
ARTICLE 37 OF THE UCMJ AND
COMMAND RESPONSIBILITY FOR WAR CRIMES –
UNLAWFUL COMMAND INFLUENCE AS (ROGUE)
ELEPHANT IN THE ROOM

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Federal law that codifies military criminal procedure provides that “[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”² This section of the Uniform Code of Military Justice (UCMJ) statutorily limits the reach of superior uniformed authorities with regard to military court actions.³ It also sketches the outline of a specter which recurrently haunts military justice known as unlawful command influence.⁴ The many authorized means by which commanders and others subject to the UCMJ may influence courts-martial are carefully laid out in the statute itself, the rules for courts-martial, the manual for courts-martial and Department of Defense instructions and service specific justice regulations.

In 2011, I contributed a chapter to Professor David Crowe’s timely and important book, *Crimes of State Past and Present, Government-Spon-*

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² 10 U.S.C. § 837(a) (2000). This section comprises Article 37 of the Uniform Code of Military Justice [hereinafter UCMJ], found at 10 U.S.C. §§ 801-946.

³ 10 U.S.C. § 837.

⁴ *Id.*

sored Atrocities and International Legal Responses.⁵ In it, I summarized the poor U.S. record of adjudicating war crime allegations when issues of command responsibility arose in the course of several infamous wartime investigations.⁶ Throughout my analysis, I hinted at three systemic problems which I offered for the particular interest of legal officers serving the US armed forces and military justice scholars everywhere.⁷

First, if the United States continues its incremental steps toward joining the International Criminal Court (ICC), the rule of complementarity will compel change in how its land components address future war crimes when senior leaders are suspected of derelictions in the prevention, investigation, and punishment of offenses committed by units under their command.⁸ After all, the Rome Statute only requires the ICC Prosecutor to defer to a state's domestic prosecution under complementarity unless he concludes an earlier proceeding was conducted for the purpose of shielding the accused from war crimes adjudication or a given case was processed in a manner "inconsistent with an intent to bring the person concerned to justice."⁹ To reasonable minds of disinterested observers, U.S. courts-martial practice from My Lai during the Vietnam War to Haditha, Iraq may appear suspect under the above parameters.

Second, in venues including Professor Crowe's book, I observe that in practice judge advocates serving the U.S. armed forces are dutiful staff officers with no meaningful ability to impact higher-level criminal justice policies or the decisions that implement military justice actions.¹⁰ Even the UCMJ's oft cited article 6 only provides or commanders who are court convening authorities to "communicate di-

⁵ ASS'N FOR THE STUDY OF NATIONALITIES, CRIMES OF STATE PAST AND PRESENT: GOVERNMENT-SPONSORED ATROCITIES AND INTERNATIONAL LEGAL RESPONSES 169-96 (David M. Crowe ed., 2011) [hereinafter CRIMES OF STATE PAST AND PRESENT].

⁶ See *id.* at 169-88.

⁷ See *id.*

⁸ *Id.* at 170-71.

⁹ Rome Statute of the International Criminal Court, art. 20(3)(b), July 17, 1998, 2187 U.N.T.S. 90. See also *id.* art. 1. The point has been ably argued by others. See, e.g., Alan J. Dickerson, *Who's in Charge Here? – International Criminal Court Complementarity and the Commander's Role in Courts-Martial*, 54 NAVAL L. REV. 141 (2007); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 60-66 (2001).

¹⁰ See, e.g., CRIMES OF STATE PAST AND PRESENT, *supra* note 5, at 171; Wm. C. Peters, *Addendum for the War on Terror – Somewhere in Switzerland, Dilawar Remembered, and Why the Martens Clause Matters*, 37 SOC. JUST. 99, at 115-17 n.5 (2010-2011). For foundational

rectly” with their legal officers.¹¹ It says nothing of the weight which a convening authority should afford their lawyers’ direct communications when arriving at decisions that have significant legal ramifications. The UCMJ requires a staff judge advocate’s written pretrial advice on issues of jurisdiction and substantive law prior to a commander convening general courts-martial,¹² yet no parallel legal conclusions are statutorily imposed for either the failure to file charges when misconduct is substantiated by criminal investigation in the first instance, or when there is a later alternative disposition of underlying misconduct after dismissal of charges by a superior commander once properly filed by a subordinate authority.

Adding to this unique attorney-client relationship is the military’s overarching hierarchical structure. In the past, the U.S. Army practice was for service regimental headquarters to regularly admonish judge advocates (JAs) to be “soldiers first” – as if there should be any professional considerations allowed to get in the way of providing sound legal advice under some vague, undefined circumstance.¹³ The subtle though clear reminder, especially for junior legal staff officers wishing to grow into senior advisors, is that the commander as client and ranking officer need not abide by your counsel, even if it specifically addresses the lawful way ahead. When it comes to the stark business of war-fighting and the tactics, techniques, and procedures generated by battlestuffs – which may contribute to war crimes under certain circumstances – commanders tend to be strong-willed when receiving corporate counsel’s advice. Do as you are told, the JA learns, or you risk your rater’s wrath in career controlling efficiency reports. Of course, the uniformed service superior can always simply call for a new lawyer to offer up the counsel he or she prefers to hear.

Third, and the thesis explored more fully here, my chapter in *Crimes of State Past and Present* suggests that unlawful command influ-

background on the US military justice process, see ESTELA I. VELEZ POLLACK, CONG. RESEARCH SERV., RS21850, *MILITARY COURTS-MARTIAL: AN OVERVIEW* (2004).

¹¹ 10 U.S.C. § 806(b) (2000).

¹² *See* 10 U.S.C. § 834.

¹³ If we stipulate that it makes no sense to tell paratroopers, aviators, or signal officers for that matter, “remember, you’re a soldier first!” why should the Army take exception for lawyers? Even if we concede many JAs are direct commissionees, and assume this somehow diminishes the warrior ethos, senior legal corps staff officers in the Army compounded the paradox by explaining the full precept as “soldiers first, lawyers always!” How drawing attention to law as a profession unto itself smoothes over friction points that inevitably arise between a command and staff remains a deep mystery to me.

ence is but one symptom of institutional conflicts of interest built into UCMJ procedure, which surface when senior officers are suspected of wrongdoing.¹⁴ Sociologists of the faculty where I teach are wont to say that things are often not what they appear to be. Experienced trial lawyers know, however, that more often than not things are precisely what they appear to be.¹⁵ Decisions taken by commanders in their role as court convening authorities that impact investigations documenting command responsibility for war crimes will implicate, by definition, fellow senior commanders. Moving forward with searching investigations and concluding trials also risks the very real potential of exposing even more senior ranking officers to criminal liability. What likely prevails when career capture confronts “duty, honor, and country” is not a new inquiry. The West Point Protective Association practice, suspected of wrongfully intervening to influence the disposition of charges against general officers derided by New York Congressman Samuel Stratton¹⁶ in the aftermath of My Lai, has, however, taken a new and perhaps more pernicious turn.

In 2008, a Marine Corps trial judge dismissed charges of dereliction of duty referred to general court-martial against Lieutenant Colonel Jeffery Chessani.¹⁷ Chessani served as battalion commander of a unit that killed numerous noncombatants, including many women with children and one elderly, possibly wheelchair-bound, man, during an engagement at Haditha, Iraq.¹⁸ At least twenty-four Iraqis were killed in the incident, many in their own homes.¹⁹ While the precise number of innocent deaths will likely never be known, the Marines estimated a total of at least fifteen dead.²⁰ Under the guise of protecting the defendant’s due process rights and integrity of the military justice system at large, the Navy-Marine Corps Court of Criminal Appeals

¹⁴ CRIMES OF STATE PAST AND PRESENT, *supra* note 5, at 185.

¹⁵ In tort law, *res ipsa loquitur* is one familiar theory of negligence: “the thing speaks for itself.” BLACK’S LAW DICTIONARY 1336 (8th ed. 2004).

¹⁶ 117 CONG. REC. 1725 (1971).

¹⁷ United States v. Chessani, No. 200800299, 2009 CCA LEXIS 84, at *1 (N-M. Ct. Crim. App. Mar. 17, 2009).

¹⁸ See *id.* at *2; CRIMES OF STATE PAST AND PRESENT, *supra* note 5, at 185; Michael S. Schmidt, *Junkyard Gives Up Secret Accounts of Massacre in Iraq*, N.Y. TIMES (Dec. 14, 2011), <http://www.nytimes.com/2011/12/15/world/middleeast/united-states-marines-haditha-interviews-found-in-iraq-junkyard.html>.

