BRASS-COLLAR CRIME: A CORPORATE MODEL FOR COMMAND RESPONSIBILITY

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I. INTRODUCTION

The United States has long recognized the universally accepted military doctrine of command responsibility—the principle that a military commander can be held criminally liable for certain war crimes committed by troops under his or her command and control. Official U.S. military policy has embraced this doctrine for more than fifty years, formally putting commanders on notice that they are criminally accountable when they know, or should know, about violations committed by their troops but fail to prevent or punish them. Yet in modern military times, the United States has never subjected one of its own commanders to criminal prosecution on a true command responsibility theory, and indeed there is no effective legal mechanism by which to do so.

This is a problem. Beyond the element of individual tragedy to victims and family members, and beyond the moral implications, war crimes by American troops hinder our military mission and make our country less safe. This is why Americans across the political spectrum should care about command responsibility. Without a viable system of criminal accountability, there is no effective legal incentive for a commander to create a culture of compliance with the law of war. And without such a

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zero-tolerance command climate, violations will, and do, occur.

American forces have been fighting a long and hard war on multiple fronts for the better part of a decade, and they are stretched thin by the stresses of repeated combat tours. Many servicemembers have been hardened by the tactics of a ruthless insurgency that does not follow the law of war—they may have seen a squad leader maimed by an improvised explosive device buried in the road, or had a comrade killed on patrol by a sniper hiding in a crowd of civilians. Viewed through this lens, episodes in which American servicemembers exhibit the same disregard for the law of war that they see in the enemy may be shocking, but they are not entirely surprising.

Because military commanders are charged with establishing an appropriate command climate that ensures adherence to the law of war and swiftly punishes any violations, most war crimes are not only individual acts of atrocity. They are also command failures. The current system, which in theory embraces the command responsibility doctrine but in practice does not, has proven to be spectacularly ineffective in addressing these failures. For instance, U.S. military investigations concluded that multiple commanders either knew or should have known about the killing of civilians in Iraq by U.S. Marines at Haditha in 2005 and the abuse of detainees by U.S. soldiers at Abu Ghraib, and that they failed to prevent or punish these violations. The command responsibility doctrine was not invoked in either of these cases, and no commander has stood trial for charges directly stemming from these alleged command failures. These examples, explored in detail in Section V, demonstrate the impotence of the current system.

Despite this failing in the military justice system, the American legal system does have a viable and long-standing doctrine by which leaders are held accountable for certain crimes of their subordinates. This civilian doctrine, applied in the context of the Foreign Corrupt Practices Act of 1977 ("FCPA"),[1] can serve as a useful model for a military standard of command responsibility. The FCPA prohibits the paying of bribes to foreign government officials for the purpose of obtaining business and requires the keeping of transparent books and records and the maintenance of adequate internal controls. It applies to

1. 15 U.S.C. § 78dd_1 et seq (1998).

corporations and individuals alike, and one proven theory of FCPA prosecution is that an executive "stuck his head in the sand" in deliberately failing to discover the illegal acts of subordinates.[2]

The FCPA model, which has strong parallels to the military command responsibility question, clearly demonstrates that the doctrine works. As evidenced by a recent sea change in corporate compliance efforts resulting from a spate of increased FCPA enforcements,[3] holding leaders accountable is highly effective in incentivizing compliance and deterring future misconduct.

As the war in Afghanistan continues to evolve, President Obama's commitment of additional troops portends a continuing increase in violence and casualties. Future American war crimes in that conflict are not unforeseeable, as the current system has demonstrably failed to properly motivate commanders to develop a command climate of zero tolerance for violations. Against this backdrop, the issue of command responsibility has never been more urgent. The American military justice system should adopt a standard of command responsibility toward its own officers. The practicality of such a system has been established by the corporate-law example of the FCPA, which has proven workable and highly effective in holding corporate executives criminally accountable for subordinate misconduct. Surely it is no less reasonable to hold military officers to answer for certain crimes of those under their effective command and control.

2. The mens rea standard of culpability for FCPA violations is actual knowledge or conscious avoidance of knowledge as to the misconduct. 15 U.S.C. §§ 78dd-1(a)(3)–78dd-3(a)(3) (2010). By contrast, the operative standard for military command responsibility long recognized and advocated by the United States and other nations is one of simple negligence—that the commander either knew or reasonably should have known. The author believes that the United States should hold its own officers to the negligence standard of command responsibility that it has accepted for itself in theory and advocated for the rest of the world in practice. But this article does not seek to argue that point, which has been cogently articulated by others. Rather, the purpose of this article is to highlight the incongruity of the current situation, where civilian corporate executives are held to a much higher standard of responsibility for the crimes of their subordinates than are military commanders, who have a far greater degree of command and control. While there is some debate as to whether the negligence standard constitutes customary international law, the underlying doctrine of command responsibility is clearly recognized as such.

3. *2010 Mid-Year FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (July 8, 2010), http://www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx.

II. AN AMERICAN DOCTRINE OF COMMAND RESPONSIBILITY WOULD PROMOTE MISSION ACCOMPLISHMENT AND STRENGTHEN THE MILITARY

The case for an American doctrine of command responsibility is often made with appeals to lofty values and promises of abstract benefits, such as adhering to international law, upholding human rights norms, and achieving legitimacy on the global stage. To be sure, these aims are both laudable and in America's interest, and they would be furthered by adoption of a command responsibility doctrine. But a more pragmatic approach highlights the concrete benefits that the United States and its military would yield from an effective command responsibility doctrine.

Apart from moral and ethical considerations, law of war violations are contrary to our national interest. In today's asymmetrical wars, a delicate, difficult, and necessary part of our military mission is to win the hearts and minds of civilian populations. Abuses and violations of laws and accepted norms—which can be more easily documented and far more widely disseminated than in past wars—assault the dignity of local populations and may mobilize them against American forces. As one example: our efforts to stabilize Iraq, turn the local population against the insurgency and toward the American agenda, and successfully wage the war on terror were severely undermined by the scandal at Abu Ghraib. The reports and pictorial evidence graphically documenting abuses by American troops against Muslim detainees were the best recruiting tool our enemies could have hoped for. Copies of the infamous photos were sold in *souks* around the world, and the images went viral on the Internet.[4] Undoubtedly the violence that exploded across Iraq shortly afterward is attributable to many factors, but the Abu Ghraib scandal went a long way toward energizing the insurgency.[5]

To the further detriment of American interests, law of war violations contribute to a culture of general lawlessness and markedly detract from good order and discipline, leading to a

4. *See, e.g.*, Philip Carter, *The Road to Abu Ghraib*, WASHINGTON MONTHLY, November 2004, *available at* http://www.washingtonmonthly.com/features/2004/0411.carter.html.

5. *Id.*

breakdown in unit cohesion. And in the long term, violations of the law of war endanger current and future American servicemembers, as our failure to recognize, prevent, and punish war crimes by our own forces detracts from our ability to object to similarly inhumane treatment by current and future enemies.[6]

A command responsibility doctrine that is embraced and enforced by the military would send a clear message throughout the military that law of war violations are contrary to our interests and are not tolerated. It would also provide commanders with a strong incentive to ensure that their troops comply with the law of war, an incentive that the American military justice system currently lacks.

III. THE BASICS OF COMMAND RESPONSIBILITY

Customary international law provides that a military commander is responsible for his subordinates and must control the conduct of his forces in concert with the laws of war.[7] In turn, the principle of command responsibility holds that a commanding officer can be held criminally liable for failing to prevent or punish actions that violate the laws of war.[8] Because a commander cannot reasonably be expected to control every illegal action of every servicemember under his control, strict liability for every offense cannot be the measure of command responsibility.[9] Rather, some

6. This common-sense point, which was articulated by the Judge Advocate General of the Navy, the Staff Judge Advocate to the Commandant of the Marine Corps, and senior Air Force lawyers in various official memoranda and letters expressing concerns about the use of enhanced interrogation techniques and torture, was distilled into the following finding in a report by the Senate Armed Services Committee: "Employment of exceptional techniques may have a negative effect on the treatment of U.S. POWs by their captors and raises questions about the ability of the U.S. to call others to account for mistreatment of U.S. servicemembers." S. ARMED SERVICES COMM., 110TH CONG. REPORT ON INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 158 (Comm. Print 2008), *available at* http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment#document/p1.

7. Convention Respecting the Laws and Customs of War on Land Annex, art. 1, Oct. 18,1907, 36 Stat. 2277 [hereinafter "Hague IV"].

8. The command responsibility doctrine does not govern a commander's direct order of or active participation in crimes; such actions are punishable under a theory of direct liability.

9. Indeed, as noted by one scholar, the standard of strict vicarious liability has been rejected by every international law and treaty that has addressed the issue of command responsibility since World War II. Victor Hansen, *What's Good for the Goose is Good for the Gander: Lessons From Abu Ghraib: Time*

mens rea on the part of the commander is required.[10]

In an effort to understand the fundamental aspects of the current system and how it can be strengthened, a brief examination of the historical development of the command responsibility doctrine is useful.

A. Early American Developments

Although domestic U.S. military law does not currently incorporate a doctrine of command responsibility applicable to its own servicemembers, this has not always been so.[11] Various early American military codes, including several versions of the Articles of War during the first 100 years after the American Revolution, incorporated provisions of command responsibility.[12] In one illustrative early American example, the Massachusetts Articles of War, adopted in 1775, expressly provides that a commanding officer "who shall refuse or omit" to ensure that those under his command are punished for their crimes shall be punished "in such manner as if he himself had committed the crime or disorders complained of."[13]

B. The Yamashita Case

The doctrine of command responsibility developed more fully in the years following World War II. The best known of the post-World War II tribunals relating to command responsibility was the prosecution of Japanese General Tomoyuki Yamashita by U.S. military commission in 1945. General Yamashita, the highest ranking general in the Japanese Imperial Army's air force, was charged with violations of the law of war by having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against

For the United States To Adopt a Standard of Command Responsibility Toward Its Own, 42 GONZ. L. REV. 335, 348 (2007).

10. The requisite level of mens rea is the subject of continuing debate, and the standard has continued to evolve over time.

