# MY LAI: AN AMERICAN TRAGEDY

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"**Only the United States of America would not cover it up, would prosecute it at the cost of losing a war, and would use it so forcefully to prevent future incidents."**[2]

**"No My Lais in this Division – Do you hear me!"**[3]

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A reflective, evaluative essay such as this is formulated over time and is built in defined stages. Early thoughts were first gathered in the mid-1970s for a presentation to the Yale Club of Northern California in San Francisco. Some ten years later these early ideas produced a "work horse" teaching article - a war college paper and a law review article. My Lai is both an event and a problem. One cannot discuss the problem of professional conduct on the battlefield without also discussing the tragic events of My Lai. Putting ideas into perspective came the "old fashioned way" - teaching and working with bright students on the legal and ethical bases for the profession of arms. Ideas are challenged, shaped, and put in perspective. Repeated presentations give one confidence. Rarely does one have the privilege of putting academic ideas into practice as a legal advisor to a senior combat commander in wartime. Perspective, once again, was possible in a legal academic setting with the passage of time and with an opportunity such as this. This essay is an effort to record in a short, readable, non-technical style the "history" - from my point of view - of the My Lai Tragedy.

[2] Essence of introductory remarks given by Belgium Host prior to a presentation entitled "Difficulties in Prosecuting Battlefield Offenses: My Lai Example" during a Congress of the International Society for Military Law and The Law of War in Brussels, Belgium on May 31, 1991.

[3] Order of the First Armored Division Commander, then Major General Ronald Griffith, to his assembled Brigade Commanders just prior to battle in the Gulf War. Reported by his Staff Judge

## INTRODUCTION

Appropriate timing is critical in profitable discussion of volatile, contentious, and emotional issues. Discussion of the My Lai Tragedy is now timely. The passage of some thirty years has allowed the passions associated with the Vietnam Era to cool. Movement into history of the My Lai Incident and its surrounding legal, political, and ethical debate has begun. Reflection becomes less meaningless self-flagellation, often to make a political point, and more of an appropriate use of the lessons of history to prevent future misconduct.

This essay is not a definitive treatment of the My Lai Incident which, obviously, is prohibited by space limitations. Neither is it the function of this essay to be purely legal or technical, for historical lessons from famous trials certainly are not all legal. It is important to examine what actually transpired especially since, following the conclusion of all of the legal proceedings, the Government is no longer bound by its ethical obligation to present its material only in open court.[4] It is appropriate to reexamine the significant legal problems surrounding the My Lai Prosecution and to ascertain if current legal rules are satisfactory or have been corrected.[5] Of even greater importance are the lessons learned from this horrible battlefield tragedy – how has institutional behavior been modified?[6] Lastly, a brief look at the future treatment of the My Lai Tragedy is instructive.[7] The ultimate purpose for and thesis of this essay

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Advocate, then Lieutenant Colonel John D. Altenburg, Jr.

[4] *See* discussion *infra* Part I, What Happened?

[5] *See* discussion *infra* Part II, Unique Significant Problems.

[6] *See* discussion *infra* Part III, Lessons Learned.

[7] *See* discussion *infra* Part IV, The Future: Remembering My Lai.

is to record how this tragic event has been "used" to undergird responsible command and to prevent future battlefield misconduct.

Normally the function of a criminal trial is to resolve individual guilt. That singular task is in itself quite difficult in well-publicized cases. When military personnel are tried for misconduct on the battlefield, there is often a mixture of individual and corporate responsibility. The individual may be guilty, but equal or greater responsibility may rest with society in the selection, training, leadership and mission given to the alleged lawbreaker. Separation of individual and corporate responsibility becomes almost impossible. Matters are compounded even further when there is a perception that national honor and political cause are at stake. Individual criminal accountability may be lost in such a volatile mixture.

When such battlefield misconduct occurs, the prosecutor's function is often far greater than merely bringing a law violator to the bar of justice. It can be quite politically costly for the Government to expose battlefield misconduct and to attempt to hold accountable the perpetrators. In the development and evaluation of criminal cases, the normal and routine becomes complicated. Fact gathering – the essential basis of a criminal trial – is often removed in both time and distance from the event. Rarely does a prosecutor of war-related crime have the luxury of routine contemporary police investigatory and forensic expertise. Even gathering the basic facts may be complicated by security concerns that can even prevent a visit to the "crime scene." Further, basic facts may be suspect in the minds of many if they come from "enemy" lips. Absence of the normal, solid, factual basis can lead to unfounded and unfocused public speculation and can fuel passions destructive to a reasoned judicial process. Yet, if a trial of battlefield misconduct becomes notorious, the Government, by the very act of prosecution,

publicly labels that conduct unacceptable and criminal. Publicity, flowing from the very act of prosecution, fuels the engines of prevention that is the chief goal of prosecution.

My Lai is more than a battlefield tragedy. My Lai is more than the subject of several well publicized criminal trials. The very word "My Lai" is synonymous with battlefield atrocity. Within the context of the Vietnam Era, it may well have been the turning point in an unpopular war and may well be a high water mark in the "cultural civil war" that befell our country in the late 1960s and early 1970s. In countries that respect the Rule of Law, incidents such as My Lai – with their attendant unique and volatile legal, political, and social baggage – invariably end up in the courtroom. Yet a trial – with individual rights and liberties at stake and constrained by the rules of evidence – may not be the ideal forum for authoritatively disposing of such battlefield misconduct. Accordingly, in reflecting on such incidents, the focus should be broader than courtroom issues and must be more interdisciplinarily addressed to historic lessons of consequence.

Why examine My Lai? Such questions are often best answered by specifying what should not be included. An examination of My Lai should not be an exercise in national self-flagellation. One of the biggest hindrances to a productive examination of My Lai was the unreasoned anti-United States rhetoric coming from audiences in both this country and abroad. Most discussions of this type took issue with the United States Government in general, or with its foreign or military policy in particular, and used My Lai merely as the vehicle for criticism. The division in our own country, driven by political beliefs, saw one side which was too quick to criticize and another side that would refuse to admit that there was a problem or to even enter into the discussion.[8] Yet, honest, self-critical examination of such incidents is needed so that our

[8] Professor Douglas Pike, Director of Indochina Studies at the University of California-

country – and indeed other countries – can learn from the past to prevent in the future. As every teacher knows, all examples designed to influence future conduct do not have to be "good." Indeed, My Lai is so horrible and had such an impact on the world's social conscience that it became an immensely important example of how *not* to conduct oneself on the battlefield. As will be noted later,[9] My Lai has caused a fundamental reexamination in the teaching of battlefield fundamentals, has provided both the reason for and the contents of discussions surrounding professional conduct on the battlefield, and has been the motivation for new procedures to insure responsible command. Indeed if the preventive prosecutorial function is to

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Berkeley, has noted that the Vietnam War is "a prison of competing perceptions" with total lack of historic agreement. His articulation of these competing perceptions regarding the Rule of Law during that conflict is helpful in an analysis of the ideological division in our country regarding My Lai. Professor Pike writes:

> One main perception is "unspeakable horror." It holds the Vietnam War was the most horrible, brutal, atrocity-ridden war in recent history. It was primitive savagery augmented by modern technology. War criminality, by the Americans and South Vietnamese, was commonplace. My Lai was the rule not the exception. Nor were the communists without blame, witness the Hue massacre or the systemic assassination of village leaders which amounted to genocide. Suffering was universal and inflicted on far more innocents than in previous wars.
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> [The] [s]econd major perception is: "War is War." This thesis argues that while a humane war is a contradiction of terms (even oxymoronic), the Vietnam War (certainly as far as the Americans were concerned) was more carefully conducted than any earlier war. Rules of engagement and other restrictions on military actions were enforced for the first time really in any war. Atrocities were less common, only better known. The communists, for their part, were not deliberately bloody handed. Much of their brutality stemmed from the kind of a war they conducted: a people's war in which people are both chief target and primary weapon. The Americans would have preferred war out and away from the population's center (in outer space even) but the communists forced a war over and around the people. This was the war nightly viewed on American television and left the impression it was more brutal than other wars.

Douglas Pike, Case Studies in Non-Compliance: The Scope of the Problem (Vietnam War), Prepared Remarks on Panel at the Conference on Deterring Humanitarian Law Violations 3-4 (Nov. 4-5, 1994) (on file with author).

[9] *See* discussion *infra* Part III, Lessons Learned.

continue, My Lai must not only be remembered, but it must continually be "used" to prevent future incidents.