¹⁹ CRIMES OF STATE PAST AND PRESENT, *supra* note 5, at 184.

²⁰ *Id.*

upheld the dismissal of charges on grounds of *apparent* unlawful command influence (UCI).²¹

Processing court actions in the U.S. armed forces has a long history of unlawful command influence, as well as attempts to address the problem. It posed a thorny issue for drafters of the UCMJ in 1949, served as catalyst for creating a civilian member appellate court to oversee courts-martial convictions, and has been criticized both from the start and recently as a fatal flaw in the scheme of U.S. military justice. Every judge advocate who has prosecuted or defended more than a perfunctory load of courts-martial will acknowledge the very real and often insurmountable threat posed by UCI. The specter is described in a thorough analysis appearing in a 1970 law review article²² and criticism of the commander's unbridled authority over subordinates participating in courts-martial actions was resurrected in a National Institute of Military Justice Report released in 2001.²³

This article looks at issues of command responsibility from the perspective of UCI. It reviews war crime investigations of U.S. actions at My Lai, Abu Ghraib, and Haditha. One regrettable result of these three tragedies is a healthy suspicion of the likely role UCI played in the failure to bring senior officers to the bar of justice. The principles and dynamics discussed here are applicable to a number of more recent scandals U.S. ground units have played some role in – Bagram Control Point, Samarra chemical plant, and the Sunni Triangle's Tigris River Bridge incident, to identify only a few. However, a broader thematic inquiry into war crimes allegations remains beyond this paper's scope, if only as cumulative.

After a discussion of the interplay between article 37 prohibitions and command responsibility's suspected contribution to the examples considered, I proffer a new remedy which supports prosecution under the UCMJ when colorable allegations of command responsibility for

²¹ I use the term "guise" in the sense of outward appearance but not pretext. I question neither the trial nor appellate judges' integrity; to do so with no evidence would be churlish. Just as the courts implied no nefarious intent in the command and staff actions cited as basis for the case's dismissal, I do not do so in respect to the flawed legal reasoning that terminated Chessani's prosecution.

²² See Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970).

²³ See generally HONORABLE WALTER T. COX, III ET AL., NAT'L INST. OF MILITARY JUSTICE, CHAIR REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter COX COMMISSION REPORT].

war crimes arise. A civilian special prosecutor for war crimes working at the service secretariat level would provide a much needed supplement to current U.S. courts-martial procedure. If Congress were to create such a position, future effects of real or *apparent* unlawful command influence in these high profile and internationally sensitive cases could be avoided.

What follows is a plea to modify existing military law regarding adjudication of war crime allegations when senior leaders are implicated on grounds of command responsibility. The reader may consider this a motion for appropriate relief in essay form. However, as with similar arguments I have offered elsewhere, I disclaim any presumption of criminal culpability for commanders involved in the tragedies reviewed. Guilt, after all, may only be determined after a full and complete airing of all admissible evidence at trial. A transparent process that generates a thorough, searching trial and accounts for what commanders knew and what they did is the least we should demand of a functional military justice system.

ARTICLE 37 OF THE UCMJ AND UNLAWFUL COMMAND INFLUENCE

The central problem of unlawful command influence is that commanders, by virtue of their position, training, and temperament, will always want to influence, if not direct, command actions of their subordinate units. Because article 37 of the UCMJ only speaks to influencing the action of a court-martial by *unauthorized* means,²⁴ an introduction to criminal procedure in the armed forces is appropriate.

Military justice in the U.S. system functions as an attribute of command. Unit commanders who lead company-sized elements up to battalion, brigade, division, and higher²⁵ are responsible for maintaining discipline, investigating suspected criminality, and initiating, or convening, court-martial actions at their own respective levels. As with any other report of criminal misconduct, the rules for courts-martial offer no discretion when it comes to *investigating* suspected war crimes. "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by

²⁴ 10 U.S.C. § 837 (2000).

²⁵ This article deals with military justice cases in Army and Marine Corps components. Comparable military air or sea service units could be a flight, squadron, or wing, and a naval vessel, base, or station.

court-martial, the immediate commander *shall make or cause to be made* a preliminary inquiry into the charges or suspected offense.”²⁶

Because this requirement is imposed on a suspect’s *immediate* commander, the dynamic is to power down initiation and subsequent disposition of UCMJ actions to the lowest appropriate level.²⁷ For example, a report of a service-member’s two day unauthorized absence (or AWOL) will ordinarily be disposed of at company level, while the killing of dozens of noncombatants by a rifle squad during a single morning encounter should not be. This is because the severity of allegations in the latter example tends to push proper contemplated action towards a judicial resolution, and company commanders are not court convening authorities. I write “ordinarily” because superior commanders may withhold authority to dispose of criminal justice actions from subordinate commanders. For example, general officers often withhold the authority of subordinate commanders to dispose of alleged misconduct by high-ranked senior noncommissioned or commissioned officers. Thus, if that was so and the hypothetical two day AWOL was committed by a lieutenant – a commissioned officer – serving in a company size unit, neither the company, battalion, nor brigade commander could take final action regarding the misconduct, unless the authority to do so was released to them by the commanding general.

Formal criminal complaints are filed by preferral of a specification and charge, which may be brought by anyone subject to the UCMJ.²⁸ However, another reason initiation of courts-martial charges is a bottoms-up process, is that the accuser who prefers charges may not subsequently refer that same case to trial.²⁹ Similarly, when a commander is the accuser in a case, a superior officer must conduct any court proceeding involved.³⁰ In military service, criminal trials, as opposed to lesser administrative hearings or boards of inquiry, are called courts-

²⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012) [hereinafter MCM] (emphasis added).

²⁷ Minor criminal offenses may be addressed through adverse administrative actions such as non-punitive letters of censure. The UCMJ also provides for non-judicial punishment as a means of addressing lesser criminal misconduct. If found guilty by a commander after an informal hearing, punishments under this procedure may include fines, restrictions to certain areas of a military installation, or reductions in rank for more junior enlisted soldiers. See 10 U.S.C. § 815.

²⁸ MCM, *supra* note 26, R.C.M. 307(a).

²⁹ 10 U.S.C. §§ 822-824.

³⁰ *Id.*

martial. The UCMJ provides for three levels of courts: summary, special,³¹ and general courts-martial, each of which may be convened by commanding officers at increasingly higher levels of command.³²

When commanders convene courts, they act in their role as convening authorities. If a court-martial is deemed warranted, one of the three levels of courts may be convened by the corresponding commander at his or her level.³³ Existing, preferred charges are then referred to the created court-martial and, once the trial is docketed and court is assembled, the case is heard. Each level of court is statutorily limited in the severity of possible punishments it may impose upon a finding of guilt, except that a general court-martial may impose any sentence authorized by law.³⁴

Once charges are preferred, they are forwarded up the chain of command with recommendations for disposition by each successive level of command. Each commander in the chain is empowered by statute with the discretion to make their own independent judgment and recommendation regarding the severity of the offense, sufficiency of the supporting investigation, and disposition of the charge.³⁵ If the severity of suspected misconduct exceeds that which, in the view of the defendant's commanders, is appropriate for a summary or special court-martial, the action is forwarded to the first general courts-martial convening authority in the defendant's chain of command.³⁶

The standard paradigm in the Army, with some statutory exceptions, is for battalion level commanders to convene summary courts, brigade commanders, special courts, and general officers in command of separate brigades, divisions, and corps, convening general courts-martial for the most serious criminal offenses. Senior civilian leaders, including service and defense secretaries and the President, are also empowered by the UCMJ to convene general courts-martial.³⁷ Any

³¹ Special courts-martial may be empowered to issue a punitive discharge as a portion of the sentence for service members tried, or not, depending on the level of due process afforded the defendant. In this sense it may be technically said there are four levels of courts-martial: summary, straight-specials, special courts empowered to impose a bad-conduct discharge, and general courts-martial. See MCM, *supra* note 26, R.C.M. 201(f)(2)(B)(ii).

³² See 10 U.S.C. § 822.

³³ MCM, *supra* note 26, R.C.M. 504(b)(1)-(3).

³⁴ See 10 U.S.C. § 818.

³⁵ See *id.* § 815.

³⁶ *Id.*

³⁷ *Id.* § 822(a).

commander authorized by statute to convene a superior level court action may also convene an inferior one.³⁸ Thus, while a brigade commander may convene a special court-martial, she also is empowered to convene summary courts, and her division commander can convene all three levels of cases.