11. Hansen, *supra* note 9, at 349–51.

12. *Id.*

13. *Id.*; *see also* The Massachusetts Articles of War (Apr. 5, 1775), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 948_949 (William S. Hein & Co 1979) (1896).

people of the United States and of its allies and dependencies."[14] It was not disputed that Japanese troops under General Yamashita's command had committed widespread atrocities; however, there was no direct evidence that General Yamashita had ordered these acts or even had knowledge of them.

In its written evidentiary findings, the commission held that "the crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."[15] The commission then summarized its view of command responsibility as follows:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful attacks are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending on their nature and the circumstances surrounding them.[16]

Based on the evidentiary findings and this formulation of the command responsibility doctrine, the commission concluded that the charged atrocities had been committed by forces under General Yamashita's command; that these crimes were not sporadic and were in many cases methodically supervised by officers and noncommissioned officers; and that General Yamashita failed to provide effective control of his troops as was required by the circumstances.[17]

There is some scholarly dispute as to the true mens rea requirement for command responsibility advanced in the Yamashita decision. Some commentators have argued that the commission held General Yamashita to a standard of strict liability; however, the written records of the proceedings do not

14. UNITED NATIONS WAR CRIMES COMMISSION: LAW REPORTS OF TRIALS OF WAR CRIMINALS, General Tomoyuki Yamashita, Case No. 21, Judgment, Part I, 3–4 (His Majesty's Stationary Office Vol. IV London 1948).

15. *Id.* at 34.

16. *Id.* at 35.

17. *Id.*

support such a theory.[18] Other scholars contend, more plausibly, that the commission applied a negligence standard—that he "knew or should have known."[19]

C. My Lai and Captain Medina

Two decades later, for the first time since the inception of the Uniform Code of Military Justice (hereinafter "UCMJ")[20], a U.S. tribunal was called upon to adjudicate the liability of an American commander for the criminal acts of his subordinates. In March of 1968, U.S. soldiers opened fire in the Vietnamese village of My Lai, killing an estimated 500 noncombatants—many of them women, children, and elderly.[21] At trial, Lieutenant William Calley, the platoon leader on the scene, testified that he participated in the unlawful killings of noncombatants pursuant to the order of his company commander, Captain Ernest Medina.[22] That same year, Captain Medina was tried by court-martial in connection with the actions of his subordinates at My Lai.[23] Because the UCMJ lacked a clear mechanism of command responsibility, Captain Medina was charged as a principle in the

18. *Id.* Noted commentator W. Hays Parks observes that A. Frank Reel, one of General Yamashita's defense counsel, subsequently published a book asserting that the conviction was based on a theory of strict liability rather than any evidence of guilt. W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 73, 74 n. 4 (1995). Professor Parks refuted this argument with a thorough examination of the Yamashita record of trial, which he concluded was inconsistent both with Reel's theory as to the application of strict liability and with Reel's own factual representations. *Id*.; *see also* W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 26–31 (1973).

19. W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 73, 74 (1995); Timothy Wu and Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates–the Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 275 (1997); Maj. Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 298 (1995).

20. 10 U.S.C. §§ 801–946 (2005); for further discussion, see *infra* Part IV.

21. *See* Doug Linder, *An Introduction to the My Lai Courts-Martial*, UNIVERSITY OF MISSOURI-KANSAS CITY SCHOOL OF LAW, http://www.law.umkc.edu/faculty/projects/ftrials/mylai/Myl_intro.html (last visited October 7, 2010).

22. *Id.* A court-martial found Lieutenant Calley guilty of premeditated murder.

23. *Id*.

My Lai crimes.[24] Accordingly, the military judge instructed the court-martial members that a guilty verdict must be predicated by a finding of actual knowledge coupled with a culpably negligent failure to act.[25] After the Medina case, the United States continued to embrace, in theory, a doctrine of command responsibility with a negligence standard.[26]

D. The International Criminal Tribunal for the Former Yugoslavia

Fifty years after the Tokyo and Nuremberg war crimes tribunals following World War II, the international community again assumed responsibility for adjudicating criminal cases on the basis of customary international law. The statute for the

24. Maj. Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 195 (2000). Medina was eventually acquitted by a court-martial.

25. *Id*. at 193–94.

26. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501 (July 1956) [hereinafter FM 27-10]. Additionally, during the late 1970s, in the deliberations leading up to the Protocols Additional to the Geneva Conventions of 1949, the United States was a strong proponent of incorporating a negligence standard into the command responsibility article of Additional Protocol I. Although the standard advocated by the United States ("if they knew or should reasonably have known in the circumstances at the time") was ultimately rejected by the Protocol's drafters, American support for it was unwavering. DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, VOL. III, at 328 (1974-77), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-3.pdf; Jean-Francois Queguiner, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, INTERNATIONAL REVIEW OF THE RED CROSS, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-865-p175/$File/irrc-865-Queguiner.pdf (last visited October 7, 2010) [hereinafter "Commentary to Additional Protocol I"]. Two decades later, the delegation of the United States to the 1998 Rome Conference for an International Criminal Court advocated for a "should have known" negligence standard for command responsibility, arguing that such a standard "appeared to be justified by the fact that [a military commander] was in charge of an inherently lethal force." *See* Prosecutor v. Bemba Gumbo, Case No. ICC-01/05-01/08, at 8-9 (April 20, 2009) http://www.icc-cpi.int/iccdocs/doc/doc669669.pdf. And the Military Commissions Act of 2006 similarly articulates a command responsibility doctrine with a negligence standard, defining as a principle "a superior commander who . . . knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." 10 U.S.C. § 950q (2010).

International Criminal Tribunal for the former Yugoslavia (ICTY) includes a provision for holding military commanders[27] criminally responsible for the actions of their subordinates. The ICTY Statute articulates a negligence standard for command responsibility:

> The fact that any of the acts referred to in [enumerated articles] of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[28]

In the ICTY's landmark *Čelebići* judgment, the trial chamber considered at length the precise meaning of the statute's mens rea standard for command responsibility.[29] After a comprehensive examination of the underpinnings of the command responsibility doctrine in customary international law, the trial chamber concluded that the proper mens rea standard would find a defendant liable when "he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates."[30]

In the view of the trial chamber, only a defendant having access to specific information sufficient to compel further investigation could reasonably be found liable under the customary law interpretation of command responsibility that was in effect at the time the crimes were committed (in this case, 1992).[31] But the trial chamber expressly cautioned that its judgment reflected only

27. The relevant provisions actually apply more broadly to "superior" responsibility, which applies to civilian leaders in addition to military commanders. For purposes of this article, only the command responsibility aspects of this statute are discussed. Additionally, although the statute of the International Criminal Tribunal for Rwanda ("ICTR") is not discussed comprehensively here, the superior responsibility provision of the ICTR Statute is substantively identical.

28. ICTY Statute, Article 7(3).

29. Prosecutor v. Mucić et al., Case No. IT-96-21-T, Judgment, ¶ 379–93 (November 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf [hereinafter "Čelebići Trial Judgment"]

30. *Id*. at ¶ 383.

31. *Id*. at ¶ 393.

the customary international law at the time of the offenses, explicitly declining to opine as to the status of customary international law at the time of the judgment (1998).[32] Indeed, the trial chamber pointedly noted that the more recent Rome Statute of the International Criminal Court[33] employed a "knew or should have known" standard of command responsibility.[34]

E. The International Criminal Court

Customary international law as to command responsibility has continued to evolve in recent years, as evidenced by the relevant provision in the governing statute of the International Criminal Court (ICC).[35] This provision states that a military commander is criminally liable for offenses committed by forces under his effective command and control, as a result of his failure to properly exercise control over those forces, where 1) he knew or should have known that the forces were committing or about to commit the crimes, and 2) he failed to take all necessary and reasonable measures to prevent, investigate, or punish.[36]

This adoption of a negligence standard of command responsibility by the ICC is a significant development. Although the United States has "unsigned" the Rome Statute[37] and thus has disavowed the legal obligations arising from its earlier signature, the United States' unambiguous support for the statute's more expansive standard of command responsibility is evidenced by its strong advocacy in favor of the negligence standard during the drafting work of the ICC Preparatory Commission.[38] This position is consistent with the United States' vigorous support, two decades earlier, of a similar standard for inclusion in Additional Protocol I to the Geneva Conventions.[39]

32. *Id*.

33. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter "Rome Statute"], *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

34. *See* Čelebići Trial Judgment, *supra* note 29, at ¶ 393.

35. Rome Statute, *supra* note 33, at Article 28.

36. *Id*.

37. *See* Rome Statute, *supra* note 33.

38. Prosecutor v. Bemba Gumbo, *supra* note 26.

39. Commentary to Additional Protocol I, *supra* note 26.

F. The Military Commissions Act

The Military Commissions Act of 2006 authorized trial by military commission for violations of the laws of war. The Act adopted a negligence standard for command responsibility, stating that a commander may be held liable as a principle for the crimes of his subordinates where he "knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and . . . failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[40]

IV. THE AMERICAN MILITARY JUSTICE SYSTEM LACKS AN EFFECTIVE DOCTRINE OF COMMAND RESPONSIBILITY

The United States does not have a clear mechanism by which to hold American commanders criminally liable for the law of war violations of their subordinates. U.S. Army Field Manual 27-10 articulates a standard of command responsibility where the officer "has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war. . . ."[41] But the doctrine is not codified in the UCMJ,[42] and no United States court or tribunal has ever applied the doctrine of command responsibility to an American officer.

40. Military Commissions Act of 2006, 10 U.S.C. § 950q(3) (2009). It may be argued that this provision, the substance of which is identical to the United States-advocated command responsibility provision of the ICC Statute, reflects recognition by the American government that the negligence standard of command responsibility has achieved the status of customary international law.

41. *See* FM 27-10, *supra* note 26, at ¶ 501. The express purpose of FM 27-10, which does not itself constitute binding law, is to provide guidance to U.S. servicemembers on applicable law.

42. 10 U.S.C. §§ 801–946 (2005). Currently, command failures can be prosecuted under the UCMJ as dereliction of duty. *See* Uni Code of Military Justice §892 art. 92, MANUAL FOR COURTS-MARTIAL (2008 ed.). But this offense, which sets forth an exceedingly vague set of elements, limits punishment to six months of confinement in the case of willful dereliction and three months of confinement for negligent or culpably inefficient dereliction. A doctrine of command responsibility imputing liability for the underlying crimes would be a far more effective deterrent. For a more detailed exploration of the limited extent to which some articles of the UCMJ could theoretically be used to hold commanders responsible for certain crimes of their subordinates, see Victor Hansen, *supra* 9, at 388–97 (2007).