## PART I: WHAT HAPPENED?

No one will ever know exactly what happened at My Lai on March 16, 1968. The initial cover-up within the Americal Division; the lack of a timely investigation; the absence of physical forensic evidence; the disparity in culture, education, and politics between victims and perpetrators; and the pollution of politics, cause, and national honor make definitive recreation of events impossible. The sources of facts are numerous: news media accounts,[10] journalistic books,[11] the Peers Report (an official investigation),[12] Congressional testimony,[13] CID (Police)

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[10] Numerous articles appeared daily in most major newspapers. Rarely was the immediate and the sensational penetrated. As might be expected, the best reporting came from established, respected newspapers with experienced, knowledgeable correspondents - The New York Times's Homer Bigart, *see, e.g.*, Homer Bigart, *Prosecution Says That Medina 'Chose Not to Intervene a* [sic] *Mylai* [sic], N.Y. TIMES, Aug. 17, 1971, at - , and The Los Angeles Times's Kenneth Reich, *see, e.g.*, Kenneth Reich, *My Lai - Was Justice Carried Out?*, L.A. TIMES, Jan 1, 1972, at A1. Indeed, to preserve contemporary history, the Medina Prosecutors gave an extensive interview with Kenneth Reich. Kenneth Reich, *Charges Valid, They Insist: Medina Prosecutors Shrug Off Criticism and Defend Tactics*, L.A. TIMES, Sept. 26, 1971 at A1.

[11] *See, e.g.*, SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1970); RICHARD HAMMER, ONE MORNING IN THE WAR: THE TRAGEDY AT SON MY (1970). Statements by witnesses to journalists and authors were often at great variance with statements given to prosecutorial officials and under oath at trial. *See generally* FACING MY LAI: MOVING BEYOND THE MASSACRE (David L. Anderson ed. 1998). This book is a record of a conference held at Tulane University in December of 1994. It is an excellent example of value of academia bringing together conflicting ideas. Its contents are as diverse as the political feelings at the time of the My Lai trials. Importantly, this was one of the first opportunities for the Government's story to be heard. Significantly, I believe, as a result of this book and conference, National Public Radio discussed Hugh Thompson's heroic actions and not Lieutenant William Calley's crimes on the succeeding My Lai Anniversaries.

[12] William R. Peers, *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident* (Dept. of Army 1970). *See also* William R. Peers, *The My*

Reports,[14] and trial testimony.[15] Each of these sources has flaws. Yet, there are common facts that are undeniable and largely undisputed.[16] The basic facts of My Lai are thus not in serious dispute.[17]

Charlie Company of Task Force Barker, a part of the Americal Division, conducted operations in Quang Ngai Province in the Republic of South Vietnam in March of 1968. The My Lai Operation was scheduled for March 16th. The area in question, known to the Americans as "Pinkville", was a "hotbed" of enemy activity. Charlie Company, led by Captain Ernest Medina and having Lieutenant William Calley as one of its Platoon Leaders, had been operating in this area and had received several casualties from mines and booby-traps, some undoubtedly

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*Lai Inquiry* (1979); Stanley R. Resor (Secretary of the Army), *Official U.S. Report on My Lai Investigation*, U.S. NEWS & WORLD REP., Dec. 8, 1969, at 78-79.

[13] *Investigation of the My Lai Incident: Hearings Before the Armed Services Investigating Subcomm. of the House Comm. on Armed Services*, 91st Cong., 2d Sess., Under Authority of H.R. Res. 105. (H.A.S.C. 94-47).

[14] Each subject of investigation would have a Criminal Investigation Command (Police) report. For example, the report of Captain Ernest Medina: CID Report (1st M P Detachment (CI), USACIDA, DA, Washington, D.C. 20315) Medina Ernest Lou, 10 Sep 1970, Report No. 70-CID011-00013.

[15] The Clerk of Court, U.S. Army Judiciary, is the custodian of Army Courts-Martial records of trial dating back to 1939. Requests for these records or questions concerning Army Courts-Martial should be addressed to Clerk of Court (currently Joseph A. Neurauter), U.S. Army Judiciary, 901 North Stuart Street, Suite 1200, Arlington, VA 22203. The telephone number is 703-588-7908; the facsimile (FAX) number is 703-696-8777.

[16] Perhaps the most authoritative statement of facts comes from the official Government citation awarding the Soldier's Medal to Hugh Thompson. *See* text *infra* Part IV, The Future: Remembering My Lai.

[17] *See generally* Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 156-59 (1993); William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 12-14 (1982).

planted by civilian Viet Cong sympathizers.

The night before the operation, unfortunately after an emotional memorial service for a respected company casualty, Captain Medina briefed his company on the upcoming operation. This operation was unusual because intelligence indicators pointed, erroneously it turned out, to the presence of a Viet Cong Battalion in the village. A significant engagement was expected. It is widely agreed that Captain Medina gave his Company quite a pep talk. He ordered his men to destroy all crops, to kill all livestock, to burn all houses, and to pollute the water wells of the village. There is, however, an important disagreement concerning his reported orders to kill non-combatants.[18] Significantly, he gave no instructions for their segregation and safeguarding.

After an artillery preparation, Charlie Company was helicoptered into the area at 0730 and began a sweep through the village. Captain Medina remained on the outskirts of the village so that he could effectively control the operation. For all practical purposes, there was no resistance. During the next three hours, houses were burned, livestock was killed, and women were raped and sexually molested. Groups of villagers were assembled and shot. Especially large groups of bodies were located in a ditch and beside a trail. In short, approximately five hundred non-combatants died.

During this period, Captain Medina remained outside the village, and no evidence placed him at the site of any of the group killings. He gave an order to conserve ammunition at approximately 0830 in the morning. His Vietnamese interpreter begged him to stop the killings. He clearly possessed the ability to communicate with his subordinates, and they with him. When he physically came upon a group of bodies on a trail, he ordered a cease-fire that was obeyed. Only a small portion of the soldiers participated in this misconduct. Yet, those who did

[18] *See* text *infra* Part II, Unique Significant Problems: The "Order."

not participate did not protest or complain. Captain Medina later told interrogators that he lost control of his unit and found out "too late" what took place.[19]

Circling overhead in a helicopter that morning was Warrant Officer Hugh Thompson and his two door gunners, Specialists-Four Larry Colburn and Glenn Andreotta. Puzzlement caused by unusual activity on the ground turned into alarm and outrage as they realized that Vietnamese civilians were being killed. Hugh Thompson heroically landed his helicopter and ordered his door gunners to "cover him" as he confronted Lieutenant Calley. Thompson and his men saved civilians who were in a bunker, carried a wounded child to the hospital, and vigorously protested to their superiors. Their efforts resulted in the issuance of a cease fire order from higher headquarters.[20]

During the late afternoon, when queried by higher headquarters and ordered to return to My Lai, Captain Medina gathered his platoon leaders. During that meeting he asked Lieutenant Calley: "How many was it – 100 – 200?"[21] Unfortunately, the order to return to the village was countermanded, ostensibly for safety reasons. The tragic day ended as horribly as it began. Captain Medina and an intelligence officer, Captain Eugene Kotouc, interrogated Vietnamese prisoners in conjunction with Vietnamese authorities. Captain Medina shot over the head of a Viet Cong suspect to force him to talk. Captain Kotouc threatened other suspects with a knife, cutting off the finger of one suspect. When Captain Kotouc would point symbolically toward

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[19] Polygraph Examination Report, Subject: Medina, Ernest Lou, 25 November 1970, Case Control No. 70-CID011-00013, Robert A. Brisentine, Jr., Examiner, Criminal Records Branch, U.S. Army Investigative Records Repository, Fort Holabird, Maryland 21219, Statement of Robert A. Brisentine, Jr., p.4, ¶ ss.

[20] *See infra* note 93 and accompanying text.

[21] *See* Polygraph Examination Report, *supra* note 19, at ¶ uu.

heaven, the accompanying Vietnamese police would lead the suspect away and shoot him.

Public exposure of the My Lai incident did not take place for over a year. An unusually articulate letter triggered an investigation by a former soldier, Ron Ridenhour, to various governmental officials.[22] Yet, it was only after the Army Inspector General had completed his investigation and had turned the probable criminal offenses over to the Criminal Investigation Command for further criminal investigation and after Lieutenant Calley had been formally charged that journalist Seymour Hersh reported the incident.[23] Contrary to the opinions of many public commentators, the press did not expose the incident or cause the Government to react. The Government merely did its duty and reacted to a credible, but unusually articulate, citizen's complaint.

News media reporting resulted in an instant *cause celebre*. The corroboration of unimaginable allegations and their subsequent investigation riveted America. Pictures of the carnage at My Lai taken by Ronald L. Haeberle, a young Army enlisted reporter during the operation, were published with devastating effect in the December 5, 1969 issue of Life magazine.[24] Time magazine placed Lieutenant Calley on its cover with a bold caption: "The Massacre: Where Does the Guilt Lie?"[25] The evil of what transpired was further graphically illustrated during a CBS in person interview with Paul Meadlo, a soldier who assisted Lieutenant

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[22] *See* William R. Peers, *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident*, Vol. 1, p. 1-7. This letter is a model citizen's complaint. Governmental officials read their mail and listen to "hot lines" to receive leads such as this.

[23] *See* HERSH, *supra* note 11.

[24] *The Massacre at Mylai* [sic], LIFE, Dec. 5, 1969, at 36-45.