Three aspects of military court procedure should be noted at this juncture. First, no provision of the UCMJ requires preferral of charges where allegations of misconduct are supported by a criminal investigation.³⁹ Second, the UCMJ also does not require the referral of charges to trial and convening of a court for existing charges once properly preferred and forwarded for action.⁴⁰ Once in possession of charges that have percolated up the chain, “[a] commander *may dispose of charges* by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene.”⁴¹

Third, general courts-martial convening authorities perform a myriad of other roles in the processing of military justice actions. Under article 32 of the UCMJ, no charge, once preferred, “may be referred to a general court-martial for trial until a thorough and impartial investigation of all matters set forth therein has been made.”⁴² While these pretrial hearings are in addition to military police or criminal investigative agency investigations, the reports they generate are advisory only. General officers in command select and appoint the officer tasked with examining the charge and supporting evidence under article 32 and receive the investigating officer’s non-binding conclusions on sufficiency of the evidence, form of the charge, and whether referral to court is recommended.⁴³ The convening authority of a courts-martial also hand-picks the potential jurors who will hear the case,⁴⁴ approves of any sentence rendered by the Court⁴⁵ and, within

³⁸ MCM, *supra* note 26, R.C.M. 504(b)(1)-(3).

³⁹ See 10 U.S.C. §§ 801-946.

⁴⁰ *Id.*

⁴¹ MCM, *supra* note 26, R.C.M. 401(c) (emphasis added) (discussing the rule which allows for dismissal by providing that, “[a] charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate”) (emphasis added).

⁴² 10 U.S.C. § 832. This pretrial hearing is frequently, though not entirely fairly, compared to the grand jury indictment phase of a federal district court prosecution.

⁴³ *Id.*

⁴⁴ *Id.* § 825(d)(2). Juries in military criminal practice are called panels. The foreman, or panel president, is the ranking officer on the panel.

⁴⁵ *Id.* § 860(c)(2).

the commander's sole discretion, may change any finding of guilty once a decision is rendered.⁴⁶

Criminal investigations and processing of actions, which contemplate courts-martial, are shepherded through the various levels of command by legal officers called judge advocates (JAs). These JAs are law school graduates, members in good standing of at least one state bar, and are responsible for advising commanders at all levels. A general court martial convening authority, normally a general officer, will have a staff judge advocate (SJA) as a member of his special staff to provide counsel on UCMJ actions which may involve preferred charges. Less senior ranking JAs at division or corps level work for the SJA, advise subordinate commanders who are lesser convening authorities in the general officer's command, and prosecute all courts-martial. Defense counsel detailed to represent defendants are also JAs but are supervised by a uniformed defense bar that does not answer directly to the command prosecuting the service-member represented.

Commands which deviate from the above structure may have engaged in unlawful command influence (UCI), which has long and properly been called "the mortal enemy" of military justice.⁴⁷ The text of article 37 specifically prohibits commanders from admonishing any member of a court with respect to its findings or sentence or as regards any other exercise of the members' conduct toward the proceeding.⁴⁸ Thus, in theory, jurors, uniformed witnesses, military judges, trial and defense counsel, or any other member of a court are free to fulfill their roles at courts-martial without fear of any commander's influence on their judgment or participation. A commander may not attempt to coerce or improperly influence the decision or actions of court members, nor consider a member's performance of duty during court actions when preparing evaluation reports for purposes of the service-member's potential for career advancement.⁴⁹ The means by which improper command influence can be exerted need not be intentional, and it may be overt or implied, direct or through third parties, and actual or apparent.

⁴⁶ *Id.* § 860(c)(3)(B).

⁴⁷ *United States v. Thomas*, 22 M.J. 388, 393 (1986). For a primer on UCI, see Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261 (C.M.A. 1996).

⁴⁸ 10 U.S.C. § 837(a).

⁴⁹ *Id.*

Unlawful command interference in courts-martial actions is itself a crime under the UCMJ, prosecutable under article 98.⁵⁰ Intentionally failing to enforce or comply with the rules for processing court actions or knowingly violating prohibitions spelled out in article 37 is punishable by dismissal from the service and up to five years confinement.⁵¹ While laudable that drafters of the Code included this provision, the dearth of reportable prosecutions under this statute speaks volumes. At the time enactment of the UCMJ was considered by Congress following WWII, committees considering a comprehensive scheme of military justice for a modernized armed force were told point blank that article 37's enforcement provision was inadequate.⁵² Testimony before a Senate armed services subcommittee could not have been clearer: "there [is] absolutely no way of proving an officer guilty of a violation of [a]rticle 37 unless he is a hopeless idiot."⁵³

Judge advocate senior lieutenant colonels, whose Army careers have seemingly peaked, often find themselves supervising the military defense bar. They know well their own potential for further advancement lies elsewhere and can always find ways to rein in a zealous and effective defense counsel without spelling out institutional displeasures in written evaluations. Similarly, command legal advisors who deliver mixed results—or worse—have advised a commander against taking certain military justice actions in the first place, may conveniently be damned with faint praise and quietly reassigned to less than career-competitive positions. Of course, the same may hold true for court members, investigating officers, and other principled participants who are often times career-rated by the court convening authority.

⁵⁰ 10 U.S.C. § 898. The interplay between article 37 UCI and the statutory sanction provided by article 98 presents a serious gap for effective enforcement. While UCI may occur by direct or indirect means and intentionally or negligently, article 98 makes it a crime and provides for punishment only for violations committed "knowingly and intentionally."

⁵¹ *Id.*

⁵² Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1 (1970).

⁵³ *Id.* at 82, citing *Enacting a Uniform Code of Military Justice: Hearing on S. 857 Before the Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. D256 (1949) (statement of Arthur E. Farmer, Chairman of the Committee on Military Law of the War Veterans Bar Association). The ultimate protection against the UCI envisioned by drafters of the UCMJ was a civilian member Court of Military Appeals to oversee military prosecutions. *Thomas*, 22 M.J. at 393 (holding that "a prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence."), citing *Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. (1949).

COMMAND RESPONSIBILITY AS DERELICTION OF DUTY

The central problem of command responsibility for war crimes has always been how far up the hierarchy of command a prosecutor can justifiably go. A war crimes charge referred to court-martial against a senior uniformed officer, and allowed to play out to conclusion through a legitimate and searching trial, *might* reveal evidence of additional misconduct well above the defendant's level.⁵⁴

A fundamental recognition is perhaps appropriate here: the legal doctrine of command responsibility developed out of the customary law of war, itself a subset of public international law. Criminal law, a domestic development of normative enforcement, is a very different regime. The dichotomy becomes clear when we accept that a variety of otherwise criminal behavior is excused under law when committed in accordance with the laws of war during a state of armed conflict.

As a doctrine of international law, a superior's criminal culpability, by way of command responsibility, traces its origins at least to Hugo Grotius.⁵⁵ As a principle of military leadership the appreciation that

⁵⁴ The journal literature on command responsibility as legal doctrine is comprehensive. Though by no means exhaustive, the following sources provide a broad base of the more recent scholarly inquiry. See Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999); Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395 (2009); L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 (1995); Victor Hansen, *Creating and Improving Legal Incentives for Law of War Compliance*, 42 NEW ENG. L. REV. 247 (2008); Victor Hansen, *What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335 (2007); Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1 (2001); Arthur Thomas O'Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71 (2004); William C. Peters, *Adjudication Deferred: Command Responsibility for War Crimes and US Military Justice from My Lai to Haditha and Beyond*, 37 NATIONALITIES PAPERS 925 (2009); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251 (2009); Symposium, 5 J. INT'L CRIM. JUST. 599-682 (2007). Prior to post-September 11th campaigns in the "war on terror," several uniformed scholars examined the problem of command responsibility. See, e.g., Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

⁵⁵ See Joakim Dungel & Shannon Ghadiri, *The Temporal Scope of Command Responsibility Revisited: Why Commanders Have a Duty to Prevent Crimes Committed After the Cessation of Effective Control*, 17 U.C. DAVIS. J. INT'L L. & POL'Y 1, 13 (asserting that "[t]he founda-

commanders should be held to account for subordinate misconduct under some circumstances is seen as early as Sun Tzu.⁵⁶ Commanders may be liable through direct or indirect theories under a broad umbrella of the concept “command responsibility.” Individual culpability attaches for crimes directly attributable to a commander. If a commander orders his soldiers, in unambiguous terms, to conduct operations that violate the laws of war, the commander may be held directly liable under theories of solicitation or aiding and abetting those acts which comprise the war crime itself.

