing public politicization of the military.²⁶ 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 the case studies examined by the donations raised to fund the defence of Marines at Son Thang and Haditha’s Wuterich. Finally, the support in popular culture from Lieutenant Calley after My Lai, as evidenced by Joe Watford’s “Rally for Lt. Calley” song, released under the Ginny and Joe record label, through that for the Pendleton 8 after the killings at Hamdania show the continued force of the connection.

The U.S. constitutionally-mandated military tradition of civilian control means that, though 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 United States 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 the elected officials to prescribe laws that better influence the military to investigate and prosecute law of

²⁵ Kramer, ‘Race-Making and Colonial Violence’, pp. 172, 205.

²⁶ This politicization has much to do with the use of the military as backdrops by politicians on both sides of the aisle, though 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.

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 non-combatants.

So, to what extent is the U.S. military responsible for continuing law of war violations and what shapes the military responses to them? 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 honourably and who step in to stop violations to its ethics or the law of war such as Hugh Thompson, Paula Coughlin, Joseph Darby, and Justin Watt. It also has many whose experience and intellect should adequately arm them to provide enough supervision and direction down the chain of command to reduce violence against non-combatants to levels much lower than we see 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, though many 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 Two onward, but there remains room for more.

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Paige Chandler, Retired Marine officer. Interviewed by author on 31 August 2020.

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Warren Ferdinandsen, U.S. National Guard Engineer Officer stationed with 800th Military Police Brigade during the deployment the Abu Ghraib scandal occurred. Interviewed by the author by phone on 22 November 2021 and email on 31 December 2021.

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Brian K. McCrary, Retired Marine Pilot. Interviewed by author on 31 August 2020.

Fletcher Pearson, Retired Marine Corps Sergeant Major who spent two separate tours at Abu Ghraib, the first soon after revelations of the abuse were made public. Interviewed by author 14 October 2022.

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