[25] *My Lai: An American Tragedy*, TIME, Dec. 5, 1969, at 23-34. *See also Judge Bars Civil Trial For Calley*, ATLANTA J., Sept. 26, 1970, at 20-B.

Calley. Paul Meadlo emotionally confessed to shooting old men, women, children, and babies.[26]

Lengthy investigations, hearings, and trials followed. The Criminal Investigation Command, unaided by today's modern computer technology, gathered witness statements from former soldiers scattered across the United States. These reports were the factual basis for prosecution. Lieutenant General William R. Peers was appointed to conduct an inquiry into the incident and its possible causes. His report is a classic government "White Paper," gathering appropriate background information and making necessary individual and institutional assessments. However, the Peers Report's witness statements were largely unhelpful to the trial lawyers. Compound questions coupled with rambling, unfocused answers that often were not pursued provided little trial ammunition. It should be noted that testimony before the House Armed Services Committee was given a congressional classification and was not released prior to the trials. The contents of this Congressional testimony played no role in the trials. However, the Armed Service Committee's calculated attempt to block release of this testimony and thus sabotage the criminal trials had a profound impact.[27]

The trials that followed were military courts-martial because the accused were soldiers and because the Congress placed "war crimes" exclusively in the military criminal code.[28] Since Congress specifically designed trials by courts-martial to be as similar to criminal trials in

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[26] *See* Calley v. Callaway, 382 F. Supp. 650, 661-62 (M.D. Ga. 1974).

[27] *See* text *infra* Part II, Unique Significant Problems: Interference with the Trial Process.

[28] *See* Memorandum from Robert E. Jordan, III (Army General Counsel) to the Assistant Attorney General (Office of Legal Counsel) (citing *Hearings on the Geneva Conventions for the Protection of War Victims Before the Senate Comm. on Foreign Relations,* 84th Cong., 1st Sess. 24-29, 58-59) (regarding "Trial of Discharged Servicemen for Violation of the Law of War) (on file with author).

civilian federal district courts as possible,[29] the military venue was largely irrelevant to the legal issues involved. "War crimes," in the international law sense, is a technical term. My Lai was not a "war crime" because the victims were not enemy aliens in an occupied territory.[30] Even though not technically "war crimes," what occurred at My Lai clearly fell within the list of crimes specified by Congress in the Uniform Code of Military Justice – murder, assault, rape, and larceny, among others. These were the crimes chosen for prosecution.

There were two chief locations for these courts-martial: trial for the "ground action" occurred primarily at Fort McPherson, Georgia, and the trial for the "cover-up" at Fort Meade, Maryland. Lieutenant Calley was tried at Fort Benning, Georgia, and Sergeant Mitchell was tried at Fort Hood, Texas, before the cases were consolidated. In all, some thirty individuals were accused of "commission and omission." Charges were preferred against sixteen, five were tried, and one (Lt. Calley) was convicted. Charges against twelve others were dismissed prior to trial.[31] This prosecutorial record was abysmal. Yet, in retrospect, as will be seen, what is amazing is not the poor prosecutorial trial record but how far the prosecution was able to progress despite herculean odds.

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[29] "The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code." 10 U.S.C. § 836(a) (1994).

[30] *See generally* Waldemar A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 AKRON L. REV. 43, 48-54 (1972).

[31] *See* Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 160-62 (1993) (accompanying footnotes provide the names of those charged). *See also* GUENTER LEWY, AMERICA IN VIETNAM 362 (1978).

# PART II: UNIQUE SIGNIFICANT PROBLEMS

## A. THE "ORDER."

Passage of time is the enemy of justice. Memories fade and prosecutors are forced to make pressured decisions by statute of limitation deadlines. In the My Lai Incident, there certainly was no absence of witness statements. Yet, reconstructing a battlefield incident some two years after the fact was extremely difficult. Individual involvement could be isolated and ascertained but the bigger problems of "why" the orders were given and the scope of the orders themselves still remained. All of the witnesses indicated that they had received a "pep talk" briefing ordering the company to destroy all crops, kill all livestock, burn all houses and pollute the water wells. In all my military experience before and since, I have never seen or heard of such an order. Obviously with the passage of time, the chief prosecutorial concern and focus was on human life.

Surprisingly, there were no customary instructions for handling civilians who might get in the way. Significantly, most simply declined to participate. Not unexpectedly, only those who participated in the killings said that they received orders to do so. Prosecutors were quite puzzled by the lack of uniformity of the content of the order as it related to the killing of non-combatants, particularly since the theory of prosecution for Captain Medina was that he was guilty as a principle to murder because he issued an order to kill non-combatants. Participating defendants attempted to use the alleged Medina order to kill non-combatants to justify their actions both morally and legally. The public viewed the order as evidence of intentional governmental policy, undoubtedly reasoning that all orders are governmentally directed and sanctioned.

This order dilemma was both resolved and complicated when civilian counsel for Captain

Medina, F. Lee Bailey, requested a polygraph examination. F. Lee Bailey had long been a public supporter of polygraph examinations. The Army, under the leadership of Robert A. Brisentine, Jr., who was recognized as one of the most professional polygraphers in the United States, utilized polygraphs within a system of checks and balances on the equipment itself, on the control questions utilized, and on the examiner's competence and performance. The Government has long relied on their accuracy. In preparation for the Defense-requested polygraph, the Prosecution spent days identifying questions that needed to be answered. Nearly all of our questions in fact were answered in the three days of examination. The results were startling but not totally unexpected.

Captain Medina "was truthful when he denied ordering or intentionally inferring to his company during his briefing of 15 March 1968, that non-combatants be killed at My Lai (4)."[32] Yet, Captain Medina "was not truthful when he denied knowing that his company had killed numerous non-combatants at My Lai (4) prior to 0930, 16 March 1968, and was aware that his company was killing numerous non-combatants at My Lai (4) between the hours of 0730 and 0900, 16 March 1968."[33] Since the killing occurred prior to 1030, he possessed knowledge during a critical period. The Prosecution thus learned from the polygraph examination that Captain Medina had not intentionally ordered this massacre, but that he had known about it, had the ability to stop at least a portion of it, and had done nothing to stop it. In more theoretical criminal law terms, this information moved a key participant from direct to indirect criminal responsibility since he did not order or participate in the killings yet knew about the killings and had both the duty and the ability to prevent them.

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[32] *See* Polygraph Examination Report, *supra* note 19, at 4b.

[33] *See id.*

Captain Medina was thus the pivotal figure between personal responsibility and command responsibility – between ground action and cover-up. I was personally relieved when I learned of these results. I found it difficult to believe that an American officer would issue such an order to kill defenseless non-combatants. The polygraph confirmed the information from the participants themselves about the contents of the order. This information pointed to ill-disciplined troops getting out of control.[34] There is a great deal of difference between out of control troops and troops carrying out calculated government policy.[35]

The Medina Polygraph Examination helped to resolve the pressing factual question regarding official orders pertaining to non-combatants. Yet, this information complicated the legal theory of prosecution for a major participant, Captain Medina, the Company Commander and only surviving "on scene" supervisor.[36] At the trial itself, mechanical results of polygraph examinations were not admissible. The law at the time was quite clear.[37] What was admissible is what a properly warned suspect, in this case Captain Medina, told his polygraph examiner. In

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[34] *See* Homer Bigart, *Medina Said to Have Felt He Lost Control of Troops,* N.Y. TIMES, Aug. 28, 1971; Ken Boswell, *Lost Control of His Men, Medina Says in 'Truth Test,'* ATLANTA J., Aug. 28, 1971, at A1; Ken Boswell, *Polygraph Expert Tells Medina Story,* ATLANTA J., Sept. 9, 1971, at A1.

[35] In a contemporaneous atrocity that occurred within sixty days of My Lai, the North Vietnamese entered Hue with lists of individuals to be arrested. *See* GUENTER LEWY, AMERICAN IN VIETNAM 274-75 (1978). Some six thousand Vietnamese were systematically arrested and killed in this operation. *See id.*

[36] The Battalion Commander, Lieutenant Colonel Frank A. Barker, was killed in action prior to the public disclosure of the My Lai Incident.

[37] The law provided that: "The conclusions based upon or graphically represented by a polygraph test and the conclusions based upon, and the statements of the person interviewed made during, a drug-induced or hypnosis-induced interview are inadmissible in evidence in a trial by court-martial." MANUAL FOR COURTS-MARTIAL (rev. ed. 1969), ¶142e

short, the "charts" are inadmissible but the "pre-test confession" is. In his pre-test statement, Captain Medina stated that at 1025, he issued an order to his platoon leaders to cease killing innocent civilians.[38] This admissible verbal statement is in sharp contrast to the inadmissible polygraph charts which indicated that he knew much earlier – 0730 to 0900 – that his men were killing non-combatants. While the polygraph results may not have been admissible, they made the Government's duty to prosecute quite clear. A graphic case of command responsibility presented itself.[39]

## B. PROSECUTION OF FORMER SERVICEMEN.

One of the more important consequences of a cover-up and complex investigation in a draft-era Army is the "turn-over" of personnel who leave the Army at the expiration of their terms of service. For the My Lai Incident, this meant the loss of jurisdiction for some ninety percent of the members of Captain Medina's Charlie Company – approximately fifteen of whom were deemed suspects.[40] Stated differently, only those who remained in the Army were

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[38] *See* Polygraph Examination Report, *supra* note 19 at 4a, 4b.