But what of situations involving more tenuous links? The gist of current, codified provisions of indirect liability provide that superiors may be held criminally culpable for war crimes committed by their subordinates if the superiors either knew or should have known that such crimes were being committed and did not stop them; or, if the superiors knew of war crime violations perpetrated by units under their control, and they did not adequately investigate and punish the responsible parties.⁵⁷ Leading scholars on the law of armed conflict refer to this second strand of criminality under command responsibility as an expression of dereliction of duty and extension of accomplice liability under the classical theory of *respondeat superior*.⁵⁸ The principle is well established in numerous court decisions ranging from the U.S. Supreme Court holding *In Re Yamashita*⁵⁹ to rulings of the Interna-

tions of the doctrine of command responsibility come from the writings of Sun Tzu, Hugo Grotius Hugo Grotius expanded the concept to include rulers who ‘may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it.’”); Jennifer Lane, *The Mass Graves at Dasht-e Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 CAL. W. INT’L L.J. 145, 149 (“[i]nternational law has long recognized that acts of omission are punishable offenses. For example, Hugo Grotius wrote one of the first treatises on international law in the early seventeenth century, and in his treatise, Grotius questioned when punishments could be ‘shared.’”).

⁵⁶ See SUN TZU, *THE ART OF WAR* 40-41, 44 (Lionel Giles trans., Tuttle Publ’g 2008).

⁵⁷ See, e.g., Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90; Statute of International Criminal Tribunal for the Former Yugoslavia art. 7.3, Sept. 2009; Statute of the International Criminal Tribunal for Rwanda art. 6.3, 2007; Statute of the Special Court for Sierra Leone art. 6.3, Aug. 14, 2000; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 29, Oct. 27, 2004.

⁵⁸ See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 271-72, 275 (2d ed. 2010); GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* ch. 10 (Cambridge Univ. Press 2010).

⁵⁹ 327 U.S. 1 (1946).

tional Military Tribunal at Nuremberg. The principle is further established in prosecutions of Nazi war criminals under Control Council Law No. 10, opinions of the International Military Tribunal for the Far East, and more recent opinions from the International Criminal Tribunals for the Former Yugoslavia and Rwanda.⁶⁰

It may be argued that the *mens rea* component of criminality for war crimes under indirect command responsibility remains unsettled; to the extent that law evolves, the observation may be accurate. The doctrine of command responsibility “in its various customary and statutory manifestations, creates liability based on a combination of omission and a minimum *mens rea* that resides somewhere between negligence and recklessness.”⁶¹ A commander’s negligence occurs when, under all attendant circumstances of a subordinate unit’s past practice, command climate, situational reports, and battle updates, he *should have known* that war crimes were being or had been committed. Recklessness for purposes of criminality is a *mens rea*, which reflects a conscious disregard of a known, substantial risk. It clearly fulfills one’s state of mind under the principle where the commander *knew* of ongoing criminality. Thus, a commander’s actual knowledge of subordinate war crimes, accompanied by his or her omission to adequately repress and address the breach, is also a prosecutable offense.

Some commentators have argued for adoption of tighter standards of culpability that would ease successful prosecution of commanders for war crimes committed by members of their units.⁶² A proposed standard, which approaches strict liability for war crimes committed by their subordinates, frequently appears in recent literature.⁶³ Some commentators go so far as to suggest that the actionable wrong is not the commander’s dereliction or omissions to act.⁶⁴ Rather, the offense is simply commanding a unit engaged in armed

⁶⁰ For a more complete discussion of development of the doctrine, see Peters, *supra* note 54, at 928-33.

⁶¹ O’Reilly, *supra* note 54, at 88.

⁶² See, e.g., Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT’L CRIM. JUST. 638, 664 (2009); Sepinwall, *supra* note 54, at 303.

⁶³ See, e.g., Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 229 (1994); Victor Hansen, *Conservative Bastion or Progressive Problem Solver: The Evolving Face of Military Jurisprudence and International Law*, 13 ILSA J. INT’L & COMP. L. 329, 331 (2007); Charles J. Moxley, Jr., *Arms and the Law: The Unlawfulness of the Use or Threat of Nuclear Weapons*, 8 ILSA J. INT’L & COMP. L. 447, 459 (2002).

⁶⁴ See, e.g., Sepinwall, *supra* note 54, at 257.

conflict, if acts amounting to war crimes are committed, without regard to *any* knowledge requirement or overt act on a commander's behalf.⁶⁵ A criminal enterprise theory of war crimes, which presupposes all armed conflicts are illegal, would effectively make any military commander a war criminal.

Whether this development gives voice to a friction between the often divergent ends of international and criminal law, as noted earlier, or whether it simply speaks to the evolving nature of law, is quite beside the point for the purpose of this paper. What jurisprudential theories best support future statutory or judicial developments on what constitutes command responsibility for war crimes is similarly beyond our scope of inquiry. In accord with current and past versions of the UCMJ, violations of indirect command responsibility are prosecutable under article 92 as a dereliction of duty.⁶⁶ The elements of the crime as implemented in the manual for courts-martial are "(a) [t]hat the accused had certain duties; (b) [t]hat the accused knew or reasonably should have known of the duties; and (c) [t]hat the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties."⁶⁷

WAR CRIMES AND UNLAWFUL COMMAND INFLUENCE: APPEARANCE OR REALITY?

Mass murders by American soldiers at My Lai, systemic abuse of detainees at Abu Ghraib, and law of war violations by Marines at Haditha attracted attention at the highest levels of our government. When U.S. presidents, secretaries of defense, and congressmen voice public statements that transgressions will be sternly resolved by the service components concerned, unlawful command influence is not likely far behind. In the first two institutional disasters identified, UCI obviously *appeared* to play a dispositive role in the military justice actions that followed. In more recent war crimes committed at Haditha, and the only U.S. command responsibility prosecution since the Vietnam War, two military courts ruled dispositively that UCI was *apparent*.⁶⁸

⁶⁵ See, e.g., Martinez, *supra* note 62, at 638; Sepinwall, *supra* note 54, at 251.

⁶⁶ 10 U.S.C. § 892(3) (2000).

⁶⁷ MCM, UNITED STATES, pt. IV, ¶ 16.b (2008). A soldier's lawful duty may be imposed by "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." *Id.* at pt. IV, ¶ 16.c.

⁶⁸ See *United States v. Chessani*, No. 200800299, 2009 CCA LEXIS 84, at *6 (N-M. Ct. Crim. App. Mar. 17, 2009).

In March of 1968, a company from the 11th Brigade of the Army's 23rd Infantry Division, the "Americal," murdered approximately 500 unarmed and compliant noncombatants at My Lai, in the Republic of Vietnam.⁶⁹ Two years later, courts-martial charges were preferred against more than a dozen soldiers for their role in the My Lai massacre.⁷⁰ Including those charged were the 23rd Division's commander, deputy commander, and its chief of staff.⁷¹ Under a theory of indirect command responsibility, Major General Samuel Koster, Brigadier General George Young, and Colonel Nels Parson were charged with dereliction of duty for their failure to properly investigate and report the atrocities.⁷² This senior leadership was investigated and charged for their omissions – failure to respond appropriately to subordinates' criminal conduct of which they knew or should have known.⁷³ The lone soldier subsequently convicted for the massacre was a junior platoon leader, Lieutenant William Laws Calley, Jr.⁷⁴ Lieutenant Calley was on the ground at My Lai; he was tried and convicted for his direct role in committing and ordering the murders.⁷⁵ Sentenced to be imprisoned for life at hard labor, Calley was promptly released to his Army bachelor's quarters on the order of President Nixon pending the outcome of appeals.⁷⁶

⁶⁹ See Lieutenant General William R. Peers, Army Regulation 15-6 Department of the Army Review of the Preliminary Investigations into the My Lai Incident (1970) [hereinafter LTG Peers, AR 15-6 Investigation] (on file with the author). For balanced and comprehensive treatment of the killings and subsequent prosecutions see MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL* (2002); MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* (1992).

⁷⁰ See BILTON & SIM, *supra* note 69, at 322-23.

⁷¹ *Id.* at 325-26.

⁷² BELKNAP, *supra* note 69, at 217.