The absence of a functional doctrine of command responsibility is in part attributable to the lack of a structure for prosecuting and punishing "law of war violations" as such. It is the express policy of the United States that American servicemembers are not charged with "war crimes" as such.[43] In My Lai, in Abu Ghraib, in Haditha—indeed, in every single instance of an alleged violation of the law of war by an American under the modern American military justice system—the offenses were charged as common crimes under the UCMJ.[44]

The UCMJ codifies a variety of offenses that are analogous under certain circumstances to law of war violations, but it has no article specifically prohibiting war crimes as such.[45] While it is theoretically possible that a servicemember could be charged with a violation of the law of war under the Article 134 (the general article, a vehicle by which certain other crimes from outside the UCMJ may be charged), this has never happened, and indeed a referral of charges in this manner would violate U.S. policy.[46]

In light of these institutionalized American sensitivities about prosecuting war crimes as such, it is unsurprising that the United States has not embraced a standard of command responsibility to impute its officers with liability for the law of war violations of their subordinates. The current U.S. practice and policy of prosecuting war crimes as common violations of the UCMJ does hold servicemembers accountable for law of war violations, albeit by another name, and this system is entirely compatible with a doctrine of command responsibility for those violations. Because the current structure for command responsibility in the American military justice system is ambiguous at best, codification of such a

43. *See* FM 27-10, *supra* note 26, at ¶ 507(b):
The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code

44. *See generally*, Mynda G. Ohman, *Integrating Title 18 War Crimes Into Title 10: A Proposal To Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1 (2005).

45. *See* UCMJ, *supra* note 42. Examples from the UCMJ include: Article 93 (Cruelty or Maltreatment), Article 97 (Unlawful Detention), Article 102 (Forcing a Safeguard), Article 118 (Murder), Article 119 (Manslaughter), Article 120 (Rape), Article 124 (Maiming), Article 128 (Assault), and Article 134 (Kidnapping).

46. FM27-10, supra note 26; *see generally*, Ohman, *supra* note 44, at 3.

doctrine would be most credibly accomplished by an amendment to the UCMJ. This amendment should take the form of a new UCMJ article, analogous to the articles establishing the doctrines of accomplice liability[47] and accessory liability[48] that would apply the doctrine of command responsibility to all relevant punitive articles.[49]

The following two case studies illustrate the problems that can arise absent a clear doctrine of command responsibility.

V. TWO RECENT CASE STUDIES

The military's own investigations into the allegations of unprovoked killings of civilians at Haditha and systematic detainee abuse at Abu Ghraib produced strong evidence indicating that American commanders in each case either knew about these crimes or should have known about them.[50] In the case of Haditha, the evidence suggests that those commanders were not merely negligent in not knowing; rather, they either knew about the offenses or were willfully blind to them, and failed to report and investigate the violations and to punish the perpetrators.[51] Thus, these officers could have been prosecuted under a theory of command responsibility with a conscious-avoidance standard.

In the case of Abu Ghraib, the evidence indicates that at least three officers either knew or should have known of the abuses but failed to prevent the offenses or punish the perpetrators. However,

47. Article 77, 10 U.S.C. § 877 (2005).

48. Article 78, 10 U.S.C. § 878 (2005).

49. For one example of such an article, see the proposal by Victor Hansen, *supra* note 11, at 412–13.

50. Having not been subject to the court-martial process on a command-responsibility theory, these officers are entitled to the presumption of innocence (as are the servicemembers under their command who have not been convicted of the underlying offenses). This article argues that the military's investigative findings would have supported a referral of charges on a command-responsibility theory.

51. This article does not posit that immediate commanders of the Marine unit operating in Haditha could reasonably be liable for failing to prevent the commission of violations at Haditha; rather, the evidence suggests that they were aware of apparent violations after the fact and failed to report, investigate, and punish the perpetrators. While the existing offense of dereliction of duty ostensibly covers these actions, incorporating these offenses under a doctrine of command responsibility (which would carry a wider sentencing range, as well as a more tailored deterrent and stigma) would provide a more appropriate fit for such cases. *See* 10 U.S.C.§ 892 (2007).

the evidence suggesting knowledge or willful blindness on the part of at least two[52] of these officers is less compelling, and successful prosecution of these officers on a theory of command responsibility could likely only have been effected with a negligence standard.

A. Haditha

In November 2005 at Haditha, Iraq, Marines from Kilo Company, Third Battalion, First Marine Regiment ("3/1") shot and killed twenty-four Iraqis, at least fifteen of whom were later determined to be civilians.[53] The dead, who were killed inside several different houses, included numerous women and young children in bed and clad in pajamas.[54] Later that day, a second group of Marines arrived to collect the bodies. The death reports completed by these Marines state that all twenty-four victims had died from gunshot wounds.[55]

The day after the incident, the Second Marine Division issued a statement that the fifteen civilians had died in a roadside bomb

52. As discussed below, one military investigation found evidence that Colonel Pappas had failed to take appropriate action in the face of credible allegations of detainee abuse raised by the International Committee for the Red Cross, and also that he had failed to "take aggressive action" against soldiers who violated the Geneva Conventions and U.S. military policies regarding the treatment of detainees. This evidence arguably would have supported a command-responsibility prosecution of Colonel Pappas on a willful-blindness theory.

53. Of twenty-four Iraqis reported killed, fifteen were reported as "civilians," a term that the Marine Corps in this instance defined as "women and children." The remainder of the dead were classified as "the enemy," which the Marine Corps in this instance defined as "military aged males." Thus, apart from the unconfirmed possibility that the nine military-aged males could have been enemy combatants, there was "no apparent rational basis for the distinction made in Battalion reports between civilian casualties and [enemy casualties]." Major General Eldon Bargewell, *Bargewell Discovery*, U.S. ARMY 50 (June 15, 2006), http://warchronicle.com/DefendOurMarines/Documents/BargewellReport/000_MG_Bargewell_15-6_(Haditha_Report).BATES.pdf [hereinafter *Bargewell Report*]. Rather, for all reporting purposes relating to this incident, it appears that civilians were distinguished from enemy fighters solely by this separation of women and children from military-aged males. *Id.* at 30 n.139–40; *Id.* at 56–57 n.279; *Id.* at 63.

54. Tim McGurk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME MAGAZINE (March 19, 2006), http://www.time.com/time/world/article/0,8599,1174649,00.html.

55. *Bargewell Report*, supra note 53, at 1 n.3.

blast, and that Marines from 3/1 had shot nine insurgents in an ensuing gun battle.[56] The false initial report that the victims were killed by a roadside bomb was blatantly contradicted by the physical evidence—including official and unofficial photographs of the dead victims depicting their apparent manner and place of death—as well as by the Marine Corps' own death reports.[57] One's curiosity regarding the clear incongruities between the evidence as observed and the facts as reported might have been further piqued by the fact that fifteen civilian deaths is an unusually high number of casualties from a roadside bomb, and a casualty count invoking an immediate official reporting requirement to the highest levels of command in Iraq.[58] Nonetheless, neither the battalion commander nor any other military official in the chain of command undertook an investigation at that time.[59] And, in violation of the official reporting requirement triggered by the "significant civilian casualties," no accurate report was made.[60]

Several months after the Haditha incident, *Time* magazine reported that the official U.S. account was inaccurate, and that all of the dead Iraqis, including the civilians, had been killed by United States Marines.[61] Prior to publication of the story, the *Time* reporter, Tim McGurk, contacted the Marine Corps with his allegations.[62] Upon receiving this information at 3/1 headquarters,

56. *Id*. at 2.

57. *Id*. at 1 n.3. The *Bargewell Report* concluded that the official report that fifteen Iraqi civilians were killed by a roadside bomb blast was "clearly inaccurate" in light of the facts understood at that time, and further notes that the omission of information that might have suggested Marine responsibility for civilian deaths made the release of that clearly inaccurate report "suspect." *Id*. at 47.

58. The *Bargewell Report* specifically found that the death of fifteen Iraqi civilians, standing alone, met the criteria for three independent reporting requirements that mandated immediate reporting at every level of command throughout Multinational Force–Iraq. These three criteria were: 1) an event resulting in significant civilian casualties; 2) an event likely to generate media interest; and 3) possible alleged, or suspected violation of the law of armed conflict. *Id*. at 61.

59. *Id*. at 50.

60. *Id*. at 45–48. "[L]ittle or no action that can be described as appropriate, including anything meaningful in the form of further inquiry into the circumstances surrounding the killings, was taken or directed by [the division, the Regimental Combat Team, or the battalion]." *Id*. at 48.

61. McGurk, *supra* note 54.

62. *Bargewell Report*, *supra* note 53, at 53.

the battalion executive officer and the battalion intelligence officer reportedly went together to the battalion commander and recommended that he commence an investigation.[63] Apparently ignoring yet another red flag that an investigation was warranted, the battalion commander reportedly stated words to the effect that, "my men are not murderers," and dismissed the subordinate officers without further action.[64]

When the *Time* story was published, the military assigned Unites States Army Major General Eldon Bargewell to conduct an investigation into the Haditha incident, including the possibility of a command cover-up.[65] The ensuing report, known as the *Bargewell Report*, made a number of factual findings supporting its ultimate conclusion that multiple officers throughout the chain of command ignored numerous red flags and were, at a minimum, willfully blind to the significant probability that the incident involved violations of the law of war by 3/1 Marines.[66]

The *Bargewell Report* found that multiple officers, including the company commander, a Marine captain, visited the scene almost immediately after the killings.[67] The battalion commander conducted a command assessment of the scene the following day;[68] however, this visit was cursory and the battalion commander did not enter into any of the homes where the killings had actually occurred.[69] Moreover, at least five individual Marines took

63. *Id*. at 54.

64. *Id*.

65. Major General Eldon Bargewell, U.S. Army, was at the time of his assignment to this investigation the director of operations for the U.S. military command in Iraq. A career Special Forces operative who was wounded seven times in various combat operations over four decades of service, he was one of the most highly decorated soldiers then on active duty. He was reportedly selected to lead this investigation because of his intimate familiarity with counter-insurgency operations, as well as his reputation for candor, integrity, and good judgment. Ann Scott Tyson, *General Leading Haditha Probe Known For Integrity, Toughness,* WASH. POST (June 16, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/15/AR2006061501887.html.

