Chapter 1

THE ORIGINS AND PURPOSES OF MILITARY JUSTICE

In the United States and around the world, nations and multi-national coalitions have long relied on military justice to restrain the horrors of war and allocate the burdens and privileges of military service. This opening chapter sets the stage for the exploration of military justice that follows by sketching a framework for the origins and purposes of military justice. It introduces, or perhaps simply reminds readers of, the reasons that many nations have developed separate systems of military justice. The first section, Contexts, uses a series of historical vignettes to reveal the demands of the environments in which military justice has operated and to suggest the extent of military justice's challenge. The second, Objectives, briefly outlines the history of military commanders' efforts to establish military justice systems and the goals those systems have pursued. Throughout, the reader should keep in mind the balance and synergy between the primary objectives of military justice: to preserve discipline and to seek justice, often amid the danger, deprivation, and high stakes of military operations.

I. CONTEXTS

No legal system operates in a vacuum. Criminal justice systems, perhaps more than any other legal regimes, are acutely sensitive to the social, political, and cultural contexts in which they are implemented. The investigation and prosecution of crime is heavily influenced not only by statutes and regulations, but by social norms, cultural practices, and community objectives. In military justice systems, these norms and objectives differ markedly from those that shape the procedures and outcomes of civilian criminal justice. This section provides a brief overview of some of these distinctive contexts. It focuses on revealing the challenges, risks, and fears that characterize the environments in which military crimes are committed, investigated, and prosecuted.

A. War

Peter Maguire, *Law and War: An American Story* 22 (2000)

Colonial leaders [in North America] had no qualms about slaughtering those tribes that resisted the colonists' "civilizing" influence. As early as 1675, colonists nearly wiped out the Algonquin Indians for attacking and destroying colonial

settlements in what would come to be known as King Philip's War. In the end, King Philip, the Algonquin Indian leader, was captured and killed. His head was exhibited in Plymouth for the next twenty years, and his wife and children were sold as slaves in the West Indies. Reprisal would become the key word in America's emerging Indian policy. Tribes that refused American demands were subjected to harsh punitive measures.

America's first President, George Washington, ordered Major General John Sullivan to "chastize" hostile Iroquois in a May 31, 1779 letter. President Washington wanted the Indian villages "not merely overrun but destroyed. But you will not by any means, listen to any overture of peace before the total ruin of their settlements is effected." Washington wanted to establish a precedent of terror and believed that American national security demanded it: "Our future security will be in their inability to injure us . . . and in the terror with which the severity of the chastizement they receive will inspire them." Major General Sullivan shared his commander-in-chief's view that "the Indians shall see that there is malice enough in our hearts to destroy everything that contributes to their support."

In 1792, George Hammond, the first British ambassador to the United States, asked Thomas Jefferson what he "understood as the right of the United States in Indian soil?" Jefferson responded, "We consider it as established by the usage of different nations into a kind of jus gentium (Law of Nations) for America," arguing that while the United States would treat the invasion of Indian territory by "any other white nation" as an act of war, America assumed "no right of soil against the native possessors." Hammond was utterly unconvinced by Jefferson's earnest claims and told him that the British believed the United States planned to "exterminate the Indians and take their lands."

Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*

43 Stan. L. Rev. 13, 15-22 (1990)

The Dakota people are part of what is often identified as the Sioux Nation, a group comprised of seven politically distinct tribes — the Seven Council Fires — that share family ties and a cultural value system, social organization, and language. The four tribes principally involved in the war — the Mdewakanton, Wahpekute, Sisseton, and Wahpeton — are among those that refer to themselves as Dakota.

The Dakota people had once inhabited and controlled large areas of land in the upper Midwest. By 1862, however, the seven thousand Dakota occupied only a narrow strip of land — about one hundred twenty miles long and ten miles wide — along the Minnesota River in the southwestern part of Minnesota. The remainder of their land had been ceded to the United States in a series of treaties between 1805 and 1858 in return for cash payments and for money allocated to build facilities such as schools and mills. The Sisseton and Wahpeton tribes lived on the northwestern side of the reservation, with the Mdewakanton and Wahpekute tribes residing on the southeastern side. The reservation also contained two administrative centers established by the federal government, the Yellow Medicine

or "Upper Sioux" Agency in the northwest and the Redwood or "Lower Sioux" Agency in the southeast.

Despite the pledges of eternal peace and friendship in the treaties, by the summer of 1862 serious tension existed between the Dakota and American communities, fueled by a lengthening list of Dakota grievances against the United States. The treaties of 1851 had promised the Dakota lump sum payments in exchange for land, but eleven years later the Dakota people still had not received the funds. After 1851, American settlers began to move onto reservation land north of the Minnesota River; in the treaties of 1858, a largely unwilling Dakota community was forced to relinquish that land. Restricted as they were to a small area, the Dakota could no longer support themselves in their traditional manner and so became increasingly dependent on the goods, services, and annuity payments promised in the treaties. When payments and delivery of goods were delayed, the Dakota suffered hunger and hardship.

In 1857, the Indian Agent [of the federal government] withheld the annuities in order to force the Dakota to pursue and capture an outlaw band of Dakota, thereby punishing the whole group for the actions of a few individuals who were not part of the community. Later, the Agent began to divide the payments unequally among the Dakota to reward those who adopted American ways at the expense of those who maintained a traditional Dakota lifestyle. When annuities were distributed, the Agent often paid most or all of the money directly to the traders for goods already sold to the Dakota on credit, based on unverified claims that were probably padded and were viewed with great — and justified — suspicion by the Dakota.

In the summer of 1862, the annuity payments were late once again. Rumors spread that, because of the American government's preoccupation with the Civil War, payments might be made in paper money rather than the stipulated gold, or might not be made at all. The traders were reported to have said that the payments, if ever made, would be the last. Because of past abuses by the traders, the Dakota made plans to demand payment of the annuities directly to the people rather than to the traders; when the traders learned of this, they refused to sell any more provisions on credit, though many of the Dakota were starving. When Indian Agent Thomas Galbraith met with the traders to try to resolve the impasse, Andrew Myrick, the spokesman for the traders, responded, "So far as I am concerned, if they are hungry, let them eat grass."

Thus, longstanding grievances over treaty violations and trader abuses, combined with worsening economic conditions and pressures created by the American drive to assimilate the Dakota, set the stage for war. An incident on Sunday, August 17, 1862, finally precipitated the conflict. Four young Dakota men returning from a hunting expedition killed five American settlers on two homesteads in Acton, Minnesota. The attack, apparently unprovoked by any immediate act, was fueled by the increasing tensions between the Dakota and the American settlers. If serious grievances against the Americans had not built up over the previous several years, the Dakota might have delivered the four men to the Americans for punishment, and peace would have prevailed, at least temporarily. The incident then might have remained an isolated occurrence, one of many so-called "Indian depredations" on the frontier.

Instead, many of the young Dakota men urged their leaders to initiate war against the American settlers to try to drive them from the Minnesota Valley. Councils were held among the Dakota that night. Many of the leaders expressed reluctance or even opposition to war. Some felt sympathy with or had ties to the American community; others realized that a war against the superior numbers and firepower of the Americans could not be won, even though many of the Minnesota men had been sent east to fight the Civil War. The young men, however, hoped to recapture their lost land, drive the American settlers away, and return to their traditional way of life.

Many also believed that the Americans would stop payment of the annuities and take vengeance upon the whole tribe in retaliation for the Acton killings, particularly because women were among the victims. They argued that the Dakota should strike first rather than wait for the inevitable. The Council decided on war.

The fighting began the next morning when a group of Dakota attacked the Redwood (Lower) Agency, a settlement populated by traders, the Indian agent, various government personnel and their families, farmer-Indians, and some other mixed and full bloods. Thirteen Americans were killed in the attack on the Agency, seven more were killed while fleeing from the settlement, and ten were captured.

Forty-seven settlers escaped from Redwood to Fort Ridgely, a federal army outpost garrisoned by Minnesota volunteer regiments that the United States government had mustered into federal service while the regular troops fought in the Civil War. After hearing the news of the attack, Captain John S. Marsh, the commander at Fort Ridgely, set out for the Redwood Agency with forty-six enlisted men and an interpreter. Despite warnings from fleeing settlers that he would be outnumbered, he continued toward the Agency. The Dakota attacked him and his men at the Redwood Ferry, killing twenty-four. The remaining soldiers retreated with some difficulty to Fort Ridgely.

In the days that followed, the Dakota fought several different kinds of engagements with Americans. The Dakota fought two battles at New Ulm, a German settlement in a strategically significant location in the Minnesota Valley. In both battles, the town was defended by men who had volunteered to serve in the fight against the Dakota; these "citizen-soldiers" fought to protect themselves and more than a thousand women, children, and unarmed men barricaded in the center of town. Other battles involved only the military: attacks on Fort Ridgely, an attack on a party of soldiers at Birch Coulee, skirmishes in Meeker County, and the final battle at Wood Lake. The American forces were led by Colonel Henry H. Sibley, appointed on August 19 by Minnesota Governor Ramsey to be commander of the volunteer forces and named on September 29 by President Lincoln to be Brigadier General of United States Volunteers in charge of the U.S. Military District of Minnesota.

From the outset the Dakota also attacked other American settlements and settlers who had not yet taken shelter behind the fortifications being constructed by the citizens of the towns. Many of the settlers were reportedly unarmed and taken by surprise. In most cases, the Dakota killed the men and took the women and children prisoners. Wild stories of mutilation by the Dakota in these encounters spread among the settlers, but historians have concluded that these

reports were probably exaggerations of isolated instances of atrocities.

Meanwhile, the disagreements evident at the initial Council continued, dividing those Dakota who supported the war from those who opposed it. The Sisseton and Wahpeton located at the Yellow Medicine (Upper) Agency at first declined to join the war, and some of them helped American settlers and missionaries escape attacks on the Agency. Some Mdewakanton opposed continuing the war and urged return of the women and children hostages. Colonel Sibley contacted Taoyateduta (Little Crow), the reluctant leader of the war, to attempt negotiation, but Sibley demanded the return of the hostages before beginning any discussions. The Dakota held Councils to decide whether to negotiate. Taoyateduta was loath to do so, believing that no mercy would be shown the Dakota, but two other leaders, Chiefs Wabasha and Taopi, who had opposed the war from the outset, contacted Sibley to discuss a surrender.

On September 23, scarcely a month after the war had begun, the Dakota fighting men returned to camp after the battle at Wood Lake to discover that the Dakota who opposed continuation of the war had taken control of the white captives. Support for the war was rapidly diminishing, and those who wished to continue fighting or opposed surrender moved out of camp with their families and belongings, leaving the others behind. Among those who fled north were three of the leaders of the war effort, Taoyateduta, Shakopee (Little Six), and Wakanozanzan (Medicine Bottle). The remaining Dakota then sent word to Sibley that he and his soldiers could "come up," which he proceeded to do. On September 26, Sibley set up Camp Release opposite the Dakota camp. He entered the Dakota camp later that day and took some 1200 Dakota men, women, and children into custody. About 800 more surrendered in small groups over the next several weeks.

In thirty-seven days of fighting, 77 American soldiers, 29 citizen-soldiers, approximately 358 settlers, and an estimated 29 Dakota soldiers had been killed.