⁷³ *Id.*

⁷⁴ Speaking before a small gathering at the Kiwanis Club of Greater Columbus, Georgia one summer day in 2009, Calley, then aged 66, broke a forty-year silence on his perspective of the massacre. "There is not a day that goes by that I do not feel remorse for what happened that day in My Lai," he offered in a soft voice, "I feel remorse for the Vietnamese who were killed, for their families, for the American soldiers involved and their families. I am very sorry." See The Associated Press, *Ex-Officer Apologizes for Killings at My Lai*, N.Y. TIMES (Aug. 23, 2009), available at <http://www.nytimes.com/2009/08/23/us/23mylai.html?r=0>.

⁷⁵ See BILTON & SIM, *supra* note 69, at 331-38.

⁷⁶ *Id.* at 342-43; See also U.S. CONST. art. II, § 2, cl. 1. In a letter to President Nixon, Captain Abrey Daniel, a member of the trial counsel team that prosecuted Calley, complained, "[n]ot only has respect for the legal process been weakened and the *critics of the military judicial system been supported for their claims of command influence*, the image of Lieutenant Calley . . . as a national hero has been enhanced." Letter from Captain

Two prongs of unlawful command influence were *apparent* throughout the My Lai court process; one of them was argued at Calley's trial.⁷⁷ His lead defense counsel, a seasoned military justice practitioner and former judge on the Court of Military Appeals,⁷⁸ argued that undue command influence directed Calley's trial to deflect attention from the responsibility of more senior Army officers.⁷⁹ Whatever the institutional command motive, if any beyond overwhelming evidence of Calley's guilt was necessary, under the UCMJ an accuser who prefers charges may not later serve as convening authority in the same case.⁸⁰ What is more, when any commander acts as accuser only a superior commander may refer the action to a court-martial.⁸¹

The trial judge in Calley's court-martial, and later the Army Court of Military Review, U.S. District Court, and Fifth Circuit Court of Appeals were presented with "the isolated issue of unlawful influence . . . whether the Army Chief of Staff at the time of trial, General William C. Westmoreland, was an accuser under the Code, and, if so, whether the convening authority, who was junior to him, lawfully convened the court-martial."⁸² Based on public comments by President Nixon and Secretary of Defense Melvin Laird well prior to prefferal of charges against Calley, the trial judge also had to decide the larger question of whether "the investigation, prefferal and referral of charges, and conduct of the court-martial were free from unlawful command influence."⁸³ If General Westmoreland, Secretary Laird, or President Nixon directed through channels that Calley be court-martialed, then they themselves became nominal accusers. If so, the two-star general in command at Fort Benning, Georgia was not empowered to refer the case for trial or take other subsequent action on the case.

The trial judge denied the defense's motion based on select testimony from Fort Benning's chain of command and the legal staff of officers involved in processing the case.⁸⁴ They testified in substance

Aubrey M. Daniel to Richard Nixon (April 3, 1971), in NAT'L ARCHIVES (emphasis added).

⁷⁷ United States v. Calley, 46 C.M.R. 1131, 1149-62 (1973).

⁷⁸ CMA at that time was the highest court of military appeals. In 1994 it was renamed the Court of Appeals for the Armed Forces (CAAF). See MILITARY CITATION GUIDE (ARMY LAW. & MIL. L. REV. et al. eds., 16th ed. 2011).

⁷⁹ See United States v. Calley, 46 C.M.R. at 1149-62.

⁸⁰ 10 U.S.C. § 822(b) (2000).

⁸¹ *Id.*

⁸² United States v. Calley, 46 C.M.R. at 1148.

⁸³ *Id.* at 1149.

⁸⁴ *Id.* at 1154.

that, although they knew the national command authority wanted Calley punished at court-martial, no one had communicated that message to them directly.⁸⁵ While holding open the possibility of later “interviews,” the judge also denied the concomitant defense request to subpoena the Army’s highest ranking officer and the service and defense secretary to explore under oath who said what to whom and when.⁸⁶ Following Calley’s conviction, the Army Court of Military Review affirmed the trial court’s ruling on a grammarian’s analysis of the statute and the observation that Chief of Staff Westmoreland was not a “commander” subject to the statutory requirement of who may convene a subsequent court when any commander acts as accuser in the same case.⁸⁷

In a *habeas corpus* action following the Army appellate court ruling, the federal district court ordered Calley released from custody and held that he was denied due process of law at trial for, *inter alia*, violations of the 6th Amendment.⁸⁸ Among many issues before the court was the failure of the trial judge to subpoena defense requested witnesses on the issue of UCI.⁸⁹ On the point of who effectively was the accuser for Calley’s charge-sheet, the district court focused on trial testimony the military judge and Army appellate court failed to fully address.⁹⁰

The district judge, citing trial testimony, highlighted:

[T]he accusers, Captain Hill and Lieutenant Colonel Vincent, were in the office of their superior [Colonel Lon Marlow, Calley’s brigade commander] when the following transpired: Colonel Marlow stated to Captain Hill that ‘You know this thing has gone to the President.’ And Captain Hill answered ‘Yes’ and that he wanted to advise him that regardless of any decision the President might make, that they were not bound under the Uniform Code of Military Justice; if they thought a crime had been committed, they could prefer the charges against Lieutenant Calley.

Colonel Marlow stated that if he had reason to believe a crime had been committed he realized that the charges could still be preferred regardless of the decision in Washington that he knew that he was free to do what

⁸⁵ *Id.*

⁸⁶ For analysis of the record which suggests the presiding judge was less than thorough in his consideration of evidence on this point, see LUTHER C. WEST, *THEY CALL IT JUSTICE* 156-66 (1977); see also the District Court’s subsequent holding in *Calley v. Callaway*, 382 F. Supp. 650, 692-99 (M.D. Ga. 1974) *rev’d*, 519 F.2d 184 (5th Cir. 1975).

⁸⁷ *United States v. Calley*, 46 C.M.R. at 1148-56.

⁸⁸ *Calley v. Callaway*, 382 F. Supp. 650.

⁸⁹ *Id.* at 694-95.

⁹⁰ *Id.*

the President wanted or not, and that *if he didn't do what the President said, [h]e would either be a fool or a jackass and he was inclined to believe the latter.*⁹¹

The court's opinion went on to note that the senior Fort Benning legal officer had made numerous calls, as well as a visit to the office of his service Judge Advocate General in Washington, DC prior to preferal of charges.⁹² Further, the court reasoned "[t]wice during the decision making process, those at Fort Benning received messages from their superiors [in Washington] to hold up any decision because they would be receiving additional information through channels."⁹³ Though the district judge made no finding of fact that UCI occurred, the court ruled there was ample evidence of record to infer impropriety and require compulsory process of the most senior witnesses the defense had requested.⁹⁴

That never happened; the district court's ruling on this portion of the appeal was subsequently reversed by the Fifth Circuit Court of Appeals sitting *en banc* on the rationale of military deference.⁹⁵ However, a vigorous dissent focusing on one of many collateral issues in the case noted "[b]ecause counsel failed to preserve error in connection with the effort to subpoena Secretary Laird, Secretary Resor and General Westmoreland, we find no error of constitutional magnitude . . . [still] we do not approve of the idea of substituting an interview for an examination under oath as a method of proving command influence."⁹⁶ This comment was an appellate swipe at the trial judge for denying testimony from defense requested witnesses while tacitly acknowledging the breadth of potential UCI in the case by suggesting the later possibility of high-level witness "interviews."

The second, and perhaps understated, prong of suspected UCI in the multilayered disaster that was My Lai was the Army's failure to properly conclude courts-martial of the Americal Division's senior leaders. Charges of dereliction of duty and failure to obey orders were preferred, and article 32 pre-trial investigations completed against Generals Koster and Young and the division chief of staff.⁹⁷ None of

⁹¹ *Id.* at 696 (emphasis added).

⁹² *Id.* at 697.

⁹³ *Id.*

⁹⁴ *Id.* at 697-99.

⁹⁵ *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (*en banc*).

⁹⁶ *Id.* at 229 (Bell, J., dissenting).