66. *See Bargewell Report*, *supra* note 53.

67. *Id*. at 16, 48.

68. An official report by 3/1 inaccurately stated that the battalion commander had assessed the scene on the date of the incident; however, he did not visit until the following day. *Id*. at 46, 51 n.221.

69. *Id.* at 51.

photographs of the victims at the scene,[70] both for official and unofficial purposes.[71] At least one set of these photographs, taken by an intelligence specialist in the course of his official duties, was reviewed by the company commander.[72] These photographs were subsequently deleted from the intelligence specialist's camera.[73] A number of 3/1 staff officers with information about the incident and the discrepancies in reporting—including the executive officer, the battalion staff judge advocate, the intelligence officer,[74] and the Civil Affairs Group team leader—later stated that they assumed that an investigation would be directed by the battalion commander or higher headquarters.[75]

The *Bargewell Report* further found that the fact that Marines from Kilo Company 3/1 had killed women and children was generally known throughout the company, including by the company commander and other company leadership.[76] This issue apparently so affected morale that the company commander addressed it at a meeting.[77]

According to the *Bargewell Report*, the condolence-payment process raised another red flag.[78] A standard practice reflecting Iraqi cultural traditions, these "CERP"[79] payments are a gesture made by the U.S. military to express condolences for loss of life, injury, or property damage, but they do not constitute an admission of wrongdoing.[80] In this case, the *Bargewell Report* found that the CERP payment involved an amount that was unusually high, and that the process had been monitored by the 3/1 battalion commander, who had determined quickly and without apparent inquiry that the claim should be paid.[81]

The *Bargewell Report* was sharply critical of the actions of

70. *Id*. at 31, 49.
71. *Id*. at 56.
72. *Id.* at 31, 49.
73. *Id*. at 31.
74. From the beginning, the battalion intelligence officer suspected that the reporting as to this incident was fundamentally inaccurate; however, the discrepancies that led to this suspicion were never investigated. *Id*. at 48.
75. *Id*. at 50.
76. *Id*. at 50.
77. *Id*.
78. *Id*. at 52–53.
79. Commander's Emergency Response Program.
80. *Bargewell Report*, *supra* note 53, at 52–53.
81. *Id*.

the Marine Corps chain of command, concluding that the command had ignored "obvious" signs of "serious misconduct."[82] It concluded that the initial reports of Marines and officers to their superiors as to the civilian deaths were "untimely, inaccurate and incomplete,"[83] and that the Marine Corps leadership at the company, battalion, regimental, and division levels "failed to take any follow on action that could be called appropriate or adequate."[84] It further stated: "Despite many indications that inquiry was warranted and opportunities to conduct further inquiry, no individual accepted the responsibility to investigate the potentially unlawful killing of noncombatants."[85]

The report specifically attributed these failures to "inattention and negligence, in certain cases willful negligence."[86] Moreover, "[l]eaders from the platoon through the 2d Marine Division level, particularly at the Company and Battalion level, exhibited a determination to ignore indications of serious misconduct, perhaps to avoid conducting an inquiry that could prove adverse to themselves or their Marines."[87] It further concluded, in unusually explicit terms, that these initial failures were compounded by the fact that the chain of command declined to conduct any investigation despite numerous red flags and a clear duty to investigate sooner:

> I found that the duty to inquire further was so obvious in this case that a reasonable person with knowledge of these events would have certainly made further inquiries. . . . The most remarkable aspect of the follow-on action with regard to the civilian casualties from the 19 November 2005 Haditha incident was the absence of virtually any kind of inquiry at any level of command into the circumstances surrounding the deaths.[88]

Specifically, the report characterized the repeated refusal of the battalion commander to investigate as "an unwillingness, bordering on denial, on the part of the Battalion Commander to examine an incident that might prove harmful to himself or his

82. *Id*. at 62.
83. *Id*. at 61.
84. *Id*. at 62.
85. *Id*.
86. *Id*. at 61.
87. *Id*. at 62.
88. *Id.* at 17, 47, 63.

Marines."[89]

The *Bargewell Report* specifically found that:

[A] case for willful dereliction of duty could be made out against some of these individuals. This is not to suggest that any individual willfully covered up misconduct, but that they may have willfully failed to inquire more closely because they were afraid of the truth which might be harmful to their unit, their career, or to their personal standing.[90]

Additionally, the report went a pace further, specifically noting and identifying "some unusual and suggestive circumstances" with regard to some actions on the part of the command.[91]

When the *Time* story was published, approximately four months after the incident, it sparked intense and widespread interest, and the Marine Corps commenced a criminal investigation.[92] Along with several enlisted Marines and staff officers, two Marine officers in positions of command were subsequently charged with violations of the UCMJ stemming from the Haditha affair. The company commander, Captain Lucas McConnell, was charged with a single count of dereliction of duty for failing to investigate.[93] This charge carried a maximum prison sentence of six months.[94] The government dismissed the sole charge against Captain McConnell in September 2007 after granting him immunity to secure his cooperation with the remaining prosecutions.[95] The battalion commander, Lieutenant Colonel Jeffrey Chessani, was charged with two counts of

89. *Id*. at 54.

90. *Id*. at 63.

91. *Id*.

92. Josh White & Thomas E. Ricks, *Investigators of Haditha Shootings Look to Exhume Bodies*, WASH. POST (June 2, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/01/AR2006060100343.html.

93. *Napan Among Eight Charged By Marine Corps for Haditha Incident, Aftermath*, NAPA VALLEY REG. (Dec. 21, 2006), http://napavalleyregister.com/news/local/image_f76b1c13-f7c3-52ec-b7e6-cd68ec06df25.html.

94. 10 U.S.C. § 892 (2010).

95. *Charges Dropped Against Company Commander in Haditha Killings*, CNN.COM (Sept. 18, 2007), http://edition.cnn.com/2007/WORLD/meast/09/18/iraq.haditha. *See also* Adam Tanner, *U.S. Officer Charges Dismissed in Haditha Killings*, REUTERS.COM (Sept. 18, 2007), http://www.reuters.com/article/idUSN1845602020070918;

dereliction of duty and one count of violating a lawful order for willful failure to accurately report and investigate the killings.[96] Each dereliction charge carried a maximum prison sentence of six months; the orders violation charge carried a maximum prison sentence of two years.[97] In June 2008, all charges against Lieutenant Colonel Chessani were dismissed without prejudice after a military judge determined that the prosecution's case had been tainted by unlawful command influence due to the participation by the commander's legal adviser in the Article 32 investigation.[98] Of the eight Marines charged in connection with the Haditha killings and its aftermath, there have been no convictions, and only a single enlisted Marine remains to stand trial.[99]

Applying the command responsibility doctrine to the facts found in the *Bargewell Report*, even under a conscious-avoidance standard, charges could reasonably have been referred against both commanders for failing to report, investigate, and punish violations of the law of war about which they knew or to which they were willfully blind. A command responsibility doctrine specifically articulating a commander's duty to prevent, report, investigate, and punish violations of the law of war would be more appropriate—and perhaps more likely to yield a just result—than the highly generic dereliction and orders violation charges that were stretched to fit in these cases. Most importantly, the existence and enforcement of such a tailored doctrine in U.S. military law would send a strong message to commanders as to their legal duty to prevent and punish violations.

Gidget Fuentes, *General Clears Two Marines in Haditha Deaths*, NAVY TIMES (Aug. 12, 2007), http://www.navytimes.com/news/2007/08/marine_sharratt_070809/.

97. 10 U.S.C. § 892 (2010).

98. *Case Dropped Against Officer Accused in Iraq Killings*, N.Y. TIMES (June 18, 2008), http://www.nytimes.com/2008/06/18/us/18haditha.html. The finding of unlawful command influence was predicated on the fact that the staff judge advocate to the convening authority had participated in the preliminary investigation. The dismissal without prejudice, which was unrelated to the weight of the evidence against Lieutenant Colonel Chessani, left room for reinstatement of the charges by another command; however, this has not occurred.

99. Lee Ferran, *Iraqi Ambassador Calls Haditha Ruling 'Encouraging,'* ABCNEWS.COM (Mar. 26, 2010), http://abcnews.go.com/TheLaw/exclusive-sgt-frank-wuterich-trial-iraqi-ambassador-calls/story?id=10213254.

B. Abu Ghraib

In April of 2004, the American news media broadcast the first of many photographs graphically depicting physical abuses against Iraqi detainees at the hands of American soldiers at the Abu Ghraib prison in Baghdad during 2003 and early 2004. The now-familiar images showed a hooded man standing on a box, arms outstretched, with wires attached; a naked man wearing a dog leash and collar and led by a smiling female soldier; and American soldiers looking on as naked men were forced to simulate sexual acts, among many others. Since that time, evidence has surfaced that the abuses at Abu Ghraib during that time period extended to the rape and sexual abuse of women and minors.[100]

The detainee-abuse scandal spawned various official investigations within the U.S. Department of Defense, including independent criminal investigations into the conduct of individual soldiers involved. As a result of these criminal investigations, several junior enlisted soldiers faced courts-martial for their direct involvement in the abuses.

In addition to those charged with direct liability, two senior commanders received administrative punishment for their role in the scandal. Brigadier General Janis Karpinski, the commander of U.S. operations at Abu Ghraib during the time of the abuse, was administratively investigated by the Department of the Army's Inspector General and subsequently punished in 2004 for dereliction of duty.[101] She was demoted to the rank of colonel, given a written reprimand, and relieved of her command.[102] Colonel Thomas Pappas, the top military intelligence officer at Abu Ghraib, accepted non-judicial punishment for two counts of dereliction of duty. The first count charged that Colonel Pappas had failed to ensure that his subordinates were properly trained in and supervised on interrogation procedures.[103] The second count

100. Duncan Gardham, *Abu Ghraib Abuse Photos 'Show Rape,'* THE DAILY TELEGRAPH (May 29, 2009), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html.

101. *Army Releases Findings in Detainee Abuse Investigation*, GLOBALSECURITY.ORG (May 5, 2005), http://www.globalsecurity.org/military/library/news/2005/05/mil-050505-army01.htm.