NOTES AND QUESTIONS

1. What crimes, if any, are revealed by these descriptions of United States-Native American armed conflict? Who was responsible? What legal forum could have prosecuted any crimes? Chomsky reports on what actually happened when the Dakota were tried by military commission: "[N]early four hundred Dakota men were tried for murder, rape, and robbery. All but seventy were convicted, and 303 of these were condemned to die. After an official review of the trials, the sentences of thirty-eight were confirmed and, on December 26, 1862, these thirty-eight were hanged in Mankato, Minnesota, in the largest mass execution in American history. On November 11, 1865, after three additional trials, two more Dakota followed them to the gallows." 43 Stan. L. Rev. at 13.

2. The brutality of the United States' campaign against Native Americans is well known, from outright wars like King Philip's War to the 19th-century policy of forced removal. On the "Trail of Tears," the most infamous example of military action in support of removal, the U.S. Army forcibly marched 18,000 Cherokee Indians out of Georgia and into Oklahoma in 1838, leaving 4,000 Cherokee dead of exposure, starvation, disease, and violence. Less well known are the legal argu-

ments that supported such aggressive military action. During the 1830s, two decisions of Chief Justice John Marshall's Supreme Court addressed the plight of Indians in the State of Georgia. In the first, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Court held that the Cherokees could not sue Georgia because they lacked the status of a sovereign nation and were instead a "ward" to the U.S.'s "guardian"; in *Worcester v. Georgia*, 31 U.S. 515 (1832), the Court upheld the doctrine of discovery, recognizing U.S. rights to lands previously held by Indians and asserting the supremacy of federal over state power, thus rejecting Georgia's extension of state law over Cherokee land as unconstitutional. The official response to the Court's ruling in Worcester, as Justice Breyer has explained, was swift: "The first thing the Georgia legislature did was pass a law that said anyone who comes to Georgia to enforce this ruling of the Supreme Court will be hanged. Andrew Jackson, President of the United States, supposedly said (and he said enough such things that it is probably true): 'John Marshall, the Chief Justice, has made his decision. Now let him enforce it.' Nobody did a thing." Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 9 (2005).

3. In the excerpt above, President George Washington advocates "terrorism" as a means to eliminate the threat that Indian tribes posed to U.S. interests. Was such "chastizement" (or total destruction) of Indian tribes a legitimate goal for the young United States? If so, why? How was this practice justified under American law? *See, e.g.*, Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2006).

4. During World War II, Japanese special warfare units conducted medical experiments on Chinese, Korean, and Russian POWs. "Prisoners were frozen alive, infected with syphilis, given transfusions of horse blood, subjected to vivisection with no anaesthesia, and given numerous x-rays to test the effects of radiation. . . . Lieutenant General Shiro Ishii [head of one of these special warfare units], traded his research results to American authorities in exchange for immunity from prosecution for himself and his staff." PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 139 (2000). Such atrocities were used after the war to justify the United States' atomic bombing of Hiroshima and Nagaski. The U.S. did not release accurate information about the full extent of the destruction until many years later. *See, e.g.*, ROBERT J. LIFTON & GREG MITCHELL, HIROSHIMA IN AMERICA: FIFTY YEARS OF DENIAL (1995). Did the U.S. government act wrongfully in failing to disclose accurate information at the time to the public? If not, did it later become necessary to release such information? At what point in a war does an obligation to release accurate information to the public arise?

5. World War II pitted the Allied powers against the Axis powers, which included Japan and Nazi Germany, two of the most feared, repressive, and aggressive governments in modern history. Does the nature of that conflict change the legal framework on which it was fought? Does it reduce the extent to which precedents from that era should bind future generations?

6. "Indiscriminate" weapons, or those that cause disproportionate civilian casualties or destruction because their impact is uncontrollable, are generally considered unlawful. *See, e.g.*, U.S. Dep't of the Air Force, Air Force Pamphlet 110-31, Int'l Law — The Conduct of Armed Conflict and Air Operations 6-3 (1976). In 1996, the International Court of Justice issued an Advisory Opinion on "The Legality of the Threat or Use of Nuclear Weapons." 35 I.L.M. 809 (1996). *See also* The Case Against the Bomb (Roger S. Clark & Madeleine Sanns eds. 1996); Charles J. Moxley, Jr., Nuclear Weapons and International Law in the Post Cold War World (2000). Does the atomic age pose fundamental challenges to lawful conduct of war? If nuclear weapons transform the nature of war, is their impact similar to other technological advancements in weapons?

BARRAZA RIVERA v. IMMIGRATION AND NATURALIZATION SERVICE

United States Court of Appeals for the Ninth Circuit
913 F.2d 1443, 1445-53 (9th Cir. 1990)

Pregerson, Circuit Judge:

Jose Antonio Barraza Rivera ("Barraza") petitions for review of a decision of the Board of Immigration Appeals ("BIA" or "the Board"). The BIA dismissed Barraza's appeal and upheld the immigration judge's denial of Barraza's requests for political asylum and withholding of deportation under the Immigration and Nationality Act. 8 U.S.C. §§ 1158 and 1253(h). The Board also upheld the immigration judge's denial of Barraza's motions for remand of his case to the Bureau of Human Rights and Humanitarian Affairs ("BHRHA") and for discovery of the basis of the BHRHA advisory opinion. We have jurisdiction over Barraza's petition under 8 U.S.C. § 1105a. We grant the petition, reverse the BIA order, and remand for further proceedings.

In December 1983, Barraza was forcibly recruited into military service in El Salvador, his home country. He entered training in January 1984 at a military headquarters in the city of La Union, and was trained in weaponry and self-defense for about 20 days. On or about January 13, 1984, Barraza took one or two hours off from training and went into town to apply for a passport. He applied for the passport on the advice of his mother, who was concerned about unlawful acts committed by the military. He changed from military to civilian clothing to apply for the passport, and did not indicate military service on his passport application. After training, Barraza was sent to the city of Morazan for two weeks, where he backed up troops fighting guerrillas. He never engaged in battle. Barraza returned to military headquarters in La Union on January 31, 1984. He and approximately one-half of the 100 soldiers in his unit were given a three-day leave to visit family.

Before being dismissed for leave, Barraza was pulled aside from the group by a man he identified in his testimony as Lieutenant Calbo. According to Barraza:

> [H]e said prepare yourself when you return, because we have a commission. We're going to take two men to . . . assassinate. And then I said why, it's an order he said, because they have paid me and I need the

> money. And then he said, what do you prefer, that they kill you or kill them? and then I said okay, as you say, lieutenant. . . .

Barraza returned to formation and was dismissed for leave. He then picked up his passport. On February 4, 1984, he left El Salvador for the United States because, he testified, "it wasn't correct what I was going to be doing." Barraza was apprehended by the INS near Brownsville, Texas, and was placed in deportation proceedings. He applied for political asylum. The BHRHA prepared an advisory opinion on his application and sent it to the INS pursuant to applicable regulations. A hearing on his asylum and withholding of deportation claims was held on December 18, 1985.

At the hearing, Barraza testified that he left El Salvador because he did not want to participate in killing the two men, and that he fears that, if returned to El Salvador, he faces persecution by both the military and the guerrillas. First, Barraza fears being punished for refusing to participate in paid assassinations. Second, he fears that the military will suspect that he is an informant for the guerrillas and will kill him for that reason. To support this claim, he testified that an uncle was beaten severely by soldiers in 1982 for suspected pro-guerrilla activity, and that another uncle and cousin were killed by soldiers, also in 1982. Also, Barraza stated that in December 1983, a friend and fellow soldier was killed by a colonel in Barraza's unit at headquarters in La Union after being held for several days by guerrilla captors. The colonel apparently accused this friend of being a guerrilla informant. Third, Barraza fears that the guerrillas will kill him if he is returned to El Salvador because he was a member of the military. To support this claim, he testified that a friend was killed by guerrillas after being identified as a member of the national guard.

Barraza also stated that his family informed him that anonymous threats against him had been attached to the door of his family's home, beginning approximately two months after he entered the United States. Barraza received two letters from his family just days before his asylum hearing in December 1985 that warned him not to return to El Salvador because of recent anonymous threats. The letters' authenticity was not challenged at the asylum hearing, and the letters were admitted into evidence.

Finally, Barraza submitted background documentation regarding El Salvador's civil war, death squad activities, and the military. In particular, he submitted newspaper and magazine articles on increased levels of violence from both sides of the civil war and an Amnesty International report on widespread human rights violations. The Amnesty International report stated that military officials were known to work in "close conjunction" with certain repressive civilian paramilitary groups. Barraza also submitted to the Board on appeal an article that appeared in the March 1986 edition of *The Progressive.* The article described in detail the extensive involvement of the Salvadoran military in death squad activities, and included specific accounts of military officers ordering soldiers to participate in assassinations requested by wealthy private citizens. The immigration judge denied Barraza's requests for political asylum and withholding of deportation. The BIA dismissed Barraza's appeal. . . .

[The court holds that "Barraza proved his asylum eligibility" because "he faces

persecution by the Salvadoran military because he abandoned military service and fled the country to avoid participating in an inhuman act," explaining:]

Barraza was ordered by a military officer, under threat of death, to participate in the paid killing of two men. Barraza abandoned military service and fled El Salvador because he did not want to participate in the killings. He asserts that, if returned to El Salvador, he will be persecuted by the Salvadoran military because he refused to participate in the murders and deserted and because he will be suspected of pro-guerrilla activity. The BIA found that Barraza failed to establish a well-founded fear of persecution by the government, and, a fortiori, a clear probability of government persecution. The Board found that Barraza's fear of being persecuted as a suspected guerrilla sympathizer was not well-founded and also rejected Barraza's claim of persecution based on objection to military service.

We hold that the BIA's finding that Barraza failed to demonstrate a well-founded fear of persecution for his refusal to participate in paid assassinations is not supported by substantial evidence. Barraza demonstrated a well-founded fear of persecution based on his objection to participating in the murders under orders from a Salvadoran military officer, and is eligible for political asylum on that basis. . . .

In deciding Barraza's case, the BIA held that "a claim to conscientious objector status should be sustained and refugee status granted if an individual establishes that he will be forced to participate in activities which are contrary to the basic rules of human conduct." The Board, however, found that: (1) Barraza was not actually threatened by Lieutenant Calbo, the military officer who ordered him to participate in the assassinations; (2) Lieutenant Calbo was dead; and (3) Barraza failed to establish that the murders were sanctioned by the Salvadoran government or military. The BIA concluded that Barraza failed to establish a well-founded fear that if returned to El Salvador he would be forced, through military service, to participate in unconscionable acts, or would be punished for refusing to participate in the acts.

Assuming, as we must, that Barraza's testimony was credible, we cannot doubt that Barraza satisfied the subjective component of the "well-founded fear" standard. He testified that he opposed participating in paid assassinations because he believed they were wrong and illegal, and that he feared being forced to participate in the murders or being killed for refusing to participate. We conclude, based on the record before us, that Barraza has shown "genuine fear." *See Diaz-Escobar v. INS*, 782 F.2d at 1492. . . .

The issue, then, is whether substantial evidence supports the BIA's conclusion that Barraza did not show a reasonable possibility that the persecution he feared would occur if he was returned to El Salvador. We hold that the BIA's conclusion is not supported by substantial evidence.