⁹⁷ WILLIAM R. PEERS, *THE MY LAI INQUIRY* 214-15 (1979).

them ever went to trial. Despite “some evidence”⁹⁸ supporting two of the command responsibility based counts filed against Koster, all charges were dismissed and he was administratively punished in a court’s stead.⁹⁹ Similarly, the Army said charges of dereliction against General Young were dismissed as they were unsupported by the evidence.¹⁰⁰ Who reached that conclusion remains unclear to this day given two field grade officers testified during the 11th Brigade commander’s trial that they reported the war crimes personally to Young the day after the mass killings, and Koster denied ever receiving a report of criminal acts.¹⁰¹

Who says what to whom at the highest levels of our armed services about processing court actions that draw international attention will always remain open to conjecture, or will be revealed only years later. It may never be understood why senior officers with some responsibility for My Lai never stood trial to conclude a judicial resolution of their actions. Lieutenant General William Peers, who oversaw the My Lai board of inquiry for the US Army, didn’t understand it.¹⁰² Of the decision not to try Koster and other senior leaders, the veteran of jungle combat commands in WWII and Vietnam later wrote, “[w]e of the Inquiry were intimately familiar with each of the cases . . . all members of the panel felt the commissions and omissions, as listed in the report, were valid and should have been subject to the most rigorous examination.”¹⁰³

Still, *res ipsa loquitur*, the doctrine in negligence law which translates as “the thing speaks for itself,” appears particularly apt. Any commander in receipt of charges under the UCMJ may dismiss them if there are *other sound reasons why trial by court-martial is not appropriate*.¹⁰⁴

⁹⁸ *My Lai: Now Only Five*, TIME, Feb. 8, 1971, at 32.

⁹⁹ *2 Generals Face Demotion over Roles in Mylai Case*, N.Y. TIMES, Mar. 19, 1971, at 1.

¹⁰⁰ *Id.* at 6.

¹⁰¹ Douglas Robinson, *Henderson Jury Hears Gen. Koster: Ex-Division Chief Testifies He Wasn’t Told of Killings*, N.Y. TIMES, Oct. 15, 1971, at 5. Colonel Oran K. Henderson, Lieutenant Calley’s brigade commander at My Lai, did stand trial. Henderson was charged with dereliction of duty for failing to investigate the massacre, disobeying regulations which required reports of war crimes, and lying to the board of inquiry. He was acquitted of all charges. The investigating officer for My Lai, Lieutenant General William Peers, later said of Henderson’s verdict, “[i]f his actions are judged as acceptable standards for an officer in his position, the Army is indeed in deep trouble.” PEERS, *supra* note 97, at 226.

¹⁰² PEERS, *supra* note 97, at 23, 222.

¹⁰³ *Id.* at 222.

¹⁰⁴ See 10 U.S.C. §§ 822, 823 (2006). See also PEERS, *supra* note 97, at 222.

A senior simply suggesting a case might be dropped in a military culture of yes sir, no sir, three bags full, may be sound reason enough. One need not harbor an overly fertile imagination or sense of drama to readily envision a superior's off-the-record conversation with a subordinate convening authority over a leisurely dinner, the evening telephone call, or soul-searching exchange between golfing partners. The "needs of the Army" or "the good of the Corps" is something loyal commissioned officers feel somewhere deep in their professional DNA and undoubtedly it resonates apart from personal ambition.

The military justice system's penchant for disposing of command responsibility allegations of war crimes against senior officers by lesser administrative measures continues. When Secretary of Defense Donald Rumsfeld repeatedly offered to resign over the Abu Ghraib catastrophe in 2004, he acknowledged political culpability but not a legal one.¹⁰⁵ In his uncomfortable testimony before the Senate and House Armed Services Committees, Rumsfeld acknowledged "[t]hese events occurred on my watch . . . [a]s Secretary of Defense, I am accountable for them. I take full responsibility."¹⁰⁶ At the same time, Rumsfeld's memoir acknowledges that his understanding of the limiting nature of unlawful command influence restrained his public comments on the scandal out of concern for soldiers pending courts-martial.¹⁰⁷ Of course, to 'take full responsibility' and to actually determine participant or command criminality are two very different things.

The courts-martial convened in the aftermath of systemic detainee abuse at forward operating base Abu Ghraib, Iraq and fixed legal accountability only on junior enlisted soldiers.¹⁰⁸ The Taguba, Jones/Fay, and Schlesinger Reports all document a pattern of derelictions of duty by officers and commanders of the Army's 800th Military Police and 205th Military Intelligence Brigades.¹⁰⁹ The Schlesinger Report

¹⁰⁵ GEORGE W. BUSH, DECISION POINTS 88-89 (2010); see also DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR 547, 550-51 (2011).

¹⁰⁶ RUMSFELD, *supra* note 105, at 549.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 552.

¹⁰⁹ For those portions of the reports made public see ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE: THE TAGUBA REPORT (2004), reprinted in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 279-328 (2004); HON. JAMES R. SCHLESINGER ET. AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS: THE SCHLESINGER REPORT (Aug. 2004), reprinted in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 329-402 (2004); ANTHONY R. JONES & GEORGE R. FAY, THE FAY/JONES REPORT

concluded with a finding of the proper command responsibility standard: that Abu Ghraib commanders either knew or should have known of their subordinates' war crimes and failed to intervene and put a stop to ongoing violations or punish the perpetrators.¹¹⁰ Yet neither Brigadier General Janis Karpinski nor Colonel Thomas Pappas, the on-site brigade commanders responsible, stood courts-martial. They were never even charged despite overwhelming evidence of their derelictions.¹¹¹

Army Major General Antonio Taguba, who was tasked with inquiring into the military police role at Abu Ghraib, later admitted he took from the evidence that knowledge of detainee abuse, *during the timeframe it regularly occurred*, extended all the way to Lieutenant General Ricardo Sanchez, the ranking coalition commander in Iraq.¹¹² While Rumsfeld may have understood the explicit contours of UCI for carefully chosen public comments about Abu Ghraib, a more resounding message was arguably conveyed by the commander in chief's failure to accept his defense secretary's resignation over the scandal. If Rumsfeld was to stay at DOD, the investigations had to stop at the lowest possible level – and the sooner the better. When General Taguba was quietly sidelined after submitting his report and forced to retire, the implicit danger of UCI was equally made clear across the ranks. “The President’s failure to act decisively resonated through the military chain of command: aggressive prosecution of crimes against detainees was not conducive to a successful career.”¹¹³

On a November morning, just a month after Army Specialist¹¹⁴ Lynndie England was convicted for her conspiracy to maltreat detainees at Abu Ghraib, a fire team from Kilo Company, 3rd Battalion, 1st

(2004), reprinted in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 403-579 (2004).

¹¹⁰ THE SCHLESINGER REPORT, *supra* note 109, at 351-53.

¹¹¹ For more thorough discussion of command responsibility at Abu Ghraib, see Peters, *supra* note 54, at 935-39 (2009). One officer, Lieutenant Colonel Steven Jordan, was court-martialed for his role at Abu Ghraib. His conviction on a single count of disobeying orders not to speak to witnesses while under investigation was disapproved and all charges dismissed *after trial* by the general officer who convened the Court.

¹¹² See Seymour M. Hersh, *The General's Report; How Antonio Taguba, who investigated the Abu Ghraib scandal, became one of its casualties*, 83 THE NEW YORKER 58, 62 (2007).

¹¹³ *Id.* at 68.

¹¹⁴ A “specialist” rank in the US Army is at the fourth enlisted pay grade. It falls just above a private first class but below a “hard-stripe” corporal. The senior ranking soldier the Army held judicially accountable for Abu Ghraib was a staff-sergeant at the sixth (of nine) enlisted grades.

Marines killed twenty-four Iraqi nationals during an engagement at Haditha, Iraq.¹¹⁵ For those not blinded by ideology in opposition to the Iraqi Campaign – and for all others familiar with the facts – “massacre” is simply not a proper description of what occurred that day.¹¹⁶ Haditha’s comparison to My Lai in the press and by some members of Congress is apposite only insofar as commanders of units responsible in both instances neglected to conduct thorough, timely investigations of the incidents and failed to fully report the matter up the chain of command beyond division level. Nevertheless, a rifle squad’s reckless failure to distinguish between lawful targets of fire and innocent non-combatants is a war crime.¹¹⁷

On November 19, 2005, a four-vehicle Marine Corps patrol from Kilo 3/1 was ambushed near a Haditha intersection with an improvised explosive device – a roadside bomb.¹¹⁸ Once the patrol stopped, marines began receiving small arms fire from a southerly and north-western direction and the vicinity of at least three nearby villas.¹¹⁹ One marine was killed in the initial attack and two wounded.¹²⁰ A taxi that rapidly approached the patrol had been halted just prior to the blast and marines ordered the military aged Iraqi male occupants out of the car.¹²¹ The marines suspected them as insurgents that were acting as either a signaling unit for the already detonated bomb, a triggering team for additional explosive devices, or a possible element of some further vehicle borne ambush.¹²² Intelligence reports received prior

¹¹⁵ Peters, *supra* note 54, at 940.