102. *Id.*

103. R. Jeffrey Smith, *Abu Ghraib Officer Gets Reprimand*, WASH. POST

alleged that he had failed to obtain approval to use military working dogs in interrogations.[104] He was fined $8,000, given a written reprimand, and relieved of his command.[105]

Only one officer faced court-martial in connection with the Abu Ghraib affair. Lieutenant Colonel Steven Jordan, the deputy intelligence officer at Abu Ghraib, was tried in 2007 by general court-martial on the following charges relating to the abuses at Abu Ghraib:[106] disobeying orders not to discuss the case with potential witnesses; dereliction of duty in failing to train, supervise, and ensure compliance with interrogation policies; failing to obtain permission to use military working dogs in interrogations; oppressing detainees via forced nudity and intimidation with dogs;[107] making false official statements; and obstruction of justice. After a seven-day trial, Lieutenant Colonel Jordan was acquitted on all counts relating to the abuse.[108]

Multiple U.S. Army investigations conducted in the wake of the Abu Ghraib scandal found substantial evidence that reasonably could have supported prosecutions of several senior officers on a theory of command responsibility. These investigations concluded that Brigadier General Karpinski failed in her duties as Commanding Officer of the 800th MP Brigade in numerous respects, including the following:

(May 12, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/11/AR2005051101818.html.

104. *Id.*

105. *Abu Ghraib Intelligence Boss Relieved of Command*, AM. FORCES PRESS SERVICE (May 13, 2005), http://www.defense.gov/news/newsarticle.aspx?id=31662.

106. Steven L. Jordan Charge Sheet, U.S. ARMY (April 28, 2006), www.pegc.us/archive/DoD/docs/Jordan_charge_sheet_20060428.pdf.

107. This allegation of direct involvement in detainee abuse is not relevant to a theory of command responsibility. For this charge, Lieutenant Colonel Jordan was prosecuted on a theory of direct liability for the underlying offense. He was acquitted of this charge at court-martial.

108. The sole charge on which Lieutenant Colonel Jordan was convicted, disobedience of an order, carries a maximum sentence of five years in prison and dismissal from the Army. *See* 10 U.S.C. § 890. The sentence adjudicated was a reprimand. Several months later, the convening authority disapproved the findings and sentence, instead issuing an administrative reprimand, and dismissed the charges. Josh White, *Army Officer Is Cleared in Abu Ghraib Scandal*, WASH. POST (Jan. 9, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/09/AR2008010903267.html. By this action, the convening authority cleared Lieutenant Colonel Jordan of all criminal responsibility in connection with Abu Ghraib and voided his federal conviction.

After prior instances of detainee abuse by soldiers in the 800th MP Brigade (several weeks before she assumed command) had come to light, she failed to institute corrective training to ensure that these unlawful acts by soldiers in the same command were not repeated.[109] She further failed to ensure that the soldiers under her command and control knew, understood, and followed the requirements of the Geneva Conventions and other applicable laws regarding the treatment of detainees.[110]

She failed to ensure that the military police soldiers under her command and control had appropriate standard operating procedures (SOPs) relating to treatment of detainees.[111] Indeed, there were virtually no detailed SOPs in effect at any of the detention facilities under her command and control.[112] Those few SOPs that did exist were not understood or followed by those soldiers charged with the difficult mission of detention operations.[113]

Despite her awareness that the soldiers under her command and control were inadequately trained for their mission, were not proficient in their basic job skills relating to detainee operations, and were almost uniformly unfamiliar with the applicable Army Regulation and Field Manual provisions relating to treatment of detainees and other elements of detainee operations, she failed to request or provide any additional training for her soldiers.[114]

She failed to adequately supervise the soldiers under her command and control, including a failure to make regular visits to her subordinate commands at the prison.[115]

She failed to enforce the most basic military discipline standards (i.e., saluting of officers, uniform regulations, weapons protocols, non-fraternization policy) throughout her command.[116]

109. Major General Antonio M. Taguba, AR 15-6 Investigation of the 800th Military Police Brigade, DEPARTMENT OF THE ARMY, at 7, 16, 43, 44 (June 4, 2004), http://www.dod.gov/pubs/foi/detainees/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf [hereinafter *Taguba Report*].

110. *Id*. at 43, 44.

111. *Id*. at 44.

112. *Id.* at 31.

113. *Id*. at 43.

114. *Id*. at 11, 19–20, 37, 44.

115. *Id.* at 43–44.

116. *Id*. at 38, 41, 44.

She failed to take any corrective action regarding the established ineffectiveness of her subordinate commander and numerous other members of her command staff, including several officers in particularly critical roles.[117]

One Army investigation—citing a memorandum of admonishment by Brigadier General Karpinski's superior—specifically concluded that the incidents of detainee abuse at Abu Ghraib were the direct result of a lack of leadership by Brigadier General Karpinski and "a poor leadership climate that 'permeates the Brigade.'"[118] Taken together, the investigative findings would have supported a prosecution on a command-responsibility theory.[119] From these findings, which collectively paint a picture of a commander with her head stuck firmly in the sand, a court-martial panel might have reasonably concluded that Brigadier General Karpinski not only should have known, but in fact actively chose not to know that prior violations of the law of war were again being perpetrated by the poorly trained, poorly disciplined, and poorly led soldiers under her command and control.

According to the Army investigative reports conducted in the aftermath of Abu Ghraib,[120] the evidence supported a finding that Colonel Pappas's tenure as the senior intelligence officer at Abu Ghraib prison at the time of the abuses was marked by the following failures:

He failed to take aggressive action against soldiers under his command and control who violated the ICRP, applicable U.S. military interrogation and detention policies, and the Geneva Conventions.[121]

Upon receipt of independent reports by the International Committee for the Red Cross (ICRC) of systematic detainee abuse by soldiers and civilians under his command and control, he failed

117. *Id*. at 40-41, 43.

118. *Id*. at 44 (concurring with and quoting Memorandum of Admonishment to Brigadier General Karpinski (January 17, 2004)).

119. These findings would reasonably support a command-responsibility prosecution even if the operative standard were the more lenient conscious-avoidance standard, which requires either actual knowledge or willful blindness.

120. *Taguba Report; see also* Major General George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, U.S. ARMY, http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited October 8, 2010) [hereinafter "*Fay Report"*].

121. *Id.* at 91, 120.

to take appropriate action to investigate and confirm or refute the ICRC's findings.[122]

He failed to institute the necessary checks and balances to prevent and detect abuse by the soldiers and civilians under his command and control.[123]

He failed to ensure that the soldiers under his command and control charged with the sensitive mission of interrogating detainees knew, understood, and followed the requirements of the Geneva Conventions relating to the treatment of detainees.[124]

He failed to ensure that the soldiers under his command and control charged with interrogating detainees were properly trained in, and followed, the applicable rules of engagement.[125]

He failed to properly supervise the soldiers under his direct authority.[126]

The military investigations determined that Lieutenant Colonel Jordan had failed in his duties in the following respects, among others:

He failed to ensure that the soldiers under his command and control charged with the sensitive mission of interrogating detainees knew, understood, and followed the requirements of the Geneva Conventions relating to the treatment of detainees.[127]

He failed to ensure that the soldiers under his command and control charged with interrogating detainees were properly trained in, and followed, the applicable rules of engagement.[128]

He failed to properly supervise the soldiers under his direct authority.[129]

He failed to establish the necessary checks and balances to prevent and detect abuses.[130]

In sum, of the three officers who were disciplined administratively in connection with the Abu Ghraib affair, the

122. *Id.* at 64–67, 120.
123. *Id*. at 120.
124. *Taguba Report, supra* note 109, at 45–46; *Fay Report*, *supra* note 120, at
125. *Id.*
126. *Id.* at 46.
127. *Id.*.
128. *Id*. at 45; *Fay Report*, *supra* note 120, at 121.
129. *Taguba Report*, *supra* note 109, at 45–46.
130. *Fay Report*, *supra* note 120, at 121.

government's own investigative findings indicate that prosecutions of all on a command-responsibility theory would have been reasonably warranted.[131] As the military justice system does not have a functional doctrine of command responsibility, such a prosecution theory was not available in those cases. The military justice system should look to the realm of corporate law, which does feature an effective doctrine under which superiors can be held criminally responsible for certain acts of their subordinates.

VI. THE FOREIGN CORRUPT PRACTICES ACT AS A MODEL FOR A COMMAND RESPONSIBILITY DOCTRINE

The U.S. military can, and should, look to the international community and to its own history in embracing a negligence standard of command responsibility. But the civilian justice system provides a model that can be instructive to the military as well. The FCPA has proven to be highly effective in holding civilian executives for certain crimes of their subordinates, employing a standard of conscious avoidance. Military leaders too must be held accountable for the actions of their subordinates. Indeed, in light of the far greater ability of military leaders to impact command climate and to ensure compliance by their subordinates, as well as the higher stakes of the military world, the stricter negligence standard is appropriate for a military doctrine of command responsibility. Nonetheless, the FCPA provides a helpful example of a functional American doctrine of superior responsibility.

A. Parallels Between the Law of War and the Foreign Corrupt Practices Act

An effective corporate organization is in many ways functionally similar to an effective military organization. This is particularly true in the areas of structural hierarchy and leadership dynamics. Perhaps as a reflection of these organizational similarities, service as a military officer tends to be highly valued

131. However, if the more lenient conscious-avoidance standard were applied, only in the case of Brigadier General Karpinski would these findings likely have been sufficient to support a command-responsibility prosecution. In the cases of Colonel Pappas and Lieutenant Colonel Jordan, prosecution on a command-responsibility theory arguably would have been warranted only with a negligence standard.

by post-graduate business schools as well as by corporate boards.[132] A leading business magazine has likened the U.S. Marine officer training course to a highly effective MBA program, and has declared that "there is no better preparation for the rigors of running a business than the intense training of the U.S. Marine Corps."[133] And some top-tier MBA programs sponsor mock boot camp sessions at military installations to take advantage of military-style leadership training.[134]

In March 2010, *Fortune* magazine ran a cover feature entitled "The New Warrior Elite" that chronicled how the past decade of war has spawned "a new generation of business leaders."[135] Perhaps due to these parallels between military and executive leadership, successful military officers often later become successful CEOs. According to one study, American military officers are overrepresented among the ranks of CEOs, and there is a positive correlation between service as a military officer and strong executive performance.[136]

The military and corporations alike recognize that discipline and compliance within the organization follows the command climate set from the top. The current corporate buzzword for command climate is "tone at the top," but the basic definition—namely, the ethical atmosphere created in the workplace by an

132. *See*, *e.g.*, Diana Middleton, *Business Schools Tap Veterans*, THE WALL STREET JOURNAL (Feb. 18, 2010), http://online.wsj.com/article/SB10001424052748703444804575071231319849408.html.