The BIA's findings that Barraza was never threatened and that the military officer who threatened Barraza was dead are not supported by substantial evidence. The BIA explained:

> [T]he respondent states . . . that he would be killed by the lieutenant if he failed to take the action. The transcript indicates that the respondent

> was told that if he did not kill the intended victims . . . , they would kill him.

This is a strained reading of the transcript, which states in relevant part:

> A: There was a lieutenant that told me to come over here.
>
> Q: What was his name?
>
> A: They called him Calbo, Lieutenant Calbo.
>
> Q: Calbo?
>
> A: And he said prepare yourself when you return, because we have a commission. We're going to take two men to . . . assassinate. And then I said why, it's an order he said, *because they have paid me and I need the money. And then he said, what do you prefer, that they kill you or kill them?* (Emphasis added.)

When taken in context, the meaning of the exchange is clear: the lieutenant told Barraza that either Barraza helped kill the two men or whoever had hired the lieutenant to do the job would have Barraza killed.

Under the circumstances, Barraza could reasonably expect that, in either case, Lieutenant Calbo would be involved in the killing. . . . Reversed and remanded.

NOTES AND QUESTIONS

1. To what lengths can (and should) a government go in order to compel military service? Should opposition to forced wartime service constitute sufficient "persecution" to sustain a request for political asylum? In a footnote to *Bazzara-Rivera*, the Ninth Circuit addressed the legal definition of persecution, noting

> Requiring military service and punishing deserters does not, per se, constitute persecution. We have, however, recognized conscientious objection to military service as grounds for relief from deportation. The Board also has addressed the conscientious objector issue.

2. Sometimes the need for replacements in the field leads commanding officers to create new battlefield incentives. Consider historian Russell Weigley's description of the challenges faced during the U.S. military campaign in France and Germany during the last two years of World War II, when a very high casualty rate among the infantry created personnel problems:

> The United States Army has never in its long history discovered a satisfactory method of [maintaining] the fighting strength, integrity, and morale of units long exposed to the hard attrition of combat. In its first war requiring massive forces, the Civil War, the United States Army simply held a regiment's nose to the grindstone of combat until that regiment was no more. With minor and usually ineffective exceptions, there was no replacement system. Union army regiments with a table of organization strength of 845 to 1025 were down to an average of 375 by the time of Gettysburg, only halfway through the war. New regiments were raised to take the place of depleted ones, an unconscionable waste of the experience

> of veteran officers and enlisted men. To avoid such waste, in the world wars the army gave depleted units infusions of individual replacements. . . . While units did not simply fade away as they had in the Civil War, there remained the Civil War problem, aggravated by the more continuous combat of the twentieth century, that once a unit entered the lines it stayed there until the end of the war. Divisions occasionally went to quiet sectors to rest and refit, but not often enough or according to any system. The German army almost until its final extremity rotated units out of the line of fire more frequently and regularly than the American army. The effect was to undermine an effective American division's asset of experience by sheer weariness.
>
> Once an individual soldier was committed to combat, he had to count on remaining under fire until the war ended or he was so badly wounded he could not return — or until he was dead. For all its faults, nevertheless, this system was preferable to the British practice, followed in North Africa and fortunately less evident in Europe, of rotating units out of the line so frequently that relatively raw or rusty British formations were forever being chewed to pieces by veteran German divisions. The American replacement system of World War II was also far superior to the Korean and Vietnam War systems, which rotated individuals, officers as well as men, out of both their units and combat as soon as they had served under fire for a stipulated time. . . . [T]he World War II replacement system had the great virtue of sustaining unit integrity as well as numbers; the later Korean and Vietnam replacement system practically destroyed unit cohesion. . . .
>
> [In order to address a near-desperate situation in France after the Battle of the Bulge — a surprise German attack in December of 1944 that took the lives of 19,000 American troops and led to the infamous Malmedy massacre and trial,] [t]he theater command considered a sweeping withdrawal of combat-trained men from engineer battalions and general service regiments. For the time being, Eisenhower settled for the less drastic expedient of sending his own representatives through the Communications Zone to select men qualified to fight and to hasten them to the front. He also promised a pardon and a clean slate to soldiers under court-martial sentences who would go to the front and fight; everyone who faced fifteen years or more of hard labor volunteered.

Russell F. Weigley, Eisenhower's Lieutenants: The Campaigns of France and Germany, 1944-45, 370-72, 568-69 (1981). Was Eisenhower wrong to offer amnesty to convicted criminals? What impact would such an action have on the morale of law-abiding infantrymen? On the disciplinary problems facing commanders of front-line forces?

3. Sometimes the political and social climate in which military personnel policies are made creates special challenges for commanding officers. For example, in the U.S., the 1948 executive order that required "equality of treatment" across racial lines forced the services to change their practices of assigning, training, and deploying service members, and the 1975 order to admit women to the national

service academies forced changes in facilities, equipment, and administration. During the Vietnam War, the United States implemented a special program designed to increase the number of young men available for military service. It did not work out as planned:

> Project 100,000 was a Great Society program intended to augment the armed forces with recruits previously rejected because of low scores on preadmission intelligence tests. This plan, which Senator Daniel Patrick Moynihan viewed as a means of rescuing young African American men from a destructive, matriarchal culture, brought over 400,000 young men, most from poverty, into the service between 1966 and 1972. Moynihan's rationale for the program combined two popular perspectives on military service: that it built character and made men and that the modern armed forces could be an instrument of social change. The additional training that was supposed to accompany the induction of these underprepared men did not materialize, and the consequences were dire, as historian Christian Appy has shown in his study of Vietnam soldiers. Half were sent to Vietnam, where they died at a rate twice that of other troops. Although African Americans comprised only 10 percent of the military in the late 1960s, they were 40 percent of the Project 100,000 inductees. A prime reason for the disproportionately high casualty rate among these troops was the high percentage sent into combat occupations, which made up most of the military occupations deemed suitable for "Project 100,000" men.

ELIZABETH LUTES HILLMAN, DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL 11 (2005). Was Project 100,000 fundamentally flawed or was its execution simply botched? How do the demographics of military personnel affect the disciplinary challenges of military commanders? Should military leaders, rather than civilian government officials and politicians, make decisions about recruiting tactics and personnel policies?

B. Occupation

Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law on Hawai'i 1941-1946*
19 U. HAW. L. REV. 477, 487-520 (1997)[1]

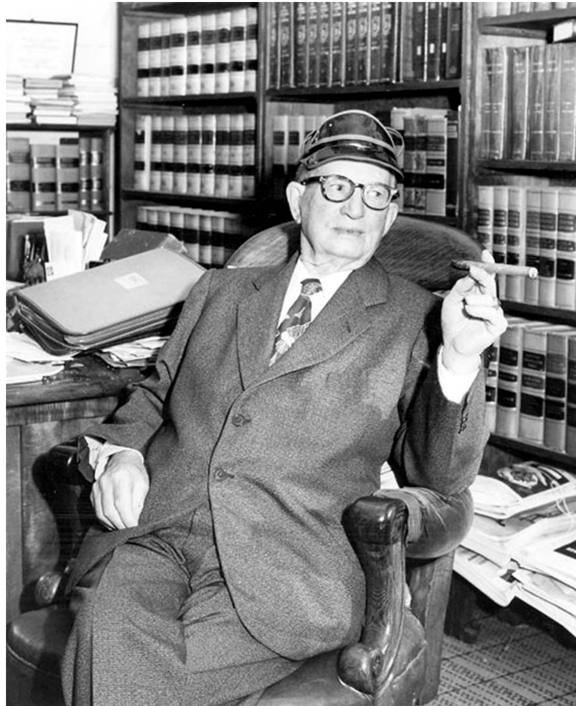
[Securing borders and controlling territories, hostile and friendly, during times of war creates additional disciplinary and law enforcement burdens for military troops. The imposition of martial law is most often associated in the United States with the Civil War and President Lincoln's suspension of habeas corpus. During World War II, however, the territory of Hawai'i was under martial law for almost three years. Below, historians Harry and Jane Scheiber explain:]

Within hours of the early morning attack on December 7, 1941, Joseph P. Poindexter, the territorial governor of Hawai'i, issued a proclamation placing the entire territory under martial law. He suspended the writ of habeas corpus and

[1] Copyright © Jane L. and Harry N. Scheiber. All rights reserved. Reprinted by permission.

requested the commanding general of the Hawaiian Department to exercise all governmental functions, including judicial powers, "until the danger of invasion is removed." In a simultaneous proclamation, the commanding general, Lieutenant General Walter C. Short, declared himself the "Military Governor" of Hawai'i — a self-assumed title that was to become a point of great controversy in later months — and he warned that citizens who disobeyed his orders would be "severely punished by military tribunals" or held in custody until the civil courts were once again able to function. . . .

Thus was the entire civilian population of the Hawaiian Islands placed under the control of a military governor whose discretionary powers were absolute. This comprehensive suspension of constitutional guarantees was destined to last for nearly three years, until October 1944. . . .



Judge Delbert E. Metzger (1875-1967), trial judge in the landmark case of Duncan v. Kahanamoku.
Photograph used by permission of the Honolulu Star-Advertiser.

Although the wide scope of martial law brought the activities of all civilians in the Islands under Army rule, the declaration of martial law and the actual administration of military government had some uniquely harsh consequences for residents of Japanese ancestry — both alien residents and citizens — in Hawai'i, and to some degree for other residents of Asian ancestry. In marked contrast, however, to the drastic policy of forcibly evacuating and then interning the 110,000 Japanese-American residents of California, Washington, and Oregon, the Army did leave most Japanese-Americans in Hawai'i free to continue their lives in their own homes (and

in most cases, their prewar employment), as best they could — but, like the rest of Hawai'i's civilian population, under Army rule. After initially being prevented from enlistment in the armed forces, they were finally invited to form a Hawai'i fighting unit; and, as is well known, their combat team became one of the most decorated units in American military history. . . .

This is not to say that Hawai'i residents of Japanese ancestry were regarded by the military government as beyond suspicion. Approximately 159,000 persons out of a total civilian population of 465,000 were of Japanese descent. Of these, 124,000 were citizens and another 35,000 aliens. Both military and civilian security officials had long believed that there was substantial danger of "fifth column" activity from within this group if the Islands were invaded by Japan; and after the Pearl Harbor attack, such an invasion appeared to be an immediate danger. As happened on the mainland, therefore, the Army and the FBI moved quickly to round up aliens and other individuals who previously had been investigated and were suspected of being disloyal or dangerous in a war situation. Eventually 1,569 persons were detained on suspicion of disloyalty. Of these, 1,466 — less than 1 percent of their ethnic group — were of Japanese descent. The detainees included almost all Shinto and Buddhist priests, teachers of Japanese language schools, other leaders of the Japanese community, and many Japanese fishermen whose offshore activities had become the subject of unsubstantiated rumors and suspicions.

These measures were deemed insufficient, however, by some prominent haoles [caucasians] and by many junior uniformed officers and their families in the Islands, who were a principal source of what a confidential FBI report in 1942 dismissed as "the million false and fantastic rumors" of disloyalty among the Japanese-Americans in Hawai'i. . . . [The Army eventually interned hundreds of Hawai'ians of Japanese descent but successfully resisted the federal government's pressure for even harsher measures, such as mass evacuation.]