[39] *See infra* text Part II(D)(1): Troublesome Legal Standards: Command Criminal Responsibility.

[40] *See* Memorandum from Robert E. Jordan, III (Army General Counsel) to the Assistant Attorney General (Office of Legal Counsel) (regarding "Trial of Discharged Servicemen for Violation of the Law of War) (on file with author); *see also U.S. Plans No Prosecution Of My Lai GIs Now Civilians*, ATLANTA CONSTITUTION, Apr. 9, 1971, at A1.

> The Defense and Justice departments [sic] have abandoned a search for ways to prosecute 15 former servicemen linked by Army investigators to the My Lai massacre . . . ." It has turned out to be, as a practical matter, an insoluble problem at this time," . . . Charges have never been brought against any of the 15 because they already had returned to civilian life . . . . Justice and the Pentagon were stymied in their 18-month effort to find some way of bringing discharged servicemen to trial for Vietnam atrocities primarily because of questions of legal jurisdiction. The Uniform Code of Military Justice applies only to uniformed personnel, and

prosecuted. The practical dictates of the law compelled this result.

Congress responded to the events of World War II and the Nuremberg trials by utilizing the Uniform Code of Military Justice to make the international concepts of war crimes a part of our domestic national criminal law.[41] But Congress envisioned a far more comprehensive jurisdictional basis for courts-martial than the Supreme Court ultimately found constitutionally permissible. By the late 1960's, Supreme Court precedents stated that courts-martial had no jurisdiction over civilians accompanying the armed forces, whether military dependents or employees, or even over former servicemen once they had been discharged.[42] The ramifications of these decisions on a comprehensive system of war crimes enforcement did not become publicly and practically apparent until My Lai. In short, established precedent would seem to preclude prosecution of former servicemen, now civilians, who committed offenses at My Lai.

Eventually, the Department of Justice declined to pursue prosecution. However, there were three jurisdictional bases that could have been chosen. The first was trial by courts-martial of these former servicemen, now civilians, for violation of the Law of War. Since Congress was utilizing its separate authority to punish offenses against the law of nations,[43] the Government

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> the Supreme Court has ruled that a man cannot be court-martialed once he has been discharged from the armed forces. There are no federal laws that would permit trial of such offenses in civilian courts.

*See generally* Waldemar A. Solf, *War Crimes and the Nuremberg Principle (Comment: On the Need for U.S. Implementing Legislation), in* NAT'L SECURITY LAW 359, 407-08 (John Norton Moore et al. eds., 1990).

[41] *See* Jordan, *supra* note 40, at 7-8 ("Hearings on the Geneva Conventions for the Protection of War Victims Before the Senate Committee on Foreign Relations, 84th Cong., 1st Sess. 24-29, 58-59 (1955).").

[42] *See* Solf, *supra* note 40, at 407 n. 200.

[43] "To define and punish Piracies and Felonies committed on the high Seas, and Offences

could argue that war crimes are simply unique and differ from other military offenses. The international obligation to prosecute war crimes further distinguishes this basis of courts-martial jurisdiction from the Supreme Court precedent forbidding prosecution of former servicemen for more normal violations of the Uniform Code of Military Justice.

A second possibility was trial by a military commission.[44] Historically, military commissions were utilized for extraordinary problems. In establishing military commissions, the President is given flexibility in the choice of both the forum and the rules of evidence. This flexibility could be utilized to create a forum for the trial of existing offenses that would preserve the rights of a defendant. Lack of recent usage and clouded, unsavory historical precedent made this choice particularly unattractive. For example, Abraham Lincoln in the Civil War draconianly used such commissions to control Indiana citizens of questionable loyalty to the federal government,[45] and the United States used repressive military authority to control the Japanese population in the United States during World War II.[46]

A third method, arguably the most attractive, amounted to an *ad hoc* but rational deviation – trial in a federal district court for federal offenses previously made criminal in the Uniform Code of Military Justice. Because only the forum would change and because such a

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against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

[44] A military commission was used for violation of the law of war in the wartime prosecution in the United States of German saboteurs despite the claim of one of the defendants to be an American citizen. *See Ex parte* Quirin, 317 U.S. 1 (1942).

[45] *See Ex parte* Milligan, 71 U.S. 2 (1866) (holding that, when civilian courts are open and functioning, martial law cannot be applied to deprive citizens of the right to trial by jury in a civilian forum).

[46] *See* Korematsu v. Unites States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

change arguably would not be prejudicial, this *ad hoc* forum creativity would be constitutionally permissible.[47] The unattractiveness of these three options is apparent, as endless litigation would undoubtedly result. Not unsurprisingly, discharged servicemen who committed offenses at My Lai were not prosecuted.

An important footnote to the problem of jurisdiction over former service personnel who have committed war crimes must be added. Political will and consensus to change the law came recently in 1996 when the Government feared that United States citizens who had participated in war crimes in the former Yugoslavia might escape justice.[48] The United States was forced to confront the problem and to make clear that violations of the law of war can be tried in federal district courts. From my point of view, one of the major legal problems so apparent in the My Lai trials has been successfully resolved.

## C. INTERFERENCE WITH THE TRIAL PROCESS

Public interest in judicial resolution of criminal allegations is essential to a healthy democracy. However, justice is bruised when it must be dispensed in a "goldfish bowl,"

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[47] *See generally* Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

[48] *See* War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West Supp. 1999).

> War Crimes.
>
> (a) Offense. - Whoever, whether inside or outside the United States, commits a war crime, . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
>
> (b) Circumstances. -- The circumstances . . . are that the person committing such breach or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . . .

*Id.*

especially in an age of thirty-second television sound bites that convey much emotion and little substance. As noted previously, justice is more difficult when national honor and cause are at stake.

Under normal circumstances, a prosecutor's strongest ally is the civic virtue that witnesses have a duty to come forward and tell the truth. Unfortunately, such was not the case in My Lai. Most citizens simply wanted the problem to go away. Witnesses soon learned that all they had to do was to say that they "could not remember" and they would avoid embarrassment and controversy. In fact, public peer pressure seemed to be on the side of non-cooperation. The inability to obtain information meant that the Government was foreclosed from determining the extent of the tragedy. Witnesses progressively remembered less and less. Lawyers even advised their witness clients to avoid process, leave the country, or reject immunity because of possible prosecution by an international tribunal.

Governmental officials were less than enthusiastic. Although there were hints that the cases should not be prosecuted, the Prosecution Team was unaware of any overt official hostility. From our point of view, most of the difficulty came after the public outcry following the conviction of Lieutenant Calley. President Nixon's precipitous intervention was countered by an articulate, courageous, respectful military prosecutor, Captain Aubrey Daniel.[49] More

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[49] In an editorial preceding the excerpt of Captain Aubrey M. Daniel's (the Prosecutor in the *Calley* case) letter to President Nixon, Life magazine commented:

> The furor over the Calley verdict was in its way almost as appalling as Mylai [sic] itself, and President Nixon's intervention did not improve matters.
>
> As Telford Taylor wrote in LIFE last week, the verdict was harsh, but acquittal would have been a disaster: here was a responsible officer, not even in the position of being fired upon, who callously mowed down women and children. The sympathy that welled up across the nation was in large part grounded on the notion that Calley was, if not singled out (after all, MyLai [sic] is a low point, even in this cruel war, for avoidable cruelty), being made the scape goat. Others above him were lightly rebuked, or charges against them

troublesome to us was the failure to move Lieutenant Calley immediately to Fort Leavenworth,

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> dismissed. Besides, wasn't Calley, like everyone else in the armed forces, fighting a ruthless enemy?
>
> Such feelings are understandable, but sympathy did not stop here. For some of the doves, Calley was merely a cog in a machine gone mad; everything about the war is wrong, and in the words of a distinguished Washington clergyman: "Calley is all of us. He is every single citizen in our graceless land." On that line of reasoning, responsibility is everyone's and therefore no one's.
>
> Perhaps this kind of masochism, this increasing feeling of national shame and revulsion at the war, helped generate that other excessive response in so many Americans: the sense that Lieutenant Calley was merely doing his duty, a wronged patriot, perhaps even a hero, for whom flags should be lowered and folk ballads sung. George Wallace rushed to make him an honorary lieutenant colonel in the Alabama National Guard. Not to be outdone, President Nixon freed Calley from the stockade while his lawyers appealed his case and was cheered for it in Congress (several of the Democratic presidential aspirants in the Senate were not exactly profiles in courage either).
>
> But this was not to be the President's only intervention. In San Clemente, the press was summoned to be told that whatever course the military appeals took, the President would personally review the case finally in a "nonlegal, nontechnical" fashion. Since the President had such authority anyway, calling it to everybody's attention seemed a presidential play to the political constituency Nixon so often cultivates, and earned an eloquent rebuke . . . from Captain Aubrey M. Daniel III, who prosecuted Calley. To the officers who must conscientiously pass on Calley's case on appeal, the implication was clear that if they didn't mitigate the lieutenant's life sentence, the President would. In a President who as a lawyer so often speaks out for law and order, in a Commander-in-Chief who should be concerned with the calm, orderly processes of the Uniform Code of Military Justice, Nixon's action was reckless and dismaying.