133. David H. Freedman, *Corps Values*, INC. MAGAZINE (Apr. 1, 1998), http://www.inc.com/magazine/19980401/906.html.

134. *See* Jeremy Deutchman, *USC Marshall Partners With U.S. Marine Corps In Challenge*, USC MARSHALL, http://www.marshall.usc.edu/news/all-articles/usc-marshall-partners.htm (last visited Aug. 18, 2010); *see also Officer Programs*, CHICAGOMARINEOFFICER.COM, http://www.chicagomarineofficer.com/offprog.htm (last visited Aug. 18, 2010) ("Many MBA Programs even sponsor mock two-day versions of OCS [Marine Officer Candidate School] to teach their students how to effectively make quick, decisive actions amidst chaos and uncertainty.").

135. Brian O'Keefe, *The New Warrior Elite*, FORTUNE MAGAZINE (Mar. 10, 2010), http://money.cnn.com/galleries/2010/fortune/1003/gallery.military_business_leaders.fortune/index.html.

136. Chuck Wardell and Joe Griesedieck, *Military Experience and CEOs: Is There A Link?*, THE KORN/FERRY INTERNATIONAL (2006), http://www.kornferryinstitute.com/ebook/406/Military_Experience_and_CEOs_Is_There_a_Link.

organization's leadership[137]—mirrors that of command climate precisely.[138] Like a civilian executive, a military commander ensures good order and discipline in the organization and is in a unique position to dictate, by and large, the behavior of his or her troops. In the military context, command climate sets the tone for what is and what is not permissible behavior in an organization that prizes discipline and adherence to rules above most other virtues. While isolated incidents may still occur even in a strong command climate, systemic violations will not.[139]

Corporations have come to recognize that a proper command climate, or tone at the top, is essential to the success of a compliance program.[140] This is because line employees who are in

137. *See*, *e.g.*, Mark S. Schwartz, Thomas W. Dunfee, and Michael J. Kline, *Tone at the Top: An Ethics Code For Directors?*, 58 J. BUS. ETHICS 79 (2005), *available at* http://lgst.wharton.upenn.edu/dunfeet/Documents/Articles/Tone%20At%20the%20TopJBE.pdf; *see also* Association of Certified Fraud Examiners, *Tone at the Top: How Management Can Prevent Fraud in the Workplace*, ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, http://www.acfe.com/documents/tone-at-the-top-research.pdf (last visited October 8, 2010).

138. *See, e.g.*, MIR BAHMANYAR, SHADOW WARRIORS: A HISTORY OF THE U.S. ARMY RANGERS 255 (Osprey Publishing 2005) ("In practice, since the Army is not a democracy, a great deal depends on the tone set from the top– or, what is known as the 'Command Climate.'").

139. With rare exceptions, violations of the law of war are command failures. The argument that such violations are often effectuated by "a few bad apples" among the lower ranks was surely eviscerated with the revelation that the precise tactics employed at Abu Ghraib were actually devised years earlier and expressly approved by the then-Secretary of Defense for use in interrogations at Guantanamo Bay. *See*, *e.g.*, Josh White, *Abu Ghraib Tactics Were First Used At Guantanamo*, WASH. POST (July 14, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/13/AR2005071302380.html.

140. *See*, *e.g.*, Melissa Klein Aguilar, *Building an Integrity Culture at Siemens*, COMPLIANCE WEEK (Mar. 11, 2008), http://www.complianceweek.com/article/3969/building-an-integrity-culture-at-siemens (quoting Siemens Chief Compliance Officer Andreas Pohlmann: "The most important issue for Siemens is to change the culture of the company going forward and to drive the tone from the top into the organization."); *see also* Larry D. Thompson, *Tone At the Top*, ETHISPHERE, http://members.ethisphere.com/?tone_at_the_top (last visited October 8, 2010) (remarks by Pepsico Senior Vice President of Government Affairs: "we all know that having the right tone at the top is critical"); *Corruption Crackdown: How The FCPA Is Changing The Way The World Does Business*, PRICEWATERHOUSECOOPERS, at 39, http://graphics8.nytimes.com/packages/pdf/world/PwC_Corruption_whitepaper.pdf (last visited Aug. 18, 2010) (quoting Walter Ricciardi, former deputy director of SEC Division of Enforcement: "If you set the right tone at the top of

a position to engage in corruption have a natural incentive to do so—for instance, in order to meet sales targets or avoid losing a project to a competitor. Strong, consistent ethical guidance is crucial to combating this pressure. The pressure on servicemembers to violate the law of war is similar, though with far greater consequences. Employees refusing to pay bribes may risk their sales numbers, which could affect their own compensation. But compliance with the law of war may constrain servicemembers from taking action that would make them safer, thus jeopardizing their lives and the lives of their comrades.[141] Commanders must counter these natural pressures with a clear and consistent message that violations of the law of war—just like any other violation of the duty to prioritize mission accomplishment above personal safety—will not be tolerated.

For both corporations and the military—morals and ethics aside—compliance with the law operates to the benefit of the organization and the accomplishment of its mission. In the corporate context, bribery and corruption may benefit the individual employee or department in the short term, but endemic corruption is detrimental to the company's bottom line, yielding less success in the long run.[142] Similarly, in the short term, actions circumventing the law of war would often make the individual servicemember safer. But by alienating the local population, giving the enemy fodder for propaganda, and aiding in the recruitment of additional enemy fighters, such violations work to the detriment of the mission and ultimately make all American servicemembers less safe.

In the context of both the laws of war and the FCPA, the effect of a violation can extend far beyond the immediate victim.

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the company, you build a culture of integrity and you will more likely avoid problems.").

141. For instance, particularly in urban warfare against an insurgency, the individual warfighter's short-term safety would frequently be enhanced by shooting anything that moved, without concern for the principles of distinction or proportionality.

142. *4th Biennial Global Economic Crime Survey, Economic crime: people, culture and controls*, PRICEWATERHOUSECOOPERS, at 33 (September 2007), http://www.pwc.com/gx/en/economic-crime-survey/previous-surveys.jhtml; *see also* N.R. Narayana Murthy, Foreword 1 to GLOBAL CORRUPTION REPORT, CORRUPTION AND THE PRIVATE SECTOR, at xix (Dieter Zinnbauer, Rebecca Dobson and Krina Despota eds., Cambridge University Press 2009), *available at* http://www.transparency.org/publications/gcr/gcr_2009.

When an American servicemember uses electric shocks on a detainee,[143] or uses sexual humiliation tactics on detainees,[144] or kidnaps an unarmed man from his bed and executes him,[145] the consequences can reach significantly beyond the individual victim, with an explosive ripple effect that complicates our military mission and fortifies the enemy. Similarly, violations of the FCPA can have far-reaching implications beyond the bottom line of the corporation or the interests of its shareholders. Bribery and other forms of corruption tend to have a destabilizing effect on democratically elected governments around the world, and to further entrench undemocratic or corrupt governments.[146] Thus, both areas of law serve a purpose higher than protecting the immediate victim—a factor that makes deterring violations all the more critical.

In another similarity, both the FCPA and the laws of war are often viewed as separate category of crime, distinct and perhaps even removed from what the typical layperson thinks of as *a crime*. In part, this is because people generally consider a crime to have an individual victim with whom they can identify and empathize.

143. Rick Rogers, *Marines Admit Abuse At Second Prison*, SAN DIEGO UNION TRIBUNE (May 22, 2004), http://www.signonsandiego.com/news/military/20040522-9999-1n22marines1.html.

144. Seymour Hersh, *Torture At Abu Ghraib*, THE NEW YORKER (May 10, 2004), *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=all.

145. Paul von Zielbauer, *Marine Is Guilty of Unpremeditated Murder of an Iraqi Man*, N.Y TIMES (Aug. 3, 2007), *available at* http://www.nytimes.com/2007/08/03/world/middleeast/03abuse.html.

146. According to Kofi Annan, former Secretary-General of the United Nations, "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism, and other threats to human security to flourish." *Secretary-General Lauds Adoption by General Assembly of United Nations Convention Against Corruption*, UNITED NATIONS INFORMATION SERVICES VIENNA, (November 3, 2003), http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8977.html. And Robert B. Zoellick, President of the World Bank, has described corruption as "a cancer that steals from the poor, eats away at governance and moral fiber, and destroys trust." Improving Development Outcomes Annual Integrity Report Fiscal Year 2007, THE WORLD BANK GROUP, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGOVANTICOR R/0,,contentMDK:21590415~menuPK:3036140~pagePK:64020865~piPK:149114~theSitePK:3035864,00.html (last visited October 8, 2010).

For many people, corporate shareholders don't fit the bill, and neither do foreigners detained as terror suspects. In the FCPA context, bribery has been commonly viewed as a relatively harmless cost of doing business in some countries.[147] Violations of the law of war similarly fall into a category of "other" crimes that by definition cannot be committed by the majority of the population. This distance between the law of war and the civilian public's common experience with it leads to a lack of familiarity and, in some cases, an indifference or unwillingness to judge—a sense that some violations of this specialized area of law are appropriate or expected behavior for warfighters.[148]

Moreover, the American notion of justice generally emphasizes individual guilt and responsibility, and this can be a poor fit for criminal responsibility within an organizational context, be it military or civilian.[149] The hierarchical nature of an organization means that leaders do the thinking and the planning,

147. For instance, until recently, many countries provided that bribery payments were deductible as business expenses under the respective tax codes. Recognizing this problem, the Organisation for Economic Cooperation and Development (OECD) in 1996 recommended that its member countries reconsider these tax policies. *Tax Treatment of Bribes*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/about/0,3347,en_2649_34551_1_1_1_1_1,00.html (last visited October 8, 2010). The OECD recommendation was eventually widely implemented; however, bribes were still deductible in some OECD member countries for several years afterward. Siri Schubert and T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 20, 2008), http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html. And in 2010, the Israeli Supreme Court ruled that bribery payments were not deductible. Nurit Roth, *Israel Court Rules: Bribes To Foreign Officials Not Tax Deductible*, HAARETZ (Feb. 23, 2010), http://www.haaretz.com/hasen/spages/1151416.html.