In the early weeks of the war, there was no public challenge to martial law. It was accepted as an emergency measure with practically no resistance in Hawai'i and indeed with obvious relief and enthusiasm in many segments of the civilian population. Most residents of the Islands apparently also believed that the civilian courts and the civilian government would resume their basic functions as soon as the acute emergency situation had passed — in a few months at most. Any assumption that the Army would willingly relinquish its control over civilian life, however, proved wholly unwarranted. For more than fifteen months — until March 1943, when some of the civilian government's authority and individual civil liberties were restored — the military would rule Hawai'i with virtually an unchecked authority, suspending constitutional guarantees on a wholesale basis. Although the Army did permit the civil courts to re-open for non-criminal, non-jury cases early in 1942, the jurisdiction of those courts was strictly limited; hence, nearly all misdemeanors and all felonies continued to be tried before military tribunals. The general orders issued by the Army recognized no residual or controlling powers in the governor, the legislative officers of the territory or its municipalities, or the civilian courts at any level. Indeed, the Army thereafter formally regarded the civilian courts, when they were allowed to resume functioning in a limited way, as "agents of the Military Governor."

Martial law was not lifted entirely until October 1944, more than two years after the Battle of Midway had ended any real danger of invasion or massive strike against Hawai'i. During the period of most comprehensive military rule in Hawai'i, from Pearl Harbor to March 1943, some 181 general orders were issued under the name of the commanding general. As the territorial attorney general recounted at the time, these orders represented a "military regime with . . . stringent controls over the civilian population." Control was administered by the person who had planned the takeover of control: Lt. Colonel Green, who assumed for himself the title of "Executive, Office of the Military Governor," and who appropriated the Iolani Palace offices that had been the seat of territorial government. . . . And so Lt. Colonel Green (soon to be jumped to Colonel, then a year later to Brigadier General) became, in effect, the czar of Hawai'i's civilian life — including civil and criminal law enforcement: he was effectively a dictator with vast power, overseeing every aspect of comprehensive martial law, both administrative and judicial. "My authority was substantially unlimited," Green wrote in his recollections of his Hawai'i assignment.

The scope of the Army's general orders reached into every corner of daily life, often with the imposition of policies that deviated dramatically from the norms of peacetime American communities — and in many ways from the rules that were established during the wartime emergency in the forty-eight mainland states. The Army controlled not only the civil and criminal law, but nearly the entire range of federal administrative law that on the mainland was under jurisdiction of the War Production Board, the Office of Price Administration, the War Labor Board, and other "alphabet agencies." . . .

Early measures instituted by the Army included the compulsory registration and fingerprinting of all civilians except infants, and strict censorship of the press and broadcasting as well as of the civilian mails. Hospitals and other emergency facilities were placed under direct military control. Within a few months of the outbreak of war, the Army was also busily regulating gambling (forbidding use of marked cards and dice), sale of alcoholic beverages, traffic and parking, prostitution, and even dog-leash requirements. Among the most intrusive, and, in the long run, most resented incursions on freedom were the curfew that kept civilians off the street at night and the blackout orders that kept their homes dark after sunset; these orders were kept in effect for two-and-a-half years . . . .

Thus, with "military security" as its justification, martial law pervaded every aspect of civilian life. Throughout the first two years of the war, every violation of the military's general orders — from the most violent crime to the most trivial misdemeanor, and including labor relations issues basic to work-place conditions — was prosecuted in military courts, with no provisions for the usual constitutional guarantees of due process. It is little wonder, then, that Army-administered justice, with its sweeping effects on civil liberties and everyday life, eventually became a storm center of political controversy both in the Islands and in the Roosevelt Administration's civilian leadership in Washington . . . .

A key legal and constitutional issue was the suspension of the writ of habeas corpus — a fundamental constitutional right, by which persons taken into custody could seek to have a court of law determine the legality of the proceedings that had

led to their detention. At the outbreak of the war, when the civilian courts were first suspended, the Army had created a "military commission" of civilians and Army officers to try serious criminal offenses, including capital crimes, and to try crimes of war such as sabotage. Shortly after the Pearl Harbor attack, Colonel Green summoned to his office some leading members of the bar, the federal district judges, and the chief justice of the territorial supreme court; and he sought their support for the creation of this commission, as well as for the general takeover of the civilian courts. The lawyers and judges extended less than enthusiastic support, however, especially after Garner Anthony (a partner in one of the Islands' leading law firms and counsel to at least two of the "Big Five" companies that controlled much of Hawai'i's economy) expressed concern regarding the legality of the commission. In Anthony's view, any civilian who served on such a commission might later be found liable in civil suits for wrongful imprisonment and other harms to defendants . . . .

Thus conceived in controversy, the commission went into operation with a mixed board of civilians and military officers, but the Army soon decided to drop the civilian members. The commission in fact tried only a handful of cases during the entire war period, and so was of small significance as measured by the number of individuals its operations touched. In one respect, however, the commission's operation proved to be of critical importance politically: It tried and convicted for murder, which the Army had designated a capital crime, a Maui Hawaiian resident named Saffrey Brown. In March 1942, Brown — the 32-year-old father of seven children — was arrested by the authorities after shooting his wife during a domestic dispute in Honolulu, where she had gone to live, apparently gone lalau (astray), in this instance reportedly with a lover, and Brown had visited to beg her to return. Local civilian officials in Maui believed that the gun had gone off during a struggle set off by "a fit of jealousy," and there was some testimony that the gun might even have been set off when one of the children hit Brown's hand. They did not believe that premeditated murder was at issue. They were outraged when the military commission passed a death sentence after denying Brown the right to a jury trial, reportedly permitting him to be represented by a non-lawyer (against a highly qualified Judge Advocate General lawyer for the Army's prosecution team), and failing to recognize explicitly any distinction between first and second degree murder. "This is the first time that the death sentence has ever been inflicted upon anyone living in the County of Maui," the county treasurer wrote to the Hawai'i territorial delegate to Congress, Samuel Wilder King, asking King to intercede if for no other reason than all who had attended the trial felt that premeditation had never been considered as a factor and that Brown's counsel had been unqualified.

Delegate King was appalled by the information that came to him from trusted political associates concerning what seemed a serious abuse of Army authority, and he called upon Secretary of the Interior Harold Ickes to ask the War Department to head off the prisoner's impending execution. After study of the record by the Judge Advocate General, Secretary of War Stimson decided to order General Emmons in Hawai'i to hold the execution order "in abeyance;" and within a month's time — under continuing political pressure from Washington — Emmons formally commuted Brown's sentence to a life term.

The controversy over the Saffrey Brown trial served, however, to dramatize the

extent to which the Army had taken control of civilian governance and justice — and had set aside normal constitutional guarantees. . . .

Far more important institutionally than the Military Commission were the provost courts, established to enforce the whole range of military regulations; they also conducted trials for felonies and misdemeanors under territorial and federal laws, which were continued in effect by military orders. The provost courts were for more than three years the principal institutions of justice in Hawai'i . . . . [T]he provost judges were also the harsh enforcers of the notorious general orders against "chronic absenteeism" and job-switching by workers.

Civilians brought before the provost courts were denied virtually all of the basic constitutional guarantees of due process contained in the Bill of Rights, including the right to trial by jury and freedom from unreasonable searches and seizures without a warrant. Often no written charges were presented, and defendants were not permitted to cross-examine witnesses against them nor to call witnesses in their own behalf. In the few trials that were appealed, the trial record that was kept often proved to be crude and inaccurate. A single officer (often wearing a sidearm) presided in the provost court, and he directly examined prisoners and any witnesses. Many of the judges were without legal training, at least in the first year of the war. Although defendants were formally allowed the right to counsel, the provost judges commonly told them that lawyers were neither necessary nor desirable. Word soon spread that contrite acceptance of the court's verdict was likely to yield a lighter sentence than appearing with counsel — an important piece of common wisdom, since the verdict could not be appealed.

An investigation in Hawai'i conducted by the Solicitor of the Department of the Interior in late 1942 reported "defendants . . . convicted of violating 'the spirit of martial law' or 'the spirit' of general orders when the text has been found inadequate;" and that the sentences meted out were much more severe than those handed down by military courts against uniformed personnel for identical violations. Members of the Hawai'i bar who represented those defendants who decided to risk appearance with counsel had some memorable experiences before the provost judges. For example, one Honolulu lawyer, Samuel Patterson, reported that a provost judge threatened him with contempt simply because he had requested reduction of a client's bail. Authors of the Army's own official history of military government in Hawai'i would later conclude that "an orderly trial was practically unknown;" and they remarked upon serious "excesses" in the abusive way that hapless defendants were treated by the provost judges and other personnel of the provost courts, especially during the first year of the war . . .

As a result of these practices, trial in a provost court only superficially resembled a civil court trial operating under constitutional rules of procedure. Their trials were "among the worst features of the military conquest of the civilian government," amounting to nothing more than "drum-head justice," an Interior Department lawyer charged in a report written just a year after Pearl Harbor. If the jurisdiction of the courts was challenged by a defendant, the provost judges were advised by the command, they should "arbitrarily deny the claim, and if they want to contest the matter let them get out a writ of habeas corpus." The average trial in provost courts took five minutes or less, and of the 22,480 trials conducted in Honolulu's provost

court in 1942-43, some 99 percent resulted in convictions! Several hundred persons were sentenced to prison, at least two hundred of them for terms between six months and life; and more than $500,000 in fines were imposed in the first eight months of the war alone. No distinction was made between juveniles and adults, and defendants as young as fourteen years of age were tried by provost judges. Little wonder, then, that the administrator of the provost courts, Captain John Wickham, advised the judges at a 1944 conference that they should avoid publicity: "I would be very careful getting into the papers under any circumstances. . . . If there are any reporters in your courtroom, edit their stories. Establish a relationship with the reporter. If something pops up of unusual interest with dynamite in it request to see the story before [it is] published." . . .

When the full record of the provost courts was reviewed in 1946 by a leading authority on military law who was then serving as special counsel to the Army, he concluded: "From all I have been able to learn, they were unfair, unjudicial, and unmilitary. If any officer ever ran a summary court the way these people ran a provost court you would fire them out to Canton Island or a little farther . . . . It's a very, very nasty, unpleasant picture, and you just cannot justify it in any way." A federal district court judge in Hawai'i put it rather more bluntly, characterizing the military regime in Hawai'i as simply "the antithesis of Americanism."

NOTES AND QUESTIONS

1. Is the long-term imposition of martial law ever a military necessity? Under what conditions?

2. Are wartime suspensions of civil liberties protections always suspect after the fact? The Army and Navy considered Hawai'i a "fortress" on which civil juries and courts could not be trusted because, in large part, of the majority non-white population, including substantial groups of Japanese, Chinese, Korean, and Philippine aliens and U.S. citizens. If you were an elected or appointed government official, what evidence, if any, would you require before giving credence to such claims?

3. The international law that applies during military occupations remains subject to dispute. *See, e.g.*, Eyal Benvenisti, The International Law of Occupation (2d ed. 2004). Why has it proved difficult to define and enforce a body of law to govern occupying forces and territories? What political and military issues complicate this area of law? What disciplinary challenges face commanding officers in occupied territories?