Excerpts of the Daniel letter articulate the ramifications of such intervention:

> [How] shocking it is if so many people across this nation have failed to see the moral issue which was involved in the trial of Lieutenant Calley – that it is unlawful for an American soldier to summarily execute unarmed and unresisting men, women, children and babies.
>
> But how much more appalling it is to see so many of the political leaders of the nation who have failed to see the moral issue or, having seen it, compromise it for political motive in the face of apparent public displeasure with the verdict . . . . I have been particularly shocked and dismayed at your decision to intervene in these proceedings in the midst of the public clamor . . . .
>
> Your intervention has, in my opinion, damaged the military judicial system and lessened any respect it may have gained as a result of the proceedings . . . .
>
> For this nation to condone the acts of Lieutenant Calley is to make us no better than our enemies and make any pleas by this nation for the humane treatment of our own prisoners meaningless.

Editorial, *Lieutenant Calley and the President*, LIFE, Apr. 16, 1971, at 40. *See also Calley Prosecutor Rips Intervention by Nixon*, ATLANTA CONSTITUTION, Apr. 7, 1971, at A1.

Kansas, where the Government could utilize the more conservative and favorable *habeas corpus* precedent for the collateral attack in federal court which we were convinced would, and which did in fact, follow.[50]

But, by far the most serious interference came from the military's Congressional "friends." Representatives F. Edward Hebert and L. Mendel Rivers of the House Armed Services Committee decided that prosecution of the events at My Lai was not in the national interest. Having reached that conclusion, they calculatingly used their considerable power to sabotage the trials. Their plan was technical, simple, and almost effective. They held hearings (calling all the necessary prosecution witnesses), placed a congressional security classification on this testimony, and refused to release it. Despite vigorous and varied protests,[51] Congress

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[50] The lengthy and tortured collateral attack process is well articulated by Circuit Judge Ainsworth in *Calley v. Callaway*, 519 F.2d 184, 190-91 (5th Cir. 1975), *cert. denied sub nom.* Calley v. Huffman, 425 U.S. 911 (1976):

> On February 11, 1974, Calley filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia against the Secretary of the Army and the Commanding General, Fort Benning, Georgia. At that time, the district court enjoined respondents from changing the place of Calley's custody or increasing the conditions of his confinement. On February 27, 1974, the district court ordered that Calley be released on bail pending his habeas corpus application. On June 13, 1974, this Court reversed the district court's orders, returning Calley to the Army's custody. *Calley v. Callaway*, 5 Cir., 1974, 496 F.2d 701. On September 25, 1974, District Judge Elliott granted Calley's petition for a writ of habeas corpus and ordered his immediate release. The Army appealed and Calley cross-appealed. At the Army's request a single judge of this Court granted a temporary stay of the district judge's order of immediate release. This Court subsequently met *en banc*, upheld the release of Calley pending appeal, and ordered *en banc* consideration of the case. We reverse the district court's order granting a writ of habeas corpus and reinstate the judgment of the court-martial.

519 F.2d at 190-91 (internal citation omitted).

[51] Secretary of the Army Stanley R. Resor led a vigorous protest. Secretary Resor's and other similar protests are documented in TRENT ANGERS, THE FORGOTTEN HERO OF MY LAI: THE HUGH THOMPSON STORY 155-76 (Acadian House 1999). Secretary Resor anticipated the Committee's plan and clearly warned of its consequences:

> While it may theoretically be possible for the Committee to interview such witnesses without prejudicing prosecutions, there are a number of potential pitfalls in such a course of action. Is the Committee prepared to make available, if the military judge or other appropriate court so requires, complete transcripts of the testimony of witnesses which appear before it? In applying the so-called Jencks Act, 18 U.S.C. § 3500, and provisions of the Uniform Code of Military Justice and Manual for Courts-Martial relating to discovery, it is possible that such an order will be issued. Statements will undoubtedly have to be produced if the conclusion is reached that statements to the Committee or to the Committee staff constitute statements to "an agent of the Government" within the meaning of 18 U.S.C. § 3500(e)(2). Unless the cooperation of the Committee on this point is assured, a mistrial could result.

Letter from Stanley R. Resor, Secretary of the Army, to Honorable F. Edward Hebert, Chairman, Special Subcommittee - My Lai, Committee on Armed Services 3 (Jan. 6, 1970) (copy on file with author).

As matters developed, many members of Congress became appalled. Eighteen members of Congress wrote to Mr. Hebert "urg[ing] that your Committee release the transcript from the hearings on the Mylai (sic) incident." These congressmen stated:

> It would be grossly harmful not only to these defendants . . . their army careers and reputations, but to the honor of the United States, if the public believed that a Congressional Committee was intentionally withholding evidence so as to whitewash an alleged horrible violation of the rules of law which govern even in war. The defendants were and are entitled to a presumption of innocence; the public is entitled to a full disclosure of the facts.

Letter from Donald M. Fraser, Jonathan B. Bingham, Shirley Chisholm, Phillip Burton, Benjamin S. Rosenthal, Michael Harrington, Charles C. Diggs, Jr., Edward I. Koch, Frank J. Brasco, Allard K. Lowenstein, Richard L. Ottinger, John Conyers, Jr., William F. Ryan, James H. Scheuer, Don Edwards, Louis Stokes, George Brown, and Thomas L. Ashley, members of Congress, to Honorable R. Edward Hebert, Chairman, House Armed Services Committee, Subcommittee #2, at 1 (Nov. 24, 1970) (copy on file with author).

A more scholarly letter by Congressman (later Professor, Federal Court of Appeals Chief Judge, and Counsel to the President) Abner J. Mikva followed. His three and one-half page legal letter concluded:

> my review of the relevant cases and statutory provisions leave me more convinced than before that the Committee's decision to withhold from a defendant put to trial by the United States evidence which may be necessary to his defense and simultaneously deny to the prosecution testimony of important witnesses is a decision that can reflect credit on neither the Committee nor the Congress. It must seem a sorry spectacle to the citizens of this nation to see the foremost lawmaking body in the land obstructing administration of the very laws it writes.

Letter from Abner J. Mikva, member of Congress, to Honorable L. Mendel Rivers, Chairman, Committee on Armed Services 4 (Dec. 7, 1970) (copy on file with author).

adhered to this refusal, intending that this refusal would prevent the Government from calling any witness who had testified before the Committee. If the Government could not call necessary witnesses, it would be prevented from prosecuting the My Lai Incident. Such a result is compelled by concepts of due process and by the Jencks Act[52] which requires, as a matter of basic fairness to a criminal defendant, that the Government provide to an accused a copy of witness pre-trial statements in the Government's possession to facilitate cross-examination. The remedy for non-production is to prevent the Government from calling a witness whose statement was not released.

Thus, much like the Nixon Tape Case,[53] there was a fundamental clash between governmental branches, with the Congress attempting to veto an executive branch prosecution. The Military Judge in the first My Lai court-martial (Sergeant David M. Mitchell) refused to let the Government call witnesses who had given congressional testimony.[54] Not surprisingly, the

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[52] 18 U.S.C. § 3500 et seq. (1994).

[53] United States v. Nixon, 418 U.S. 683 (1974). This historic case involved a clash between the Executive and the Judiciary over a subpoena *duces tecum* by the Watergate Special Prosecutor for tapes and documents relating to Presidential meetings and conversations. *See generally id.*

[54] *See* William Greider, *Ruling Stuns My Lai Case*, ATLANTA J., Oct. 16, 1970, at 8-B.

> The Army's prosecution of 17 officers and enlisted men in the alleged massacre at My Lai was damaged, perhaps substantially, Thursday when the House Armed Services Committee refused to release its own examination of government witnesses in the cases.
>
> A military judge stunned the Army's prosecutor in the first My Lai trial as he ruled Thursday that four prosecution witnesses will not be permitted to testify against Staff Sgt. David M. Mitchell unless the House committee in Washington agrees to make available to defense lawyers transcripts of their questioning of these witnesses . . . . Potentially, if that ruling serves as a precedent for the other My Lai cases, it could eliminate dozens of witnesses, all of whom were called before the special house investigating subcommittee that held private hearings on My Lai earlier this year.