148. For instance, shortly after the Abu Ghraib abuse scandal broke, Rush Limbaugh, a popular and highly influential radio talk show host who did not serve in the military, broadcast a comment likening the soldiers' actions to harmless fraternity pranks. *See* Terry M. Neal, *The Politics of Abu Ghraib*, WASH. POST (May 12, 2004), http://www.washingtonpost.com/wp-dyn/articles/A18316-2004May11.html. And in the first civilian trial in modern history based on crimes allegedly committed by a former service member in combat, jurors acquitting a former Marine of manslaughter and related charges acknowledged that they did not feel qualified to judge a Marine's wartime actions. Tony Perry, *Marine Is Acquitted In Killings of 4 Iraqis*, L.A. TIMES, (Aug. 29, 2008), http://articles.latimes.com/2008/aug/29/local/me-marine29.

149. *See* HENRY N. PONTELL & GILBERT GEIS, INTERNATIONAL HANDBOOK OF WHITE COLLAR AND CORPORATE CRIME 311 (Springer Science and Business Media 2007).

while those below carry out those visions and are not encouraged to question policy or strategy.[150] When a crime is committed, what responsibility is due to the leader who has not personally taken part, but has turned a blind eye and thus tacitly encouraged and facilitated this and future violations? There is an answer in the civilian system that can be imputed to the military construct. In the corporate world, leaders are held accountable where they have consciously avoided knowledge of violations. This approach should be followed in the military context in adopting a standard of command responsibility.

B. The FCPA and the Standard of Conscious Avoidance

Under the FCPA's anti-bribery provisions, it is a crime to offer or provide money or anything of value to foreign government officials with the intent to obtain or retain business.[151] These provisions are applicable to individuals as well as to corporate entities.[152] Although the FCPA lay virtually dormant for nearly three decades after its enactment, the U.S. Department of Justice ("DOJ"), Securities and Exchange Commission ("SEC"), and Federal Bureau of Investigation ("FBI") have recently made clear—in actions and in words—that FCPA investigation and enforcement is now a top priority.[153] The enforcement agencies

150. *Id*.

151. 15 U.S.C. §§ 78dd-1–78dd-3 (1998). In addition to the anti-bribery provisions, the FCPA requires issuers to maintain accurate books, records, and accounts that accurately reflect in reasonable detail the issuer's transactions and dispositions of assets. It also requires that they devise and maintain an adequate system of internal accounting controls. 15 U.S.C. § 78m(b).

152. The anti-bribery provisions of the FCPA are broadly applicable to the actions of "any person" while in the territory of the United States, as well as to "issuers" and "domestic concerns." 15 U.S.C. §§ 78dd-1–78dd-3.

153. *See*, *e.g*., Lanny A. Breuer, Assistant Attorney General, Criminal Division, Address at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf (promising continued stepped-up enforcement of the FCPA: "[Paying bribes] is not business as usual. It is illegal. And it will not be tolerated. And those that do pay or authorize bribes, or even those who knowingly invest in corrupt deals, are now learning those lessons the hard way."). *See* also Press Release, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* http://www.sec.gov/news/press/2009/2009-23.htm ("FCPA violations have been and will continue to be dealt with severely by the SEC and other law enforcement agencies."). *See also* Joseph Persichini, Assistant Director, FBI, Remarks at DOJ Press Conference (Dec. 15, 2008), *available at*

have dramatically expanded actions against both companies and individuals over the past several years.[154] The government has been particularly aggressive in pursuing enforcement actions against individuals.[155]

An individual violates the FCPA's anti-bribery provisions by giving or offering anything of value to any person *while knowing* that it will be given or offered to a foreign official for the purpose of influencing official action or securing an improper advantage.[156] The statute defines this knowledge standard as follows:

> (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if
>
> (i)such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> (ii)such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[157]

This "conscious avoidance" standard was expressly intended to address what the drafters of the current FCPA identified as "[t]he head-in-the-sand problem."[158] The legislative history of the 1988 Amendments to the FCPA approvingly cites the application—in the context of a variety of other federal criminal

http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html ("The investigation of allegations of public corruption is the number one criminal priority of the FBI . . . The FBI is taking a proactive and aggressive approach at investigating violations of the FCPA.").

154. *See*, *e.g.*, *2009 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2010), http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx.

155. *Id*. ("For the past several years now, DOJ and the SEC have been aggressively targeting individual defendants for FCPA prosecutions. DOJ, in particular, has been seeking increasingly severe sanctions in individual prosecutions.")

156. 15 U.S.C. §§ 78dd-1(a)(3)–78dd-3(a)(3) (2010).

157. 15 U.S.C. §§ 78dd-1(h)(3)–78dd-3(h)(3) (2010).

158. H.R. REP. NO. 100-418, at 919 (1988) (Conf. Rep.). *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf.

statutes—of a knowledge standard to defendants who consciously chose to avoid actual knowledge of a circumstance despite a high probability of the existence of that circumstance.[159]

In a recent high-visibility case, federal prosecutors successfully invoked the conscious-avoidance doctrine to secure the criminal conviction of Frederic Bourke on charges of conspiring to violate the FCPA.[160] Bourke was not charged with personally engaging in bribery. Rather, the government's charges rested on an allegation that Bourke had invested in an entity that he knew—or at least had every reason to know—was involved in bribing government officials in Azerbaijan in order to induce the privatization of SOCAR, the Azeri state-owned oil company.[161] At closing argument, the government told the jury that Bourke "had enough understanding to know that something . . . was occurring," yet he kept his "head in the sand."[162]

The judge in the *Bourke* case instructed the jury on the knowledge element as follows:

> When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.
>
> On the other hand, knowledge is not established in this

159. *Id*.

160. Press Release, Department of Justice, Connecticut Investor Found Guilty In Massive Scheme To Bribe Senior Government Officials In the Republic of Azerbaijan (July 10, 2009), *available at* http://www.justice.gov/opa/pr/2009/July/09-crm-677.html.

161. Lev L. Dassin, *Second Superseded Indictment, U.S. v. Frederic Bourke, Jr.* U.S. DEPARTMENT OF JUSTICE (May 26, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/05-26-09bourke2nd-supersed-indict.pdf.

162. F. Joseph Warin and Michael S. Diamant, *Use of 'Conscious Avoidance' Doctrine In Frederic Bourke Conviction Expands Corporate Executives' FCPA Exposure*, SECURITIES DOCKET (July 22, 2009), http://www.securitiesdocket.com/2009/07/22/guest-column-use-of-conscious-avoidance-doctrine-in-frederic-bourke-conviction-expands-corporate-executives-fcpa-exposure.

> manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal.[163]

These jury instructions are substantively similar to various pattern jury instructions on knowledge and conscious avoidance.[164] Such an instruction is commonly referenced as the "ostrich instruction."[165]

In the *Bourke* case, the prosecution presented evidence that Azerbaijan's corrupt business environment was notorious and that post-Soviet privatization initiatives were generally known to be fraught with corruption.[166] It further presented expert testimony that the state-owned oil company was Azerbaijan's most valuable asset and likely would not have been privatized without some corrupt incentives to senior Azeri officials.[167] The court admitted this evidence over a defense objection, finding it relevant to the jury's determination of whether it was "probable that Bourke was aware that Azeri officials were being bribed in order to ensure the privatization of SOCAR."[168]

The government also presented evidence that Bourke had failed to conduct adequate due diligence into Viktor Kozeny, the founder of the companies in which he invested, and that Kozeny's background raised several corruption red flags that were directly relevant to Bourke's investment.[169] It is important to note that

163. Jury Charge, U.S. v. Frederic Bourke, Jr., S2 05 Cr. 518 (SAS) (S.D.N.Y. 2009), *available at* http://www.jdsupra.com/post/documentViewer.aspx?fid=987b0954-385d-4bd0-9dc0-019794c415df.

164. *See, e.g.*, Pattern Criminal Jury Instructions For the Courts Of the First Circuit § 2.14, *available at* http://www.med.uscourts.gov/practices/crpji.97nov.pdf; MODEL PENAL CODE § 2.02(7), *available at* http://www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm.

165. Warin and Diamant, *supra* note 162.

166. *Private Investor Convicted For Involvement In Scheme To Bribe Officials In the Republic of Azerbaijan*, STEPTOE & JOHNSON LLP (November 2009), http://www.steptoe.com/publications-6447.html.

167. *Id*.

168. United States v. Viktor Kozeny and Frederic Bourke Jr., 643 F. Supp. 2d. 415, 420 (S.D.N.Y. May 29, 2009).

169. International Law Advisory, *Private Investor Frederic Bourke Sentenced To Prison and $1 Million Fine*, STEPTOE & Johnson LLP (Nov. 16, 2009), http://www.steptoe.com/publications-6475.html

much of the government's evidence pointed only to general knowledge and did not purport to conclusively establish that Bourke himself was aware of these facts.[170]

While the *Bourke* case presents the first FCPA conviction in which the government invoked the conscious avoidance doctrine to support an argument that the defendant must have known about corrupt activities, this theory is not novel. Indeed, several similar cases have ended with negotiated resolutions. In one such case, an executive for a defense contractor entered into a marketing agreement authorizing payments to a relative of a foreign official, despite the fact that he was not aware of any actual services provided by the payee and that he believed there was a high probability that the payments were made in exchange for obtaining government contracts.[171] In that case, the defendant admitted that he had deliberately avoided knowledge about the true purpose of the payments and pled guilty to violating the FCPA.[172] In another case, an oil-and-gas software company resolved criminal charges with the DOJ on the understanding that the company had retained a consultant recommended by a foreign government official, failed to conduct any due diligence into the consultant, failed to enter a written agreement with the consultant for the services, and paid a commission to the consultant without verifying that any services were actually provided.[173] Pursuant to its agreement with the DOJ, the company acknowledged this conduct and agreed to a $1 million penalty along with various other requirements.[174]

The lesson from these conscious avoidance cases in the FCPA context is that if a defendant suspects that a circumstance may exist, if there is a high probability that the circumstance does exist, and if the defendant elects not to find out whether the circumstance exists, knowledge by the defendant may thereby be established. This principle of superior responsibility should be exported to the

170. *Id*.