C. Detention

Raymond Lech, *Broken Soldiers*
39-42 (2000)

[The prisoner of war camps controlled by North Korean and Chinese troops during the Korean War (1950-53) were characterized by some of the worst conditions in modern warfare. Death rates among U.S. troops surpassed forty percent, with starvation the most frequent killer. Under these conditions, military

discipline sometimes faltered as prisoners fought for survival. After being repatriated after the war, several U.S. POW's were prosecuted at courts-martial for committing crimes while imprisoned.]

During World War II, the Japanese, who had occupied the Korean peninsula since 1905, established a number of mining camps throughout the northern half of the country. After the war, many of those camps were abandoned, and some of the deserted shanty towns were used as collection points for prisoners. Because Americans tend to nickname everything, one camp was appropriately given the sobriquet "Death Valley."

It was located about twenty-five miles above P'yongyang, near the western town of Usan close to the narrow waist of North Korea. The camp was situated in a deep, north-south ravine flanked by two high mountains. It was rare indeed when sunlight touched the floor of the chasm. A narrow dirt road ran through the middle of the camp, and at the southern half of the ravine were three rows of long, barracks-type buildings on each side of the dirt street, four buildings per row. A few hundred yards to the north was the upper compound, which had two rows, three buildings to a side. It was a typical mining camp of Japanese architecture, common throughout Korea. The long, narrow buildings contained a number of rooms as well as an end room that housed the kitchen. Each separated living compartment in the building was ten feet square, and there were between six and eight rooms in each barrack. No windows broke the sides; occasionally, Japanese-style sliding doors divided the rooms. Most important, the rooms were unheated. All winters in Korea are extremely severe, but during the last month of 1950 and the early months of the following year North Korea suffered the harshest winter in twenty-five years.

Death Valley housed approximately three thousand men. Until they were moved in late January 1951, the only clothing they had was what they wore when captured. Nearly fifty were without trousers or jackets. Meanwhile, the temperature often plummeted to thirty degrees below zero.

No matter how uncomfortable the crowding, the extremely cramped conditions at Death Valley saved many because they could share the only heat available — each others' bodies. The average living space, about the size of a small dining room, held thirty men. During the day, a man would sit grasping his spread knees tightly to his chest, then another man would slide back between the first man's knees and grab his own. This would be repeated twenty-eight more times until all were tightly squeezed into the same position. At night in some rooms, sleeping was carried out in shifts, with a third standing, a third sitting, and the final third lying down.

Occupants of each room developed their own system of how to sleep. Lt. Jeff Erwin slept next to Capt. Robert Wise, and the captain woke the lieutenant about six times a night for two months so Erwin would turn over and allow him to do the same. Another prisoner from Portsmouth, Ohio, Joel Adams, had a similar problem and remembers, "We laid on the floor and there would be so many men on each side of the room and the room was so small and crowded that we were forced to sleep on our side; if you wanted to change from your right to your left side you had

to wake up all the men in the room and change over from the right side to the left side or vice versa."

The foulest sanitary conditions imaginable prevailed at Death Valley. Only a few half-full latrines were available for thousands of men. No shovels were available to dig new holes. Even if they had been, the ground was so frozen that a weak man with a spade wouldn't have been able to dent it. The call of nature was absolute, and Dr. (Capt.) William Shadish described the situation: "The men defecated on the ground at will, a lot of them because they couldn't help it. Diarrhea was very severe at that time, and explosive, so it was a very marked picture of not being able to find a square yard of ground without material on it. This was all frozen, of course, but it was a very potentially dangerous situation and I am sure the men walked in this material and took it into the rooms, and it was bad. Some of the men with severe diarrhea never made it out of the room."

Prisoners tried to stay in the crowded rooms at all times. If they did go out into the frigid daylight, they returned as quickly as possible. Boredom was not a problem, however, because men were busy watching for, picking, and killing lice. This parasite survived the dreadful winter by clinging to the grubby bodies of the men. There were thousands upon thousands of them, and, Doctor Shadish recalled, "You could see [a man's] collar just walking away with lice." In Lieutenant Erwin's room, POW's removed their clothing twice a day, according to the lieutenant, "to pick the lice off to keep them from eating you up. They would take blood out of you which we all knew and realized could not be replaced on the diet that we were on."

The food given to the three thousand confined Americans was cracked corn and only cracked corn, the same thing put into bird feeders or fed to chickens. Every man received about ten ounces a day. At the end of each building was a small sunken kitchen, where the corn was prepared for the several hundred people in that building. Jeff Erwin, the volunteer cook for his barrack, would awaken about 3:30 every morning to get it started. A couple of GIs helped, but no one was really anxious to assist. It seemed to Erwin that "everyone had the idea that they had to husband their strength in order to survive."

In the kitchen was an iron pot, and the first thing that had to be done was fill that rusted receptacle with water. About a hundred yards away from the building was a very small, polluted stream, and they would take two old gourds from the kitchen and walk to the water. The frozen stream was used by many prisoners as a latrine. A space would be cleared of the waste, and with whatever was available they would pick through the ice, fill the gourds, and return to the kitchen. Brush would be gathered from around the barracks area and used to build a smoky fire under the pot. When the water eventually came to a boil, the corn was tossed in and cooked for about four hours or until it became soft enough to chew and digest.

The mush was served by Erwin, and he made certain that everyone received exactly the same amount. In that abandoned mining camp, there was nothing to eat from and nothing to eat with. Men used whatever they could find to contain their food — often their caps — and they picked at it with their fingers. Those without any head covering cupped their hands, brought the soft pulp to their bearded faces, and slurped.

Ten ounces of corn mush a day was starvation fare, and every particle was precious. As captives ate, they guarded themselves and their food. "The men were more or less down to an animal stage," Erwin remembered. "They would sit and watch with a wolfish look and if a man was unable to eat — or anything like that, they would always grab it away from him." As many as twenty Americans died daily. Death Valley, North Korea, is the graveyard of perhaps five hundred young U.S. soldiers.

As for health care, the camp had two captured doctors, although, according to Erwin, "there is nothing in God's world they could do for anyone except give them a little sympathy." Doctor Shadish had a few rolls of bandages that he washed and used again and again, a hundred aspirin, a hundred sulfaguanidine tablets for diarrhea, and 150 sulfadiazine tablets. That was it. The camp also had a nominal hospital, but prisoners sent there were as good as dead (the POWs called it the "death house"). The long, mud-covered former cowshed had paper-draped windows and no heat. . . .

Bodies were stacked in the camp like cordwood, and all were naked. The moment someone died, the corpse would be stripped of everything. As Erwin pointed out, "We were facing reality." There was no point in leaving dead men with any item of clothing that the living could use to remain alive. Death Valley not only stripped men of their clothing but also of their civilization, and, finally, their lives. Death Valley was not unique. The same thing was occurring at numerous collection points throughout North Korea during the winter of 1950 and 1951.

UNITED STATES v. GRANER

United States Court of Appeals for the Armed Forces
69 M.J. 104 (C.A.A.F. 2010)

JUDGE STUCKY delivered the opinion of the court.

We granted review in this Abu Ghraib case to determine whether the military judge abused his discretion in (1) refusing to compel the Government to produce certain memoranda requested by the defense; (2) excluding the testimony of, and an e-mail from, Major Ponce; and (3) limiting the testimony of a defense expert witness. We hold that the military judge did not abuse his discretion in any of these decisions and affirm the judgment of the United States Army Court of Criminal Appeals (CCA).

I

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of two specifications of conspiring to commit maltreatment, one specification of dereliction of duty for failing to protect detainees under his charge from abuse, four specifications of maltreating detainees, assault with a means likely to produce death or grievous bodily harm, assault consummated by battery, and committing an indecent act, in violation of Articles 81, 92, 93, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 892, 893, 928, 934 (2000). The panel sentenced Appellant to a

dishonorable discharge, confinement for ten years, reduction to E-1, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence. The CCA summarily affirmed. . . .

A detainee photographed by U.S. troops at Abu Ghraib prison, Nov. 4. 2003. By permission of the Associated Press.

II

On November 7, 2003, Appellant exploited his position as a military policeman at Abu Ghraib, an American-operated detainee facility in Iraq, in order to abuse and demean Iraqi detainees. Appellant's actions that day included: ripping the pants off a detainee and having Specialist Sabrina Harman write "I'm a rapeist [*sic*]" on the detainee's leg, then punching the detainee in the temple so hard that the detainee was knocked unconscious; posing in a picture with a detainee where Appellant held the detainee's head in his hands while Appellant's other hand was cocked in a fist near the detainee's head, even though photography was prohibited at that section of the facility; helping to force the unwilling detainees into a naked human pyramid and then posing for a picture with the pyramid of naked Iraqi detainees; taking a picture of a detainee being forced to masturbate while Private First Class (PFC) Lynndie England smiled, pointed at the detainee's genitals, and gave a "thumbs up" sign; placing a detainee in a position so that the detainee's face was directly in front of the genitals of another detainee to simulate fellatio, and then photographing them; and wrapping a tether around a detainee's neck, handing the tether to PFC England, and then taking a picture of PFC England and the tethered detainee.

The defense theory of the case was that Appellant was complying with a general command climate of humiliating detainees in the belief that humiliation would make them more likely to reveal information of intelligence value, and that individual military policemen had wide discretion in implementing this agenda. Several

defense witnesses testified that the detainees were routinely naked, that their sleep was regulated and disturbed, that their food was limited, and that their hands were sometimes handcuffed to cell doors. Defense witnesses also testified that they had received vague orders to soften up detainees, that intelligence personnel did not care what was done to detainees, and that intelligence personnel supported more aggressive use of force on detainees.

III
A

On June 12, 2004, the defense requested that the Government

> provide a copy of the Department of Defense report detailing the legal obligations of the United States government to refrain from using torture as an interrogation technique and the legal liabilities of government agents who do use such methods. This report was produced on or about 6 March 2003 by a DoD working group. . . . This report would be relevant to the defense's case because the report constitutes some evidence of the duties owed to a detainee (*viz.* in the context of a dereliction of duty charge) by a government agent and of whether these duties change if the agent is ordered to engage in conduct that constitutes maltreatment. [Emphasis deleted.]

The Government denied the request, asserting that the DoD report was not relevant because Appellant's actions were not in furtherance of an official interrogation.

At a session of the trial held pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2006), the defense renewed its request for the DoD report. The military judge declined to compel release of the report because the defense had not demonstrated relevance, but the military judge invited a future motion if relevance could be established at trial.

Later in the same Article 39(a) session, the defense revisited the memo issue. At this point, the defense counsel conflated the DoD report with other memoranda that were not previously mentioned:

> Just a minute ago, we were talking about a memo from the Department of Justice, from various Staff Judge Advocates and General Counsel to the President of the United States, to the CIA and other government agencies, to the Secretary of Defense. We understand there were memos given, perhaps, to Lieutenant General Sanchez and to other officials within the direct chain of command of Specialist Graner pertaining to the legal status or not of detainees during the war on terrorism.

There was then a lengthy colloquy between the military judge and defense counsel in which the defense proposed several broad theories on why the memos were needed: (1) that the memos established that the detainees were not protected by any of the laws of war, and therefore Appellant could not possibly maltreat them; (2) that Appellant lacked the state of mind necessary to maltreat because he thought he was just following orders; and (3) that there was unlawful command

influence in general. The military judge again rejected the request because Appellant had not formulated a sufficient theory of relevance but again invited the defense to resubmit the discovery request once relevance had been established. The defense did not submit another request for the DoD report or any other memos during the remainder of the trial.