¹¹⁶ See U.S. DEP’T OF ARMY, REG. 15-6, Bargewell Report 72, 76-79 (15 June 2006) [hereinafter Bargewell Report]. At worst any criminal offenses committed by fire teams that day amounted to reckless homicides. The most favorable interpretation of evidence highlights the possibility of a doctrinal divide between how marines are trained to clear buildings once deemed “hostile” and then existing 3/1 Rules of Engagement (ROE) directives. The ROE required “positive identification” of individuals exhibiting hostile acts or hostile intent before deadly force could be applied. At either extreme, however, results of the engagement should have prompted investigation as a *possible war crime* under standing Marine Corps’ orders and the service’s law of war program. Peters, *supra* note 54, at 941 (citing to the testimony of Hays Parks).

¹¹⁷ See Peters, *supra* note 54, at 941.

¹¹⁸ U.S. MARINE CORPS, EXEC. SUMMARY OF PRETRIAL INVESTIGATIVE REPORT IN THE CASE OF LIEUTENANT COLONEL JEFFREY R. CHESSANI 1 (10 Jul 2007) [hereinafter EXSUM CHESSANI].

¹¹⁹ *Id.* at 1-2.

¹²⁰ Bargewell Report, *supra* note 116, at 41.

¹²¹ See Paul J. Ware, Army Regulation 15-6 Report of Investigation (2007) (on file with author).

¹²² *Id.*

to the ambush that morning for operations in the vicinity of Haditha warned of such possible coordinated attacks.

After establishing a defensive perimeter and initiating an evacuation plan for the wounded, further small arms fire from the south prompted marines to order the taxi occupants to get down on the ground.¹²³ When the young men refused, and at least one of them moved suddenly and possibly began to run away, marines shot and killed them all.¹²⁴ Two expedient fire teams were assembled; one was ordered to clear the villas to the north side of the road, and the other team was assigned to the south.¹²⁵ Numerous Iraqi noncombatants, including women with children and senior citizens, were subsequently killed by grenade fragmentation and rifle fire during this reactive assault.¹²⁶

If not for questions posed by *Time* magazine's Tim McGirk to Marine Corps officials at Ramadi two months later, the deaths of more than a dozen noncombatants at Haditha would likely never have been discovered.¹²⁷ The Marine Corps' version that several "neutrals" died either as result of the insurgent bomb blast or after being caught up in the crossfire of ensuing firefights was highly suspect given most of the noncombatants were killed in their own homes.¹²⁸ Two military investigations quickly established that initial reports of the engagement were misleading as to the direct cause of civilian deaths.¹²⁹ However, the hit squad version of vengeful marines murdering at will out of anguish for a fallen comrade that appeared in the press didn't align with all of the facts either.

When Congressman Frank Murtha, a retired Marine Corps Reserve Colonel, publicly characterized the Iraqi deaths at Haditha as cold-blooded murder and alleged a military cover-up, UCI to follow could have been predicted.¹³⁰ Charges were ultimately preferred against eight marines, the most senior being the 3/1 battalion com-

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ EXSUM CHESSANI, *supra* note 118, at 1-2.

¹²⁶ *Id.* at 2; Peters, *supra* note 54, at 940.

¹²⁷ See Jeffrey Kluger, *How Haditha Came to Light*, TIME, June 4, 2006, at 28.

¹²⁸ *Id.*

¹²⁹ See Bargewell Report, *supra* note 116, at 9.

¹³⁰ James Joyner, *Why We Should Be Glad the Haditha Massacre Marine Got No Jail Time*, THE ATLANTIC, Jan. 25, 2012, www.theatlantic.com/international/archive/2012/01/why-we-should-be-glad-the-haditha-massacre-marine-got-no-jail-time/251993/.

mander, Lieutenant Colonel Jeffrey Chessani.¹³¹ The suspicion of indirect command responsibility for war crimes cast on Chessani alleged he disobeyed orders and was negligent in failing to investigate a possible war crime and derelict in his duties for not fully reporting the events to his higher headquarters.¹³² The defendant's legal posture was that he relied on subordinates to report accurately to him what transpired that morning and that any innocent civilians killed was the unfortunate price insurgents paid for attacking under the circumstances at the time and place of their choosing.¹³³ Complaints by the local Iraqi town council were disregarded as insurgent propaganda.

Although evidence shows Chessani's regimental and division commanders knew of at least fifteen noncombatant deaths at Haditha within twenty-four hours of the incident,¹³⁴ including women and children killed during house-clearing operations, Chessani was the highest ranking officer charged with wrongdoing. Reminiscent of command responsibility failings at My Lai and Abu Ghraib, Major General R.A. Huck, Colonel S.W. Davis, and Colonel R.G. Sokolowski, the 1st Regiment's chief of staff and a marine judge advocate, all received letters of administrative censure from the Secretary of the Navy. This disparity of disposition prompted defense lawyers to later argue, "[w]hy is it okay for the regiment and division commanders not to take action when relying on information from their subordinates regarding fifteen dead civilians killed during an action, but when Lt. Col. Chessani relies on his subordinates, he is derelict and subject to criminal charges under the UCMJ?"¹³⁵

¹³¹ *Id.*

¹³² See EXSUM CHESSANI, *supra* note 118, at 8 (quoting the Article 32 Investigating Officer C.C. Conlin, Colonel, U.S. Marine Corps, who summarized the case as follows: "In this case, Lt. Col. Chessani failed to do his duty. He failed to thoroughly and accurately report and investigate a combat engagement that clearly needed scrutiny [as a possible war crime], particularly in light of the requirements of MCO 3300.4. He failed to accurately report the facts that he knew or should have known and inaccurately reported at least one critical fact he specifically knew (his claim to have 'moved to the scene [Chesnut/Viper] to conduct a command assessment of events') to his higher headquarters.").

¹³³ *Objections to Investigating Officer's Report ICO United States v. Lieutenant Colonel Jeffery R. Chessani, USMC, 2-3 (2007)* [hereinafter *Objections to Investigating Officer's Report*].

¹³⁴ EXSUM CHESSANI, *supra* note 118, at 3.

¹³⁵ *Objections to Investigating Officer's Report, supra* note 133, at 19 n.11. Why indeed? Of the senior commanders implicated in the Haditha incident, only Chessani was read his article 31 rights against self-incrimination when questioned by investigators.

The theory of unlawful command influence proffered at trial on the Haditha killings differed from the My Lai prosecution in two significant respects. First, whereas Calley's counsel argued a defect in the case's referral to court based on improper actions from numerous, higher-ranked superiors, Chessani's defense team alleged the convening authority was impermissibly influenced from a single subordinate in the military hierarchy.¹³⁶ Second, the trial judge in *United States v. Lt. Col. Jeffery R. Chessani* agreed with the defense¹³⁷ and dismissed all criminal charges prior to a trial on the merits.¹³⁸ Once again the military justice system found a way to avoid hearing evidence in court as to whether a senior U.S. commander was criminally culpable for war crimes under the well-settled doctrine of command responsibility.¹³⁹

The Chessani UCI motion argued that an anticipated government witness, who was a senior Marine Corps JA, improperly sat in on numerous legal meetings with the court convening authority, Lieutenant General James Mattis.¹⁴⁰ Mattis served as the convening authority for all Haditha related courts-martial and was "dual-hatted" as commander of both MARCENT, the Marine Corps component of Central Command, and I MEF (Marine Expeditionary Force), a separate unit.¹⁴¹ Chessani's case was convened by Mattis in his role as MARCENT's commanding general.¹⁴² The potential witness defense complained of, Colonel John Ewers, was a Marine Corps judge advocate who took Chessani's statement during the first comprehensive military investigation of events at Haditha in March of 2006.

Ewers was later reassigned as Lieutenant General Mattis's staff judge advocate (SJA) for I MEF. At consolidated staff meetings during the period Chessani's case moved through the system, Colonel Ewers

¹³⁶ *Id.*; *United States v. Calley*, 46 C.M.R. 1131, 1148-49 (1973).

¹³⁷ *United States v. Chessani*, No. 200800299, 2009 CCA LEXIS 84, at *3-4 (N-M. Ct. Crim. App. Mar. 17, 2009).