171. Press Release, Department of Justice, 08-394, Former Pacific Consolidated Industries Executive Pleads Guilty (May 8, 2008), *available at* http://www.justice.gov/opa/pr/2008/May/08-crm-394.html.

172. *Id*.

173. Press Release, Department of Justice, 07-751, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.justice.gov/opa/pr/2007/September/07_crm_751.html

174. *Id.*

context of law of war cases.

C. The Foreign Corrupt Practices Act Has Been Highly Effective In Transforming Corporate Culture and Command Climate

For most of the three decades after the FCPA's enactment, enforcement was weak and actions were relatively rare. But over the past several years, the U.S. government has focused with increasing vigor on investigating and prosecuting violations of the FCPA.[175] This upward trend appears set to continue, as the DOJ recently confirmed that at least 120 additional companies are under investigation for violation of the FCPA.[176] The explosive growth in new FCPA cases has been successful in inducing vast changes in the corporate culture. Faced with the heightened prospect of enforcement actions, companies are now scrambling to establish effective corporate compliance programs, to instill a proper "tone at the top,"[177] to take the initiative in investigating potential violations,[178] and in some cases to voluntarily self-report any corrupt activities that are discovered.[179] And as further evidence of the effectiveness of a proper command climate, organizations that stress the importance of compliance by implementing both ethical guidelines and effective compliance programs have a substantially

175. In 2006, DOJ initiated seven enforcement actions; SEC brought eight. In 2007, DOJ filed eighteen actions, and SEC filed twenty. In 2008, DOJ brought twenty actions; SEC filed thirteen. And in 2009, DOJ had initiated twenty-six actions, with fourteen more brought by the SEC. *See 2009 Year-End FCPA Update*, *supra* note 154.

176. Lanny A. Breuer, Assistant Attorney General, Criminal Division, Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf.

177. This term, "tone at the top," is ubiquitous in discussions about FCPA compliance, and it is directly analogous to command climate in the context of the military. See *supra* Part IV of this article for further discussion of this parallel.

178. Companies hire outside experts to perform these internal investigations with increasing regularity. The substantial cost of such an investigation is often viewed as a more palatable burden than a potentially devastating prosecution.

179. The number of companies making voluntary self-disclosures to the U.S government has risen in lockstep with the increase in FCPA prosecutions. *See* PRICEWATERHOUSECOOPERS, *Corruption Crackdown*, *supra*, note 140, at 12.

lower incidence of violations.[180]

Over the last three years, FCPA prosecutions against individuals have more than doubled.[181] The recent increase in individual FCPA prosecutions is part of a deliberate strategy by the U.S. government to deter future violations and to incentivize compliance with the law. In the words of the government's top FCPA enforcer:

The number of individual prosecutions has risen—and that's not an accident. This has been quite intentional on the part of the department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.[182]

Perhaps more than anything else, these well-publicized prosecutions against individuals—the vast majority of whom are senior executives—have brought compliance issues into corporate boardrooms across America and beyond.[183]

The government's strategy to make examples of individual executives is part of a larger campaign by the U.S. government to use FCPA enforcement to deter corruption, put wrongdoers on notice, and ultimately induce the corporate world to embrace a clean business model. By all accounts, this strategy is working.[184] The exponential rise in enforcement actions has been matched by a stratospheric increase in the size of monetary fines extracted from

180. *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme*, PRICEWATERHOUSECOOPERS (January 2008), http://www.pwc.com/en_GX/gx/forensic-accounting-dispute-consulting-services/pdf/pwc-confronting-corruption.pdf; *see also*, 2007 Survey, *4th Biennial Global Economic Crime Survey*, *supra*, note 142, at 11-12.

181. PRICEWATERHOUSECOOPERS, *Corruption Crackdown*, *supra* note 140, at 9.

182. *Mendelsohn Says Criminal Bribery Prosecutions Doubled In 2007*, 22 CORPORATE CRIME REPORTER 36(1) (Sept. 16, 2008), http://www.corporatecrimereporter.com/mendelsohn091608.htm.

183. *See, e.g.*, PRICEWATERHOUSECOOPERS, *Corruption Crackdown*, *supra* note 140, at 9.

184. For instance, in one poll conducted by an FCPA consulting company, 59% of corporate professionals from a variety of sectors predicted that the recent increase in governmental enforcement would deter future FCPA violations. *Deloitte Online Poll: Most Respondents Expect FCPA Violations to Increase in Coming Years*, DELOITTE (Sept. 14, 2009), http://www.deloitte.com/view/en_US/us/Services/Financial-Advisory-Services/Foreign-Corrupt-Practices-Act-Financial-Advisory/2ac94a5e7c8a3210VgnVCM200000bb42f00aRCRD.htm..

those who violate the law.[185] And violators are subject not only to very severe financial penalties, but also to stringent—and expensive—measures designed to require the implementation of new clean business practices and a functional compliance program.[186] Another common requirement is disgorgement of profits.[187] According to one study, the average settlement cost of an FCPA action in the United States was $13.5 million.[188] Apart from these direct economic penalties for noncompliance, but bearing a similar chilling effect, is the stigma that now attaches to FCPA violations.[189] Awareness of and concern over corruption and bribery risks have increased with heightened FCPA enforcement in recent years.[190] And even in actions against corporations, individual executives may suffer—for instance, the careers of those deemed insufficiently attuned to compliance issues

185. As late as 2007, the largest criminal fine in FCPA history was $26 million. Press Release, Department of Justice 07-075 (Feb. 6, 2007), *available at* http://www.justice.gov/opa/pr/2007/February/07_crm_075.html. The largest total (combined criminal and civil) fine by that year was $44 million. Press Release, Department of Justice 07-296 (Apr. 26, 2007), *available at* http://www.justice.gov/opa/pr/2007/April/07_crm_296.html. But in December 2008, Siemens A.G. pled guilty to FCPA violations and agreed to pay combined penalties totaling $1.6 billion. Press Release, Department of Justice 08-1105 (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html..

186. In many cases, these measures include retention, at the company's significant expense, of a long-term compliance monitor or other independent consultant to assist in establishing, implementing, and overseeing new policies and procedures; an effective training program; a functional system of prevention, detection, and discipline related to wrongdoing; and other features of a credible compliance function.

187. *See* PRICEWATERHOUSECOOPERS, *Corruption Crackdown*, *supra* note 140.

188. This figure, which was determined in a 2007 study, did not take into account the massive 2008 Siemens settlement cost or other increasingly expensive recent settlements; *see also* PRICEWATERHOUSECOOPERS, *4th Biennial Global Economic Crime Survey*, *supra* note 142.

189. One study found that 55% of senior executives see reputational damage as the most significant risk posed by corruption. PRICEWATERHOUSECOOPERS, *Confronting Corruption*, *supra* note 179, at 9. Reputational effects can include damage to the corporate brand, and may precipitate a drop in share price, impaired investor relations, and other negative consequences. PRICEWATERHOUSECOOPERS, *4th Biennial Global Economic Crime Survey*, *supra*, note 142, at 10.

190. PRICEWATERHOUSECOOPERS, *4th Biennial Global Economic Crime Survey*, *supra* note 142, at 5-6.

are often sacrificed for the corporate good.[191]

In sum, the deterrent effects of the new wave of FCPA enforcement have precipitated nothing less than a monumental change in the corporate-compliance landscape. In just a few short years, anti-corruption compliance has risen from a seldom-discussed topic straight to the top of corporate agendas in boardrooms across America and beyond. The deterrent effects are due in no small part to the prospect of individual punishment for corporate executives. By and large, corporations and executives alike have embraced the challenge of instituting compliance reforms, and many are proactively applying significant resources to this area. Perhaps most significantly, in the current environment, it is virtually universally recognized that a proper "tone at the top," or command climate, is an essential component of a successful compliance program.

In the context of the FCPA, the fundamental principles underlying the concept of command responsibility have proven both effective and workable under American law. The FCPA's successes in holding superiors accountable for misconduct and, in thereby creating functional deterrents to future misconduct, strongly support the argument for an American military doctrine of command responsibility.

VII. CONCLUSION

A sound doctrine of command responsibility applicable to American commanders is essential to creating a culture of compliance with the laws of war from the top on down. A command climate of zero tolerance for law of war violations, where commanders have strong and targeted incentives to prevent, detect, and punish abuses, would do more than achieve the laudable goal of meeting our obligations under international law. It would also strengthen our military organization and better enable the military to accomplish its missions.

To be sure, a culture of compliance with the law of war is not

191. For example, in response to the corruption scandal at Siemens, several top executives stepped down while denying any personal involvement in the crisis, citing the company's need for a fresh start under new leadership. G. Thomas Sims, *Siemens Chief Says He Will Step Down*, N.Y. TIMES (Apr. 26, 2007), http://www.nytimes.com/2007/04/26/business/worldbusiness/26siemens.html.

easily constructed. Even apart from law of war obligations, military officers bear a heavy burden. They are required to make hard, often instantaneous, decisions, knowing that those entrusted to their care may pay the price in blood. All officers are trained to place a high value on the welfare of their troops, but to prioritize accomplishment of the mission above even that weighty consideration. And to operate in compliance with the law of war, commanders must at times consciously elect to place their troops at even more risk in order to uphold ideals that seem quite abstract when compared with the lives of the men and women under their command. The need to clearly and consistently elevate mission accomplishment above the lives of one's soldiers and Marines is precisely why most people are not suited to be military officers. Commanders must be given a legal motivation to embrace the hard fact that compliance with the law of war furthers accomplishment of the larger mission. Only when commanders adopt this view can their subordinates, who are also trained to put duty first, be expected to follow suit.

The civilian principle of holding executives accountable for the criminal conduct of their subordinates under the FCPA can serve as an American model for an effective doctrine of command responsibility. Certainly it is no less appropriate to hold military commanders liable for the crimes of their troops than to do so for civilian executives. The open question is whether the internationally accepted—and American-promoted—standard of negligence should prevail for military commanders, who have a far higher degree of command and control over their subordinates than do their civilian counterparts in the corporate world, or whether the FCPA's conscious-avoidance standard is more appropriate. While the standard for a command responsibility doctrine applicable to U.S. commanders may be debatable, the propriety of the doctrine itself—as required by international law and as applied even in the civilian sector—is not.