The Government claims that the DoD report was publicly released on the DoD website one day after the Article 39(a) hearing.

B

Appellant argues that the military judge abused his discretion by not compelling the Government to submit the various memoranda because they would have supported the defense theory that senior government officials had authorized the sort of detainee treatment that Appellant engaged in. We review a military judge's ruling on a request for the production of evidence under the strict standard of an abuse of discretion. . . .

None of the theories enunciated at the Article 39(a) session by Appellant established the relevance of the request. There was no evidence that Appellant's state of mind at Abu Ghraib was in any way affected by a DoD report that he had never seen. Appellant's affirmative duty to protect the detainees under his charge from abuse was not affected by any views on the international legal status of Iraqi detainees set out in the report. Abuse of detainees in the custody or control of the United States may form the basis of a maltreatment conviction. *See United States v. Smith*, 68 M.J. 316, 323 (C.A.A.F. 2010).

Finally, Appellant failed to present any "facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). . . .

IV
A

Major William Ponce was a mid-level military intelligence officer who had been assigned to both Afghanistan and Iraq. Major Ponce wrote an e-mail on August 14, 2003, to several people in which he stated that he favored the more forceful treatment of detainees during interrogation. Abu Ghraib did not yet exist as an interrogation center when the e-mail was sent, but several of its recipients may have occupied positions at Abu Ghraib. There is no evidence that Appellant or any of his co-conspirators ever knew about this e-mail. Appellant moved for its admission prior to trial on the basis that it may have affected the orders that issued from military intelligence teams. The Government objected on the basis that it was irrelevant, was hearsay, and lacked foundation. The military judge sustained the Government's objection because the e-mail was not relevant. Later, there was a renewed discussion about Major Ponce's e-mail. The military judge again denied the admission of the e-mail because it was too far removed in time and space from Appellant's activities at Abu Ghraib.

Appellant also wanted to call Major Ponce to testify before the court members to

establish when military intelligence officers generally became more forceful in their treatment of detainees. The military judge initially agreed to allow Major Ponce to testify about the "conditions for actionable intelligence and its impression on the [military intelligence] community in the September time-frame and the October timeframe." But the military judge changed his mind after the defense moved to introduce the testimony of Roderick Brokaw, a retired military interrogator with the Army who had worked as an interrogator at Abu Ghraib, because the military judge reasoned that Mr. Brokaw had a strong connection with Abu Ghraib, while Major Ponce's connection was tenuous at best. Mr. Brokaw was permitted to testify "as to pressure from higher echelons to produce actionable intelligence."

Later, the defense again argued that Major Ponce should be able to testify in order to show "the frustration that higher command was feeling" about being unable to acquire intelligence within the existing interrogation parameters, but the military judge did not allow his testimony because it was unclear who received Major Ponce's e-mail or what impact it had on the interrogators at Abu Ghraib.

B

Appellant argues that the military judge abused his discretion when he declined to admit Major Ponce's e-mail or allow Major Ponce to testify, purportedly because Major Ponce would have helped establish the defense theory that his superiors authorized the rough treatment of detainees. We review a military judge's decision on whether to admit evidence for an abuse of discretion. *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009).

The military judge did not abuse his discretion when he declined to admit Major Ponce's e-mail and testimony. There was no evidence that Appellant, or anyone giving orders to Appellant, knew about Major Ponce's e-mail, or had any contact with Major Ponce. Appellant was still able to present direct evidence that he and his coconspirators believed that they were supposed to soften up the detainees. Given the total lack of evidence connecting Major Ponce's opinions with Appellant's conduct, neither Major Ponce's e-mail nor his expected testimony had a tendency to show that any fact of consequence to the court-martial was more or less probable.

V

A

Thomas Archambault, a non-military training instructor and use-of-force specialist, testified for the defense as an expert on the use of force. At a pretrial Article 39(a) hearing, Mr. Archambault testified that use of the leash on detainees and the naked pyramids were reasonable uses of force. With respect to the tether, he stated that the use of the tether around the neck of the detainee was a reasonable means of cell extraction under the facts of this case. While Mr. Archambault said that the tether should not have been used around the neck as it was, he reasoned that the tether may have accidentally slipped from the upper torso to the neck. Mr. Archambault testified that the fact that pictures were taken of the leash incident did not render the tether incident unreasonable because the photographer could

quickly have come to the other guard's aid in the event that the detainee became violent.

With respect to the naked pyramids, Mr. Archambault testified that this sort of "stacking" could be an appropriate use of force, even if it was neither authorized nor approved by any professional organization or training manual, as a means of controlling and containing unrestrained detainees. Here, Mr. Archambault reasoned, the detainees were not in restraints, they were shouting to each other in Arabic, and the detainees were all in a small space with limited guards. Mr. Archambault also testified that the form of stacking here prevented "positional asphyxia," a dangerous medical condition where a person has trouble breathing as a result of pressure on the diaphragm. Mr. Archambault conceded that he was aware of only one incident of stacking humans and that occurred at Attica Prison, a civilian facility in the United States, by guards taking back the facility from rioting, unrestrained inmates.

The military judge ultimately limited Mr. Archambault's testimony to the point that the detainees would not have suffered from positional asphyxiation because of the manner in which they were stacked. The military judge refused to allow Mr. Archambault to testify concerning the appropriateness of the leash (or tether) around the neck and stacking techniques. The military judge concluded that such testimony was irrelevant and not helpful to the court members. Mr. Archambault knew of no authority for either technique, and the stacking at Attica had occurred under very different circumstances.

B

Appellant argues that Mr. Archambault's testimony was improperly restricted because Appellant was denied his most effective rebuttal to the tether and pyramid incidents. An expert witness may provide opinion testimony if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." M.R.E. 702. "The military judge has broad discretion as the 'gatekeeper' to determine whether the party offering expert testimony has established an adequate foundation with respect to reliability and relevance." *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001), quoted in *United States v. Allison*, 63 M.J. 365, 369 (C.A.A.F. 2006).

We find that the military judge did not abuse his discretion when he limited Mr. Archambault's testimony to positional asphyxia. The military judge properly determined that Mr. Archambault had an insufficient basis to conclude that the naked human pyramid and the tether around the neck were reasonable uses of force.

VI

The judgment of the United States Army Court of Criminal Appeals is affirmed.

BAKER, JUDGE (concurring in part and dissenting in part):

I agree with the majority's analysis and conclusion with regard to Appellant's motion to compel discovery of the Department of Defense (DoD) report. This report was specifically requested, was made part of the record, and was not relevant to Appellant's defense, for the reasons stated in the majority opinion. I also agree with the Court's resolution of the issues pertaining to Major Ponce and Mr. Archambault. However, I do not agree with the majority's treatment of the issue of discovery of the various other memoranda. . . .

Appellant raised and this Court granted the issue challenging the military judge's refusal or failure to order discovery of a variety of official government memoranda said to pertain to the handling of detainees. He has moved to attach these memoranda to the appellate record. Unfortunately, the majority, in a footnote [omitted here], denies this motion in a perfunctory manner by stating that the documents are not "necessary" and without explaining how it can reach this conclusion without reviewing the documents. I would have granted the motion to attach.

Alternatively, if a majority of this Court concluded that it was beyond our authority to attach such documents to the record, a remand to the CCA or an order for a *DuBay* hearing [*United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)] would have been in order — or any alternative mechanism, including judicial notice, which could allow for consideration of the documents.[2] In this way, we might have addressed head-on Appellant's allegations that he was operating in a command climate, if he was not following specific instructions, that condoned and tolerated detainee abuse. Given the Court's refusal to directly address this claim, Appellant is left to allege that he was singled out for prosecution and did not receive a fair trial, writ large. Further, addressing the claim directly would afford Appellant, and the public, the knowledge that his claim, meritorious or not, was addressed in detail by a federal civilian court.

Instead, Appellant's specific and broader claims have been dismissed with a perfunctory wave of the judicial pen. True, at the time of trial, Appellant did not describe the memos in question with specificity, or directly link those memos to his conduct. However, the majority does not explain why, how, or if, Appellant's counsel could have identified these memos with sufficient specificity in order to now support a relevance claim on appeal. Neither does the majority indicate whether the memos were classified at the time of trial. More importantly, absent review of the memos,

[2] Among other things, the motion to attach included the following:

(a) Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, on Military Interrogation of Alien Unlawful Combatants Held Outside the United States to William J. Haynes II, General Counsel, Dep't of Defense (Mar. 14, 2003).

(b) Major General Geoffrey Miller, Annex 20: Assessment of DoD Counterterrorism Interrogation and Detention Operations in Iraq (U), Taguba Report with Annexes (AR 15-6 Investigation of the 800th Military Police Brigade), available at http://www.dod.gov/pubs/foi/detainees/taguba.

(c) Memorandum from Donald Rumsfeld, Sec'y, Dep't of Defense, on Counter-Resistance Techniques in the War on Terrorism to the Commander, U.S. Southern Command (Apr. 16, 2003).

Appellant and the larger audience are left to wonder whether the memos are in some manner relevant to Appellant's broader (and more amorphous) argument regarding command climate.

Of course, these documents can now be described with particularity and are publicly available. We know what they say, and can address Appellant's relevance arguments in detail. Instead, Appellant and the larger audience, including the public, the military community, and the victims of Appellant's abuse are left to review the memos on their own and reach their own determinations as to whether or not they were relevant, and in what manner, without benefit of a full judicial vetting and application of legal principles. The interests of justice and the military justice system would be better served were the documents attached to the record and subject to judicial review.

[CHIEF JUDGE EFFRON concurred in part and in the result.]

NOTES AND QUESTIONS

1. Sociologist Donald Black famously wrote that "[l]aw is stronger where other social control is weaker. Law varies inversely with other social control." DONALD BLACK, THE BEHAVIOR OF LAW 107 (1976). What sort of social control is at work during times of war? What kind of justice system ought to operate during military operations? Should the system differ from that in effect during periods of relative peace? What sort of social control was in place at Abu Ghraib?

2. Who should make legal decisions regarding the treatment of detainees: military or civilian lawyers? Who should review such decisions? What happened in World War II Hawai'i? On recent U.S. conflicts and detention, see Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from Iraq and Afghanistan*, 2005 UTAH L. REV. 619.

3. Legal scholar Louis Henkin argued in an influential book that, by the late 20th century, the idea of rights had attained more universal acceptance than any other "idea of the good" in the history of ideas. LOUIS HENKIN, THE AGE OF RIGHTS (1990). What impact does this growing consensus on international human rights have on war and other military operations?

4. A rich case study of both the special objectives of military justice and the ways in which politics sometimes collide with military discipline took place in 2009 and 2010, when three Navy SEALs were accused of abusing a high-value detainee after he was captured and in custody. The accused men demanded a court-martial rather than accept the non-judicial punishment hearing their commander offered. Eventually, all three were acquitted in separate trials. Meanwhile, 40 Republican members of the House of Representatives joined in the protest to the convening authority that appears below; earlier, 33 legislators had signed a protest to Secretary of Defense Robert M. Gates. The convening authority's response follows the letter from Congressman Burton and his colleagues.