*Id.*; *see also* Tom Linthicum, *Seen Protecting Top Brass: My Lai Trial Ruling Is Hit*, ATLANTA

Government's case was weakened, and the accused was acquitted. Fortunately for the Government, other military judges – after extensively "pleading" with Congress to release the testimony – found that it was error not to provide a copy of the Congressional testimony of witnesses but that the error was harmless in view of the extensive number of pre-trial statements available. This direct congressional assault on the prosecution produced, in my mind, the only serious constitutional question. This constitutional issue was resolved by the Fifth Circuit, sitting *en banc*, deciding eight to five that the clear error of non-release of this material was, in fact, harmless.[55]

## D. TROUBLESOME LEGAL STANDARDS.

### 1. COMMAND CRIMINAL RESPONSIBILITY.

After most controversial governmental actions, the search for blame or responsibility begins with the common sense question: "What did he know and when did he know it?"[56]

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CONSTITUTION, Oct. 22, 1970, at A ?.

[55] *See* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975). The majority, after discussing the procedural history of the problem, found that the withholding of testimony by the Congress was not a violation of due process or of the Jencks Act. *Id*. at 219-20. The dissent, written by Circuit Judge Griffin Bell, states:

> This brings us to the issue, the resolution of which, in our judgement, requires a new trial or further proceedings in the district court. This issue involves the conduct of a Committee of the Congress, conduct which in the hindsight of *United States v. Nixon* (1974, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039.), if not theretofore, appears cavalier if not arbitrary. Whichever, it constituted a denial to Lt. Calley of due process by the Congress, and thereby the government.

*Id*. at 229.

[56] For a discussion of Command Criminal Responsibility, see generally Solf, *supra* note 40 at 387-90; William Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

Instinctively, we point to knowledge – the key to accountability. Accountability for battlefield incidents can extend beyond the military to the civilian chain of command and, in theory, include the President. Of course, there are several types of accountability: criminal, administrative, political, and historical. These are all different. Importantly, in our society, criminal accountability is not imputed. Culpable personal involvement must be established within a criminal law framework and must be proven beyond a reasonable doubt.

The unique military requirements of communal living and dangerous instrumentalities shape military law. The uniqueness of military law is constitutionally recognized when the Founding Fathers placed the Congress, and *not* the Commander-in-Chief President, in the "driver's seat" in determining rules and regulations for governing the armed forces.[57] However, because of the unique societal responsibilities of the military, there are also certain legal liabilities.

One of the liabilities is that the military is the only profession whose members can be criminally punished for *in*action. This is noteworthy because the criminal law is built upon two events occurring simultaneously: a prohibited act (*actus reus*) with a proper intent (*mens rea*). In criminal law, both must be simultaneously present. This, of course, is *not* the case with command criminal responsibility. If one "aids, abets, counsels, commands, or procures"[58] the

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The Parks "mini-book" appears, at first glance, to be long and technical. Yet, my lawyer and non-lawyer students have consistently rated it as *the* most important writing they have read on command responsibility. It is a "classic."

[57] "The congress shall have Power . . . To make rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

[58] Uniform Code of Military Justice, 10 U.S.C. § 877 (1994). It provides:

> Any person punishable under this chapter who -
> (1) commits an offense punishable by this chapter, or aids, abets, counsels,

commission of a crime, one is a principle and is considered to have committed the actual criminal act itself. But command criminal responsibility is one step removed: someone else, usually a subordinate, commits the act. The inquiry then must examine an individual's connection with the offense including the duty to intervene, the ability to communicate and do something, and knowledge. Since duty and communication ability are usually givens, the practical vital connection becomes "knowledge."

The establishment of that connection or knowledge became quite controversial in the case of the company commander at My Lai, Captain Ernest Medina. The articulation of the relevant command criminal responsibility standard was found in Department of the Army Field Manual, *The Law of Land Warfare*. The command criminal responsibility standard was then, and remains to date, legislatively uncodified. In paragraph 501, entitled "Responsibility for Acts of Subordinates," the Manual makes clear that a military commander may be responsible for war crimes committed by subordinates or persons under his control. The key sentence states:

> The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, 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 or to punish violators thereof.[59]

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> commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter;
>
> is a principal.

*Id.*

[59] U.S. DEP'T OF ARMY, FIELD MANUAL, 27-10, THE LAW OF LAND WARFARE 178 (1956). This is an unusual military manual. It is far more authoritative than other military publications. Its stated purpose:

> is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land . . . . . This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding

A commander is thus required to intervene and, if intervention comes too late, to appropriately see that violators are brought to justice.

One is thus left with the application of the phrase – "[knew] or should have [known,] through reports received by him or through other means."[60] This standard, the Medina Prosecution team contended and the Military Judge instructed,[61] required actual knowledge which, of course, could and in most cases would be proven by circumstantial evidence. Thus some intent – personal linkage with the event – would be required. The Medina Command

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> upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

*Id*. at 3.

[60] 10 U.S.C. § 877.

[61] Judge Kenneth A. Howard, after reviewing the facts presented by both the Prosecution and the Defense, *see* William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, App. B, 97 MIL. L. REV. 1, 32-34 (1982), instructed the Medina jury as follows:

> In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.

Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 10-11 (1972).

Criminal Responsibility Standard proved to be quite controversial.[62] For example, Telford Taylor, a respected and articulate Nuremberg Prosecutor, argued that a standard requiring actual or constructive knowledge was too broad.[63] However, in setting an appropriate standard, it is important that the knowledge element be preserved. If it is not present, then one has taken away both the act and the intent and created criminality without personal fault based simply on the action of others.

The standard of command criminal responsibility is still not clear. The American standard has been declared politically unworkable in paperwork[64] accompanying the more conservative standard established by the later 1977 Protocols to the Geneva Conventions: "knew or had information which should have enabled them to conclude in the circumstances at the time."[65] Surprisingly, the drafters of the standards for the Yugoslavian Tribunal apparently

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[62] *See* Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7 (1972); William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1 (1982); Roger S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUT.-CAM. L. J. 59 (1973); *see also* GUENTER LEWY, AMERICA IN VIETNAM 359-62 (1978).

[63] Telford Taylor, *The Course of Military Justice*, N.Y. TIMES, Feb. 2, 1972, at 39. Telford Taylor, as a Nuremberg Prosecutor, unsuccessfully argued for a theory of strict liability for commanders. He renewed his unsuccessful and unaccepted strict liability argument, representing it as the legally accepted and appropriate standard to be applied, in his public comments regarding My Lai and the Vietnam War. *See* William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, n.2 (1973). *See generally* Waldemar A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 AKRON L. REV. 43 (1972). Such careless (at a minimum) articulation of acceptable legal standards unnecessarily increased the Government's difficulties in the court of public opinion.

[64] The United States Government's analysis records that many delegates argued that the "should have known test" "was too broad and would subject the commander to arbitrary after-the-fact judgments concerning what he should have known." *See* Col. William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 17 n.33 (1982) (citing Memorandum from H. Hansell).

[65] The relevant paragraph of Article 86 of the proposed Protocols entitled "Failure to act"

ignored the Protocol Standard when they adopted their command responsibility standard: "knew or had reason to know."[66]

Such an important legal standard should be rigorously discussed and codified. Prosecutors should not be given an opportunity to "manipulate" the law in their favor. But, even more importantly, this standard demands codification because it is the very heart of military professionalism. Disciplined and controlled use of force is the very reason for professional

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states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

UNITED STATES DEP'T OF ARMY, PAMPHLET NO. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 65 (1979).

The United States Government's analysis of this paragraph concedes that this proposed article is not as strong as the "should have known" test. It notes that this new standard is "more narrow" and "requires some showing that specific information was available to the commander which would give him notice of the breach." *See* Hansell, *supra* note 64.

Of great concern, and further demonstrating the lack of international consensus, is the *intentional* inconsistency between the English text ("information which should have enabled them to conclude") and the French text ("information enabling them to conclude"). *See* W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 73, 77 n.14 (1995).

[66] Paragraph 3 of Article 7, "Individual criminal responsibility," reads as follows:

> The fact that any of the acts referred to . . . 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.

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, U.N. Doc. S/25704 (1993) *reprinted in* 32 I.L.M. 1159, 1175 (1993).