¹³⁸ *Id.*

¹³⁹ The *Chessani* dismissal is all the more curious given an analogous UCI motion – with identical facts and Marine Corps' command and staff players – was argued less than two years later in the Haditha court-martial of Staff Sergeant Frank Wutterich who led one of the fire teams involved. Wutterich's UCI argument failed in the trial court.

See Gretel C. Kovach, *Path for Haditha trial is cleared; court-martial set*, THE SAN DIEGO UNION-TRIBUNE (Mar. 26, 2010, 10:12 PM), <http://www.utsandiego.com/news/2010/mar/26/path-haditha-trial-cleared/>. Wutterich subsequently pled guilty to one count of negligent dereliction of duty.

¹⁴⁰ See *Chessani*, 2009 CCA LEXIS 84.

¹⁴¹ *Id.* at *2.

¹⁴² *Id.*

was present along with Mattis's MARCENT staff judge advocate Lieutenant Colonel William Riggs and other subordinate judge advocates. Mattis was well aware of Ewers' earlier role in the Chessani investigation and both officers testified at the motion hearing they never discussed his case, the sufficiency of the evidence, or wisdom of a criminal prosecution. General Mattis relied on Riggs as the MARCENT SJA for the appropriate legal advice on cases arising from that command. MARCENT and I MEF were parallel, independent units; as such, Riggs worked for Mattis not Ewers – even though both were lawyers and Ewers outranked him by a single pay grade.

The trial judge ruled the *appearance* of unlawful command influence alone is fatal to a prosecution under such facts.¹⁴³ “[T]he government has failed to prove beyond a reasonable doubt Colonel Ewers’s history and presence at these legal meetings where MARCENT cases were discussed, particularly this one, did not chill subordinate legal advisers from exercising independence and providing potential contrary legal advice in the presence of Colonel Ewers.”¹⁴⁴ The Navy-Marine Corps Court of Criminal Appeals upheld the trial court’s dismissal emphasizing “the *appearance* of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.”¹⁴⁵

Assuming *apparent* UCI was manifest in the case, and without dissecting the Court’s reasoning in painful detail or considering the many alternatives to dismissal that were available as remedy, two observations on the Court’s rationale should be made. First, if *apparent* UCI flowing downwards was impermissible in Chessani’s prosecution, the same logic should control all courts-martial where government trial counsel attend meetings to discuss ongoing prosecutions with their chief of justice, deputy staff judge advocate, or staff judge advocate. This is especially so given these supervisory attorneys are at least normally in a trial counsel’s rating chain. There was no evidence of record that Colonel Ewers had any supervisory responsibility over Lieutenant Colonel Riggs or contributed to his career efficiency reports; they didn’t even serve the same command.

¹⁴³ *Id.* at *4.

¹⁴⁴ Transcript of Record at 25-26, *United States v. Chessani*, 2009 CCA LEXIS 84 (2009) (Art. 39(a) Sess.).

¹⁴⁵ *Chessani*, 2009 CCA LEXIS 84, at *5 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)) (emphasis added).

Second, if significant doubt about the fairness of courts-martial by objective, fully informed observers of UCMJ practice is now applicable at the appellate level, then validity of all courts-martial are arguably suspect. In 2001, the Cox Commission concluded that “commanding officers still loom over courts-martial, able to intervene and affect the outcomes of trial in a variety of ways . . . [which] must not be permitted to undermine the standard of due process to which servicemembers are entitled.”¹⁴⁶ Critical of a commander’s virtual control over all pre-trial matters, from the testing of physical evidence and travel accounts for witness availability, to the danger posed by a staff judge advocate’s ability to improperly influence the direction of investigations, the Cox Commission recommended Congress enact sweeping systemic changes more than *ten years ago*.¹⁴⁷

The combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.¹⁴⁸

The charges in Chessani’s court-martial were dismissed without prejudice – meaning another convening authority could have re-filed the identical charges at a different command.¹⁴⁹ That didn’t happen, and Lieutenant Colonel Jeffrey Chessani retired from military service on July 17, 2010.¹⁵⁰

THE WAY AHEAD

There is probable cause to conclude our military justice system employs UCI, as both scabbard and saber, to prevent war crime prosecutions against senior commanders from ever reaching finality in law. Forty years ago, the pernicious effects of UCI *appeared* to limit judicial responsibility for the My Lai massacre to a single lieutenant and to protect more senior Army officers from the scrutiny of trial. Today, Marine Corps trial and appellate courts have wielded *apparent* UCI to terminate the prosecution of a battalion commander which sought to

¹⁴⁶ COX COMMISSION REPORT, *supra* note 23, at 6-7.

¹⁴⁷ See COX COMMISSION REPORT, *supra* note 23.

¹⁴⁸ *Id.* at 8.

¹⁴⁹ *Chessani*, 2009 CCA LEXIS 84, at *7.

¹⁵⁰ See Gretel C. Kovach, *Marine Corps officer in Haditha case retires*, THE SAN DIEGO UNION-TRIBUNE (July 19, 2010, 8:45 PM), <http://www.utsandiego.com/news/2010/jul/19/marine-corps-officer-haditha-case-retires/>.

uncover what the defendant knew and what he did about the killing of as many as twenty-four noncombatants at Haditha, Iraq.¹⁵¹

A number of reasonable inferences may be drawn from the foregoing. First, given career capture and their status as staff advisors beholden to commander-clients, uniformed judge advocates are severely limited in their ability to pursue war crime prosecutions. Second, commanders are prone to influence, directly or indirectly, all command actions on their watch and there are few meaningful disincentives to engage in UCI. The dearth of article 98 prosecutions for meddling in the judicial process is compelling evidence of the minimal risks involved for transgressing article 37 limitations. Third, when senior commanders are implicated in war crime investigations institutional conflicts of interest act to discourage complete prosecutions. A convening authority's desire to not see a case through to conclusion arises not only from reticence to go after "one of our own," but also out of fear of discovering just how high up the chain of command criminality might be found. This omission to act may follow intentionally or through simple failure to exercise due care. Fourth, the UCMJ's allowance for commanders to dispose of court actions for "other sound reasons"¹⁵² provides a ready-made alternative to the career and institutional discomfort of a searching prosecution. The unplanned retirement and administrative letter of censure has become the default institutional response for defendants suspected of command responsibility for war crimes. Finally, given these realities, cases that draw international attention prompting public comments by presidents, defense secretaries, and congressmen are veritable petri dishes for the generation of new strands of UCI, real or apparent.

In *Crimes of State Past and Present*, I recommended that service secretaries be encouraged to play a more robust role when future allegations of U.S. war crimes arise.¹⁵³ If the civilian member military appellate court designed to dissuade UCI has proven ineffective, why not go a step further and implement a civilian special prosecutor? The UCMJ authorizes the secretary of the Army, its sister service chiefs, and the secretary of defense to convene general courts-martial.¹⁵⁴ If Congress were to create a civilian office of special prosecutor for war crimes to advise the civilian leadership on allegations of crimes under

¹⁵¹ See *Chessani*, 2009 CCA LEXIS 84.

¹⁵² MCM, *supra* note 26, pt. IV, II-31.

¹⁵³ CRIMES OF STATE PAST AND PRESENT, *supra* note 5, at 171.

¹⁵⁴ 10 U.S.C. § 822 (2000).

command responsibility, they could also serve as the equivalent of a staff judge advocate in the prosecution of colorable cases.

Two things would necessarily follow. First, uniformed convening authorities would face a structural incentive to let cases go to trial where evidence of likely misconduct suggests they should. Second, conditions which encourage the practice of UCI in highly publicized war crime cases for the uniformed ranks would disappear. The military's highest-level political appointees, if given the practical means to initiate and conclude prosecutions, would have no need to telegraph their preferences on individual cases down the chain of command. They could patiently sit back and await their own bite at the apple – providing a much needed backstop for the current process, even if only in cases where reasonable minds might differ. Neither would senior civilian leaders have to worry when international scandal erupts about the second and third order subordinate effects of inevitable press conference statements concerning the accused.

One of the Nuremberg principles – that superior orders may not serve as a legal defense for war crimes¹⁵⁵ – holds an implicit corollary for governments that send to war uniformed armed services subject to civilian control. If political leaders are not criminally culpable for war crimes because of policies they have implemented, or neglected to implement, they have no reason to systemically prevent vigorous prosecution of service-members when thorough investigation of all circumstances warrant going forward.

¹⁵⁵ See, e.g., Rome Statute of the International Criminal Court art. 33, July 17, 1998, 2187 U.N.T.S. 90.