December 10, 2009

Major General Charles T. Cleveland
Commander, Special Operations Command Central
U.S. Central Command
7115 South Boundary Boulevard
MacDill AFB, FL 33621-5101

Dear General Cleveland:

We are writing to express our strong disagreement with the decision of your officers to pursue first a non-judicial punishment and now a full court martial against three Navy SEALs — Matthew McCabe, Jonathan Keefe and Julio Huertas — on charges of assault against Ahmed Hasim Abed — at one point one of the most wanted terrorists in Iraq.

In March 2004, Fallujah, Iraq was a hub of insurgent activity. Four American civilians working as contractors were ambushed and killed; their bodies were mutilated and burned, then dragged through the streets and hung from a bridge over the Euphrates River — one of the most horrific outrages perpetrated on Americans in the last decade. The man widely identified as the mastermind of that attack, as well as other attacks on United States and coalition troops in Iraq, is Ahmed Hasim Abed.

For over five years Ahmed evaded capture until Matthew McCabe, Jonathan Keefe and Julio Huertas finally brought him to justice. Instead of being hailed as heroes, these brave Americans are being vilified for allegedly assaulting Abed once he was in custody. First, press reports raise significant doubts about whether Abed was actually in SEAL custody when his alleged minor injuries occurred. Second, al-Qaeda's own handbook instructs operatives to allege detainee abuse if detained by American forces. In fact, al-Qaeda operatives are trained to self-inflict injuries for the sole purpose of accusing U.S. forces of abuse. We've seen repeated cases of this since the conflicts in Iraq and Afghanistan began.

General, surely you agree that we are in a war that we must win. Our military personnel are putting their lives on the line every day trying to track down terrorists who want to indiscriminately kill Americans. Our troops and your SEALs need to be bold and decisive in combat; not looking over their shoulder fearing legal jeopardy for every action or gesture. In this case in particular, there is more than enough doubt as to whether these SEALs committed any wrongdoing at all. In our opinion, prosecutorial discretion should have been exercised. Failing that, we respectfully and strongly urge you to use your leadership authority, stop the impending court martial and exonerate these men.

We await your prompt response.

Sincerely,

Dan Burton (R-IN)
and 39 other Republican Members of Congress

December 15, 2009

Dear Representative Burton,

Thank you for your letter expressing your and your colleagues concern regarding the pending courts-martial of Petty Officers Huertas, McCabe, and Keefe. I understand your interest in these cases and can assure you that I am committed to protecting the rights of the Sailors who have been accused.

Regrettably it appears that your perception of the incident is based upon incomplete and factually inaccurate press coverage. Despite what has been reported, these allegations are not founded solely on the word of the detainee, but rather, were initially raised by other U.S. service members. Additionally, the alleged injuries did not occur during actions on the objective, as is also being widely reported in the media. A medical examination conducted at the time the detainee was turned over to U.S. forces determined that his alleged injuries were inflicted several hours after the operation had ended, and while in the custody and care of the U.S. at Camp Schweidler's detainee holding facility.

While the assault and resulting injury to the detainee were relatively minor, the more disconcerting allegations are those related to the Sailors' attempts to cover-up the incident, particularly in what appears to be an effort to influence the testimony of a witness. All of these allegations were fully investigated by the Naval Criminal Investigative Service (NCIS).

As you have likely read, I chose to deal with this incident administratively via non-judicial punishment pursuant to Article 15 of the UCMJ. However, Petty Officers Huertas, McCabe and Keefe elected to exercise their UCMJ rights to refuse such a hearing. I have attached previously released, redacted copies of the charge sheets in the hope that they will help clarify the allegations surrounding this incident. These charges were drawn from information disclosed during the course of the investigation. The release of any further information at this time would be inappropriate as it might prejudice the outcome of the trial.

I take my military justice authority and responsibility for maintaining good order and discipline very seriously, as I have in six commands previously. Discipline and integrity are primary factors that make our U.S. Special Operators such an effective fighting force. The abuse of a detainee, no matter how minor, creates strategic repercussions that harm our nation's security and ultimately costs the lives of U.S. citizens.

I must ensure that the service members under my command abide by the laws passed by Congress and follow the lawful orders of their superior officers. When there are reasonable grounds to believe that an offense has been committed, and that a specific individual in my command has committed that offense, it is my duty to take appropriate action to not only ensure justice is done, but also to maintain good order and discipline.

It is these factors that led me to refer these charges to Special Courts-Martial. I assure you that the rights of these Sailors are being protected and they will have all of the facts of the case presented and reviewed fully by an impartial panel.

Sincerely,

Charles T. Cleveland
MG, U.S. Army
Commanding

---

5. In 2004, a Danish officer was charged with violating the Third Geneva Convention and Denmark's own law regarding treatment of detainees. Captain Annemette Hommel commanded an interrogation tent during "Dancon Irak" (the Danish mission in Iraq) and was accused of failing to prevent military police from treating detainees harshly by forcing them to sit for extended periods in stress positions, by conducting loud and forceful interrogations, and by denying detainees water and appropriate toilet facilities. The High Court of Eastern Denmark considered six separate charges against her and acquitted her of all six, holding that the evidence did not support the charges and noting that:

> Especially with regards to the accused [redacted], part of the determination must take into consideration the importance *that* more precise guidelines for interrogation were not drawn up, *that* this training she received previously is relevant for the interrogation, *that* the training she received several years back must be considered outdated by the Military Academy, and *that* this must be the reason why the accused Hommel did not have any knowledge about this, nor about the change in practice that had been made. Of additional importance, as referred to in the judgment, it must be noted that she on several occasions addressed her superior officer and the Military Legal Adviser, intending to obtain guidance as to what kind of rules applied to her work in connection with the interrogation, and whether her interrogation progressed appropriately.

Military Prosecutor v. Captain Annemette Hommel (High Ct. E. Denmark 2006). In the realm of detainee operations, how much should the training and guidance provided to military police and interrogators matter if those individuals are charged with maltreatment of detainees?

II. OBJECTIVES

The laws governing armed conflict and the behavior of armed persons evolved in response to shifts in society, culture, and politics. As models of governance and social norms changed, the status of soldiers and officers and the relationship of warriors to the state also changed. This section briefly historicizes the development of disciplinary codes and the laws of war. These selections reveal the tension between a desire to protect human rights and an imperative for victory, between aspirational codes of military conduct and the essential violence of armed conflict.

A. Early Codes of Conduct

Robert C. Stacey, *The Age of Chivalry*, in *The Laws of War: Constraints on Warfare in the Western World*

27-31 (Michael Howard, George J. Andreopoulus & Mark R. Shulman eds. 1994)

The Age of Chivalry . . . [is] an appropriate label for the years between roughly 1100 and 1500. Even the Age of Chivalry, however, began in Rome. . . . In Roman eyes, "every war needed justification. The best reason for going to war was defence of the frontiers, and almost as good, pacification of the barbarians living beyond the frontiers. Outside these reasons one risked an unjust war, and emperors had to be careful." But within these limits, the conduct of war was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants. Classical Latin, indeed, lacked even a word for a civilian. The merciless savagery of Roman war in this sense carried on into the invasion period of the fifth and sixth centuries. . . . This was a style of warfare that was appropriate only against a non-Roman enemy, and in the Middle Ages this came to mean that Christians ought only employ it against pagans, like the Muslims in the Holy Land or, in the sixteenth century, the aboriginal peoples of the New World. . . . . [This philosophy celebrated] war by God's people for God's own purposes. . . . [S]o long as it was fought for pious ends, such warfare knew no effective limits. The wars of conquest which Charlemagne waged against the pagan Saxons during the eighth century thus qualified perfectly as a Roman war. After thirty years of plunder, massacre, mass enslavement, and mass deportations the Saxons finally saw the reasonableness of Christianity and agreed to accept Baptism at the hands of the Franks. . . .

Ecclesiastical efforts to restrain intra-Christian violence during the tenth and eleventh centuries did bear some fruit, however, and it is with them that we begin to see the modern outlines of the laws of war as these would emerge in the Age of Chivalry. Carolingian church councils issued a number of decrees which demanded that noble miscreants give up their belt of knighthood, their *cingulum militare*, as part of the punishment for their crimes. We see in these measures our first evidence that the bearing of arms was seen as a noble dignity connected with a code of conduct, the violation of which might cost a man his status as a warrior. . . .

[Changes in the society, politics, and the advent of the cavalry intensified warfare during the eleventh century. The editors are grateful to Prof. John Paul Jones of the University of Richmond School of Law for pointing out that although some evolution — perhaps the stirrup — occurred in the eleventh century, cavalry is a weapon of ancient standing. *See, e.g.*, Robert E. Gaebel, Cavalry Operations in the Ancient Greek World (2002); Augusto Azzaroli, An Early History of Horsemanship (1985) (noting the effectiveness of Parthians and Scythians).] With respect to the laws of war, two consequences followed from these developments. First, long-established but only dimly perceptible codes of noble conduct on the battlefield began to be applied to the knights as well. A greater number of fighters

were now covered by these standards of honorable conduct. In 1066, for example, William the Conqueror expelled from his *militia* a knight who struck at the dead Harold's body on the battlefield with his sword. . . . [K]nighthood had clearly emerged by 1100 as an indissoluble amalgam of military profession and social rank that prescribed specific standards of behavior to its adherents in peace and war. The laws of war would develop in the Age of Chivalry as a codification of these noble, knightly customs on the battlefield. Second, however, the sharp division which this knightly elite now drew between itself as an order of *bellatores* and the rest of society made up of *oratores* or *laboratores* meant that the laws of war themselves applied only to other nobles. In theory, peasants and townspeople ought not to fight at all. . . . If such common men did fight — and in practice they did, regularly — then no mercy was owed them on the battlefield or off. In the ordinary circumstances of battle a knight ought not kill another knight if it was possible instead to capture him for ransom. Armed peasants and townsmen, however, could be massacred at will. . . .

As an enforceable body of defined military custom, the laws of war as we are discussing them emerged [ ] out of the interplay of knightly custom with Roman law as this was studied and applied in court from the twelfth century on. By the fourteenth century this combination of knightly practice and legal theory had given rise to a formal system of military law, *jus militaire*, the law of the *milites*, the Latin word for knights. The enforceability of this law, at least in the context of the Hundred Years War, needs to be stressed. Charges brought under the laws of arms were assigned to special military or royal courts — the Court of Chivalry in England, the Parlement of Paris in France — where lawyers refined and clarified its precepts in formal pleadings. Knights and, of course, heralds remained the experts in the laws of arms. Their testimony was sought both in defining the law and in applying it to specific cases, a reflection of the status of *jus militaire* as a body of international knightly custom. From the fourteenth century on several attempts were made to record these customs in writing, the most famous being Honoré Bouvet's *Tree of Battles.* Like all medieval lawbooks these were partial and tendentious with a bias toward kings. The real history of the laws of war in the Age of Chivalry is buried in the hundreds of court cases brought under it and in the scores of chroniclers' accounts of the conduct of actual war . . .