I have been personally and authoritatively informed that this deviation from the internationally recognized Protocol Standard was calculatingly done to ease the burden of proof for the prosecution.

armed forces. The criminal standard for command criminal responsibility undergirds the unique and basic societal obligation of every sergeant, lieutenant, captain, colonel and general to control his or her troops and to intervene at the first sign of ill-discipline. Its articulation is not primarily for criminal law purposes but to clearly and authoritatively state national consensus on the professional ethical standard expected of officers and non-commissioned officers. Importantly, a clearer articulation of the standard allows clearer teaching and learning resulting in prevention of battlefield offenses. Appropriate articulation of the standard of command criminal responsibility remains the last unfinished business of My Lai.[67]

**2. PRETRIAL PUBLICITY.**

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[67] I have officially suggested to The Judge Advocate General that the explanation of Article 77 of the Uniform Code of Military Justice – Principals, 10 U.S.C. § 877, include the following language:

> While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal. Such a duty is often imposed by the responsibilities of command or leadership. Thus, command or leadership duty coupled with calculated noninterference may lead to a breach of supervisory responsibility and may make a commander, leader or supervisor liable as a principal for the acts of his subordinates. Military law and custom require that a military superior be responsible for and be required, in the performance of his duties, to make certain the proper performance by his subordinates of their duties. After taking action or issuing an order, a commander, leader or supervisor must remain alert and make timely adjustments as required by a changing situation. A commander, leader, or supervisor is responsible as a principal for the acts of his subordinates if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit criminal acts and he wrongfully fails to take necessary and reasonable steps available to him to stop such illegal acts. Thus a commander, leader or supervisor must have actual knowledge plus a wrongful failure to act. Mere presence at the scene without knowledge will not suffice. The leader-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander, leader or supervisor actually see a criminal act being committed, it is essential that he know that his subordinates are in the process of committing criminal acts or are about to commit criminal acts. This required knowledge on the part of a commander, leader or supervisor, like any other fact, may be proven by circumstantial evidence; that is by evidence of facts or circumstance from which it may be justifiably inferred that the commander, leader or supervisor had such knowledge.

One of the basic fundamentals of due process is that an accused is entitled to a fair trial and to have guilt or innocence determined beyond a reasonable doubt based upon facts proven in open court. A jury must not be influenced by information in newspapers, magazines, books and on television. Notorious cases always cause problems. The My Lai trials, in general, and the trial of Lieutenant Calley, in particular, tested the boundaries of the authority of a trial judge to insure a fair trial and highlighted the clash between the First Amendment's right of Freedom of the Press[68] and the Sixth Amendment's guarantee of a Fair Trial.[69]

If massive publicity presumptively denies an accused a fair trial, there simply could not be trials in *cause celebre* cases. There must be some nexus between pretrial publicity and the jury. There must be more than mere exposure to the facts. Automatic dismissal because of massive pretrial publicity is not the answer. The fact-finding process itself must be affected.

Vigorously using the tools suggested by the Supreme Court in the *Sheppard* case,[70] Judge Reid W. Kennedy in the Calley court-martial set the example for other My Lai trials by using every power in his arsenal to ensure a fair trial for Lieutenant Calley. He issued orders to prospective witnesses not to discuss their testimony publicly. He issued orders to prospective court-members to refrain from intentional exposure to facts regarding the entire incident. He directed counsel to explore possible relief within the broader federal court system. He instructed the Government to forward to the Attorney General incidents of violations of his orders by

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[68] "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

[69] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[70] Sheppard v. Maxwell, 384 U.S. 333, 357-63 (1966).

potential witnesses and the intentional interference with due process by the media who interviewed them. He issued gag orders to court personnel and to those even remotely connected with the trial. He promulgated extensive rules of court controlling access and prohibiting cameras and recording devices in and near the courtroom and provided special instructions regarding the handling of transcripts and exhibits. He revoked press credentials for violations of his orders. He even asked the defense if they wanted pre-trial sessions to be closed to the public. Judge Kennedy was similarly conscientious in *voir dire, sua sponti* asking each day if there had been any exposure to outside influences.[71]

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[71] The publicity sections of the numerous judicial opinions in the Calley case are instructive.

> In summary, the procedures followed by the military judge in this case assured insofar as could be done the right to a fair trial by an impartial court-martial. The military judge is to be commended for his efforts. He employed nearly all of those measures outlined in Sheppard v. Maxwell . . . to abate the effect of publicity upon the fact finders. Judicial calm and dignity were maintained by strict control of the court premises. U.S. v. Calley, 46 C.M.R. 1131, 1145, 1142-48 (A.C.M.R. 1973).

U.S. v. Calley, 48 C.M.R. 19, 22-23 (C.O.M.A. 1973).

Chief Judge Elliott of the Middle District of Georgia overturned Lieutenant Calley's court-martial conviction for, among other reasons, prejudicial pre-trial publicity. "The traditional safeguards of continuance, *voir dire*, change of venue and control of the release of information by the participants in a trial were ineffective in this case." Calley v. Callaway, 382 F. Supp. 650, 691, (M.D. Ga. 1974).

The Fifth Circuit's resounding reversal of the factual findings of Judge Elliott raise the question of whether the "politics of My Lai" even infected the federal judiciary:

> The district judge concluded that Calley had been persecuted and pilloried by news media so intent on making prejudicial revelations about the incident that Calley's right to a fair and unbiased hearing was impossible. The Court's review led it to conclude that the publicity was clearly improper, largely biased and undoubtedly prejudicial. (Footnote omitted). The district judge concluded that "it was not humanly possible for the jurors not to be improperly influenced by prior exposure," [and] that "[n]o person, however honest minded he might try to be, could avoid the lasting emotional impact" of some of the publicity, and that, with all the publicity given the incident, "it would be sheer fantasy to believe that the jurors did not see, hear and read [the publicity] or that they were not influenced by it." 382 F. Supp. at 685, 672, 686. These findings led the court to hold the publicity inherently prejudicial to Calley's

It is the creativity of the trial judge, rather than the precise legal rules, that is important. A trial judge has flexible and extensive power. The vigorous, creative use of that power is key in maintaining the integrity of the trial process. Even with such extensive worldwide publicity, the My Lai trials offered proof that vigorous trial judges can insure that guilt or innocence is determined on facts presented in open court. Publicity need not kill fair trials.

**3. OBEDIENCE TO ORDERS.**

In incidents such as My Lai, the practical fulcrum of individual responsibility often turns on obedience to orders. Ascertaining individual responsibility within a military group is always difficult. Where does corporate responsibility become individual criminality? After all, a military is built upon discipline, responsible command, and obedience to orders. Is it fair to hold a soldier accountable for executing the orders of his superiors, especially in a life-threatening combat environment?[72] Yet, the emotional impact of having to consider this issue and the practical training of soldiers to disobey illegal orders are more troublesome than the actual application of the legal standard regarding obedience to orders, which is rather straightforward.

Wearing a uniform does not make one a moral automaton. One is always accountable to God and to conscience when executing governmental orders. Illegal orders are, of course, the responsibility of both the one who issues the order as well as the one who obeys that order. Both

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> Sixth Amendment rights. The court also found "isolatable prejudice" in the fact that one court member stated during voir dire that he had seen Captain Medina on television at one time, and that Medina had appeared credible and straightforward. 382 F. Supp. at 690. We hold that the trial court's findings of inherent and actual prejudice are erroneous, and conclude that pretrial publicity did not deprive Calley of a fair trial.

Calley v. Callaway, 519 F.2d 184, 205, 203-13 (5th Cir. 1975).

[72] For a discussion of obedience to orders, see generally Solf, *supra* note 40, at 391-98.

are criminally responsible as principals. For the one who obeys the order, the analysis is as follows. First, as with My Lai, there must be a factual determination that a soldier did receive such an illegal order. Was there or was there not such an order? Even if there is no fabrication concerning the receipt of such an order, not every order leads to exoneration. Second, there must be a determination regarding the legality of the order. For example, the Military Judge in the Calley court-martial determined, as a matter of law, that any order received by Lieutenant Calley directing him to kill unresisting Vietnamese within his control or within the control of his troops would have been illegal.[73] The analysis now turns to an inquiry regarding mental state or knowledge. Third, for there *not* to be a defense, a soldier must know as a reasonable person (an objective standard: "a person of ordinary sense and understanding") or have actual knowledge that an order is illegal. As noted on appeal, Lieutenant Calley's real quarrel was with the reasonable person or the objective standard.[74] He seemed to want, for obvious reasons, a

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[73] Judge Kennedy instructed:

> Summary execution of detainees or prisoners is forbidden by law . . . . I therefore instruct you, as a matter of law, that if unresisting human beings were killed at My Lai (4) while within the effective custody and control of our military forces, their deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus, if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order.

United States v. Calley, 48 C.M.R. 19 (C.O.M.A. 1973); *see also* Donna Lorenz, *Destruction Order to Hutto Illegal, Army Judge Rules*, ATLANTA J., Jan. 13, 1971, at A1 (stating "Military Judge Col. Kenneth Howard, Wednesday declared the order given to Sgt. Charles Hutto by his commanding officer, Capt. Ernest Meina [sic], 'illegal as a matter of law.'").

[74] In the Calley Court-martial, Judge Kennedy instructed:

> A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience to orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a

subjective standard.