Code of Articles of King Gustavus Adolphus, Sweden, 1621

William Winthrop, Military Law and Precedents 907-18
(2d ed. reprint 1920)

[The brilliant and powerful Gustavus Adolphus, who led Sweden in the Thirty Years War until his death on the battlefield in 1632, is often called the father of modern warfare for his legal, administrative, and strategic innovations. His code of military laws — 167 articles long — is often cited as the first example of a comprehensive code of soldierly conduct. It specified crimes, established two levels of courts and detailed their composition, permitted review of convictions, and required a record of proceedings be maintained. A few articles follow:]

Imprimis. No commander nor private Souldier whatsoever, shall use any kind of Idolatry, Witchcraft, or Inchanting of Armies, whereby God is dishonored, upon

pain of death.

2. If any shall blaspheme the name of God, either drunk or sober, the thing being proven by two or three witnesses, he shall suffer death without mercy. . . .

19. Whosoever behaves not himself obediently unto our great Generall, or our Ambassador coming in our absence, as well as if we our selves were there in person present, shall be kept in irons or in prison until such time as he shall be brought to his answer, before a Council of Warre, where being found guilty, whether it were wilfully done or not, he shall stand to the order of the Court, to lay what punishment upon him they shall thinke convenient, according as the person and fact is.

20. And if any shall offer to discredit these great Officers by word of mouth or otherwise, and not be able by proof to make it good, hee shall be put to death without mercy. . . .

46. No Colonell or Captaine shall command his soldiers to doe any unlawful thing; which who so does, shall be punished according to the discretion of the Judges. Also if any Colonell or Captaine or other Officer whatsoever, shall by rigour take any thing away from any common souldier, he shall answer for it before the Court . . .

50. He that is taken a sleepe upon the watch, either in any strength, trench, or the like, shall be shot to death.

51. He that comes off his watch where he is commanded to keepe his Guard, or drinkes himself drunke upon his watch or space of Sentinell, shall be shot to death.

52. He that at the sound of Drumme or Trumpet repaires not to his Colours, shall be kept in irons.

53. When any march is to be made, every man that is sworn shall follow his Colours; who ever presumes without leave to stay behind shall be punished.

54. And if it be upon mutiny that they doe it, be they many or be they few, they shall die for it. . . .

76. Whosever giveth advice unto the enemy any manner of way, shall die for it. . . .

85. He that forceth any woman to abuse her, and the matter bee proved, hee shall die for it. . . .

92. They that pillage or steal either in our Land or in the enemies, or from any of them that come to furnish our League or Strength, without leave, shall bee punish'd as for theft. . . .

144. All these Judges [of the military courts] shall under blue skies thus swear before Almighty God, that they will inviolably keep this following oath unto us: I R.W. doe here promise before God upon his holy Gospell, that I both will and shall judge uprightly in all things according to the Lawes of God, of our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that

ought to be free, and doom him guilty, that I finde guilty; as the Lord of Heaven and Earth shall help my soule and body at the last day. I shall hold this oath truly.

NOTES AND QUESTIONS

1. "I believe that it has always been understood that the defenders of a fortress stormed have no claim to quarter." The Duke of Wellington (British Field Marshal during the Napoleonic Wars), *quoted in* Geoffrey Parker, *Early Modern Europe*, *in* The Laws of War: Constraints On Warfare in the Western World 48 (Michael Howard, George J. Andreopoulus & Mark R. Shulman eds. 1994). "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates his sacred trust, he not only profanes the entire cult but threatens the very fabric of international society." General Douglas MacArthur, *quoted in* Peter Maguire, Law and War: An American Story 139 (2000). Can these statements be reconciled?

2. Under the Geneva Conventions, the "rule of distinction" is a fundamental aspect of lawful warfare. This rule requires that a combatant harm only other combatants and that combatants distinguish themselves from non-combatants. Can you discern the origins of this rule in the code of chivalry to which knights subscribed? What are its limitations as a means of protecting innocents during armed conflict?

3. Who is least protected under these early codes? Who is most protected? What punishments can misbehaving soldiers expect?

4. What role does religious faith play in the legal system established by King Gustavus Adolphus? How does that role limit or enhance its effectiveness? For more background on Gustavus Adolphus and early military law see Joseph W. Bishop, Jr., Justice Under Fire: A Study of Military Law 1-19 (1974); Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190, 190-202 (2003).

B. Modern Codes

Gerry R. Rubin,
Why Military Law?
Some United Kingdom Perspectives
26 U. Queensland L.J. 353, 365-66 (2007)

Military Covenant

The [military covenant] is more of an ethical or even of a quasi-religious commitment between the serviceman and the armed forces. Moreover it is one which is expected to cut both ways in terms of the armed forces looking after the welfare of the serviceman and his family through thick and thin, a reciprocal duty which some argue is not being fully met by the services in respect of the treatment

of British military casualties from the Iraq war or in terms of the quality of service living accommodation.

The covenant seeks to imbue service personnel with certain values such as courage, discipline, trust, loyalty, integrity, self-sacrifice, respect for others and for the law, teamwork, cooperation, professionalism, regimental spirit and tradition, that is, a sense of belonging to a unit (perhaps as distinct from the Army or Navy or Air Force); in other words the primacy of the collective over the individual, of duties as against rights, in order to maintain the essential integrity of the unit as a fighting force and its military effectiveness. It also seeks to set higher standards of behaviour as reflected in civil law, military law and the law of armed conflict.

Soldiers are adjured to avoid any activity which might undermine their professional ability or place others at risk. The misuse of alcohol and drugs is singled out as unacceptable, as are bullying, harassment, discrimination or other forms of deceit. A CO [commanding officer], faced with a complaint against a soldier relating to such conduct will pose one question, "Have your actions or behaviour adversely affected or are they likely to impact on the efficiency or operational effectiveness of the Army?"

And here we can see the rationale for the general prohibition within military law of conduct to the prejudice of good order and service discipline, whether it takes the form of bullying, harassment, or even fraternization. For the last-named may well sow the seeds of jealousy or favouritism within a unit and may undermine trust in one's superior if it were known that he (or conceivably she) was having an illicit or adulterous relationship with a junior member of the unit.

That is, military law is not simply about forbidding anti-social behaviour by members of the armed forces. It is also about fostering certain values and standards. They may not, perhaps, be wholly unique to the military. Nonetheless, the value of (inter alia) trust, loyalty, teamwork and self-sacrifice are the ideological assumptions upon which military operations are conducted. They are what impel soldiers to undertake dangerous operations and where such values are slipping in any particular instance, military law will be a reminder of the "moral component of fighting power" or, in simpler terms, of military effectiveness.

Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* 21-25 (1974)

[Reforms in civilian criminal procedure led some to doubt whether modern law still had room for a separate system of military justice. After the Vietnam War, criticism of the military was at a peak in the United States. That criticism led many to defend the separate system of U.S. military law. The following eloquent summary by a Yale Law School professor typifies these responses; his arguments for preserving a military justice system are numbered, in the original, from 1 to 4.]

1. Military discipline cannot be maintained by the civilian criminal process, which is neither swift nor certain. . . . An army without discipline is in fact more dangerous to the civil population (including that of its own country) than to the enemy. The public interest in discipline is therefore entitled to greater weight, and

the rights of the accused to lesser weight, in the military than in the civilian context. . . .

The best statement of the "military discipline" argument today might be that its demands justify a procedure that does not lessen the chance of unjust acquittal, while it need not, and should not, increase the possibility of unjust conviction. In civilian jurisprudence the number of guilty men who are not punished is far, far greater than the number of innocent men who are, and few of us would have it otherwise. But the doctrine that it is better that ninety-nine (or nine hundred and ninety-nine) guilty men go free than that one innocent be convicted is not easily squared with the need to maintain efficiency, obedience, and order in an army, which is an aggregation of men (mostly in the criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons. Moreover, there are some types of conduct — desertion and insubordination, for example — which are not crimes at all in the civilian life but whose deterrence is essential to the very existence of an army. . . .

2. Another aspect of the discipline argument: Since discipline is a responsibility of the military commander, he should have some control of the machinery by which it is enforced — to decide, for instance, whether a particular offender should be prosecuted and what degree of clemency will best promote the efficiency of his command.

3. Military offenses — absence without leave, desertion, insubordination, cowardice, mutiny, and the like — have no civilian analogues: The adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors.

4. Soldiers may be stationed and commit crimes in places outside the jurisdiction of American civilian courts. There is probably no constitutional reason why federal district courts could not be given jurisdiction to try soldiers for offenses committed in foreign countries. . . . . But Congress has never attempted to exercise its power to give the federal courts jurisdiction over crimes committed by American servicemen outside the United States. One obvious reason is the difficulty of bringing before a court sitting in this country witnesses who live thousands of miles away. Both the ends of justice and of the public fisc are better served if a trial can be held in the place where the crime was committed.

NOTES AND QUESTIONS

1. Sun Tzu wrote in The Art of War that "[t]he Commander stands for the virtues of wisdom, sincerity, benevolence, courage and strictness." Modern systems of military justice often limit the commander's ability to control the process and outcomes of military justice. What is lost when the commander is constrained by the demands of due process of law? What is gained?

2. Do you agree with Professor Bishop's arguments about the unsuitability of civilian criminal courts to enforce military justice? Would efficiency and justice both be served if military courts tried all military offenses plus civilian crimes committed outside the United States, leaving civilian jurisdictions to prosecute ordinary crime among service members?

3. Some U.S. military leaders have lamented the UCMJ's impact on military discipline and effectiveness. In a law review article published after the war in Vietnam ended, General William C. Westmoreland and Major General George S. Prugh, former commander of Military Assistance Command-Vietnam and former Judge Advocate General of the Army, respectively, concluded "that the Uniform Code of Military Justice is not capable of performing its intended role in times of military stress. . . . It is presently too slow, too cumbersome, too uncertain, indecisive, and lacking in the power to reinforce accomplishment of the military mission, to deter misconduct, or even to rehabilitate." *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 53 (1980); *see also, e.g.*, GARY D. SOLIS, MARINE AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 241-44 (1989); Major Franklin D. Rosenblatt, *Non-Deployable? The Court-Martial System in Combat, 2001 to 2009*, ARMY LAW. 12 (Sept. 2010). The tension between the rule of law and military discipline is not new. For example, Union Army General William Tecumseh Sherman warned that "it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practices in the civil courts which belong to a totally different system of jurisprudence." *See* John S. Cooke, *Manual for Courts-Martial 20X*, *reprinted in* EVOLVING MILITARY JUSTICE 177 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002).

A Judge Advocate General of the Air Force has written eloquently from a very different perspective:

> *Due process enhances discipline.* America's mothers and fathers send their sons and daughters to us to join our all-volunteer force because they believe and expect we will adhere to due process in judging their children, should they violate our code; otherwise, they would not have sent them to us. As a result, when we adhere to due process, we send a message to those parents, parents of other prospective Airmen, and all Airmen everywhere that they can trust the Air Force to treat its Airmen fairly and to protect and promote justice within our service. By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving Airmen, who worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.

Lieutenant General Richard C. Harding, Judge Advocate General, U.S. Air Force, *A Revival in Military Justice*, THE REPORTER, Summer 2010, 4, 5-6. Why the change from the Civil War and Vietnam War eras? Are the perspectives cited here reconcilable? How much weight should be accorded to the views of senior military leaders (and lawyers) by civilian legislators who are responsible for enacting military codes? Should due process carry a different meaning in the midst of battle than it does in the miles of office corridors at the Pentagon? Does it?