The law is simpler in articulation than in practical, non-courtroom application. Teaching the principle of the necessity to disobey illegal orders is complex and sophisticated in a critical area that begs for simplicity and clarity. When discipline and life itself depends upon instantaneous obedience to orders, it seems counter productive to teach soldiers to disobey orders. Military organizations simply are not academic debating societies. The only way to teach the duty to disobey illegal orders is to plainly state that the intentional killing without justification of non-combatants – old men, women, children, and babies – is murder and is illegal. Having stated that obvious truism, it must be stressed that there is no lessening of the strong presumption of legality of orders. But, if an order is of doubtful legality, soldiers are to ask for clarification or, at the more senior levels, to ask that the order be put into writing.

Yet, the most effective teaching point is not solely to teach negatively – disobey illegal

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> soldier is not the obedience of an automaton. A soldier, is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.
>
> The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful."

United States v. Calley, 46 C.M.R. 1131, 1183 (A.C.M.R. 1973).

As the Fifth Circuit stated:

> The military judge properly instructed that an order to kill unresisting Vietnamese would be an illegal order, and that if Calley knew the order was illegal or should have known it was illegal, obedience to an order was not a valid defense. Thus, the military jury could have found either that the alleged order to kill was not issued, or, if it was, that the order was not a defense to the charges. The military courts found ample evidence to support either hypothesis.

Calley v. Callaway, 519 F.2d 184, 193-94 (5th Cir. 1975) (footnote omitted).

orders – but to teach positively – expected proper professional battlefield behavior.[75] The emphasis thus becomes the professional function of a soldier, stressing specific actions that are expected. My Lai forced the teaching of the obvious. Before My Lai, no one would have thought it necessary to formally teach the youth of American not to kill innocent women, children and babies. But, as we learned the hard way, such lessons are obviously necessary.

## PART III: LESSONS LEARNED

Practical deterrence is one of the chief goals of any criminal prosecution. How a government uses a tragedy to teach, to prevent and to reform is critical.

Examples can be both good and bad. As every teacher can attest, often there is more learning from a bad example than from a good one. Occasionally, an incident or example is so bad that it focuses individual and institutional attention on a specific problem. Such was the case of the My Lai Incident and the issue of professional conduct on the battlefield. Lessons learned from the My Lai Tragedy were fundamental and essential. The energy and focus caused by My Lai significantly contributed to increased military professionalism and to the prevention of future tragedies not only by the American armed forces but by armed forces worldwide.

## A. ILL-DISCIPLINE ON THE BATTLEFIELD LOSES WARS.

The Rule of Law girds our public life. Any violation of that fundamental principle brings instant societal reaction. Revulsion from the extent and mindless brutality of the My Lai Incident caused a shift in public opinion toward opposition to involvement in Vietnam and in the Vietnam

[75] *See infra* note 75.

War. Our nation expects those who use force – whether they be fireman, policemen or soldiers – to follow the Rule of Law. Whenever there is a death or a serious incident, we carefully investigate, or, put another way, "Monday morning quarterback" the incident. Both our liberty and our honor are too important to do otherwise. When force is used, we demand that it be done lawfully and professionally.

Soldiers are asked to die for causes. My Lai teaches that when soldiers behave criminally and unprofessionally, their cause can be damaged and they and their comrades may die in vain. Misconduct on the battlefield loses wars. How does one prevent such battlefield misconduct? A soldier will answer with one word: discipline. The My Lai Incident required a reemphasis of five long-standing and professional basics.

1. Professional training. Those who use force must not only be proficient in the performance of their individual skills but they must be able to perform those skills in harmony with others. Being a soldier – or a policeman or a fireman – requires constant training. A disciplined soldier who is well trained and motivated is much less likely to commit battlefield offenses.

2. Compliance with standard operating procedure. Collective training leads to an agreed upon and approved way of acting in a given situation. Training makes correct action instinctive. Reflexive, well thought out procedures for using force are necessary because deliberate, rational thought is lessened with the addition of adrenaline and confusion in a fast-moving life-threatening situation.

3. Compliance with the rules of engagement. Rules of engagement tell soldiers when and under what circumstances they may shoot. The entire chain of command must know, understand and enforce these rules, which are both general in nature and conflict specific. Such rules are

vital to the control of an armed force.

4. Control of subordinates. A responsible commander is what legally and practically distinguishes an armed force from rabble. My Lai teaches the necessity of clear, concise, legal orders. Importantly, My Lai teaches every sergeant, captain, colonel and general that they must intervene at the first sign of lack of discipline. There is no room for a non-involved, "head in the sand" approach. Inappropriate inaction will be prosecuted.

5. Insist on the truthful, moral "high road". Whenever force is used, three questions must be answered in the affirmative: (1) Is it legal?; (2) Is it moral?; (3) Does it make common sense? Especially in the uncertainty and chaos of the fog of war, the answers to each of those questions can vary. Only if the answers are all positive should an order be given. In other words, train, expect and demand the highest ethical conduct from those that employ force.[76]

## B. PRACTICAL USEFUL RULES: BRINGING THE LAW TO THE BATTLE STAFF

My Lai forced the return of the Law of War to the profession of arms from the providence of lawyers, politicians, and diplomats. The importance of this move cannot be overstated because professional conduct on the battlefield is the essence of military professionalism. The "legalization" and "criminalization" which seemingly represented the post-World War II Nuremberg and the post-Far East War Crimes trials contributed to an intellectual shifting of this problem away from commanders. My Lai's aftermath demanded a

[76] These professional basics have been previously articulated in different words. *See* William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 22-23 (1982).

workable, practical, not overly technical approach re-inculcating military fundamentals. It was apparent that the obvious must be *expressly* taught: soldiers are to protect the innocent and are not unnecessarily to kill noncombatants – old men, women and children.[77] The Army set about creating a training program[78] that has become the model for the rest of the world.[79] The United

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[77]Teaching *not* to do something is often best taught by teaching what to do. This concept, coupled with an articulation of what a service person is expected to do, was best captured in The Nine Marine Corps Principles which encapsulates both Military Professionalism and the Law of War:

THE NINE MARINE CORPS PRINCIPLES

1. Marines fight only enemy combatants.
2. Marines do not harm enemy soldiers who surrender. Disarm them and turn them over to your superior.
3. Marines do not kill or torture prisoners.
4. Marines collect and care for the wounded, whether friend or foe.
5. Marines do not attack medical personnel, facilities or equipment.
6. Marines destroy no more than the mission requires.
7. Marines treat all civilians humanely.
8. Marines do not steal. Marines respect private property and possessions.
9. Marines should do their best to prevent violation of the law of war. Report all violations of the law of war to your superior. (Or Judge Advocate, Chaplain or Provost Marshal.)

The Marine Corps Principles were adopted as The Soldier's Rules by the Army in Army Regulation 350-41, Training in Units (19 March 1993) as minimum training and knowledge for all personnel.

[78] Much of this training program evolved from *Your Conduct in Combat Under the Law of War*, Training Circular 27-1 (19 March 1976). It distills and communicates in basic terms the essentials of warfare. I paraphrase this material often when I teach as follows:

TROUBLE SPOTS TO SUPERVISE

1. **WATCH FOR FORBIDDEN "T's": TARGETS, TACTICS, TECHNIQUES**
   a. Don't attack noncombatants.
   b. Don't shoot at a parachute unless it holds a combatant.
   c. Don't shoot at the Red Cross or hide behind medical service symbols.
   d. Don't cause destruction beyond the requirement of your mission.
   e. Don't attack protected property.
   f. Don't use poison or alter your weapons to increase enemy suffering.
2. **WATCH THE PROCESS OF CAPTURING ENEMY SOLDIERS**
   a. Let enemy soldiers surrender.
   b. Treat all captives and detainees humanely.
   c. Don't use coercion in questioning captives and detainees.

States "military's law of war program is one of the more comprehensive in the world."[80]

Additionally, computer technology and renewed emphasis on professional battlefield behavior produced remarkable progress on rules of engagement. Rules of engagement are a

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d. Provide medical care for sick and wounded captives.
e. Safeguard captives from the dangers of combat.
f. Don't take personal property from captives.

3. **INSIST UPON RESPECT FOR CIVILIAN AND PRIVATE PROPERTY**
   a. Don't violate civilians' rights in war zone.
   b. Don't burn or steal civilian property.
   c. Ensure the safety of civilians.
4. **KNOW WHAT TO DO WHEN CRIMES ARE COMMITTED AND DO IT**
   a. Don't violate the laws of war.
   b. Do your best to prevent crimes.
   c. Report crimes immediately through your chain of command.

[79] Our national experience in teaching Law of War combined with more recent emphasis on Human Rights has produced interesting results. Perhaps the best example of other armed forces using our methodology comes from the Peruvian Army. I am reliably informed that "disappearances" were reduced fifty percent the month the program utilizing these instructions was implemented.

TEN COMMANDMENTS OF HUMAN RIGHTS FOR SOLDIERS

THOU SHALL:

1. Honor the spirit of the Universal Declaration of Human Rights.
2. Give and obey only lawful orders.
3. Report crimes and human rights violations to proper authorities.
4. Respect individual integrity and human dignity.
5. Abide by the Military Code of Honor, be chivalrous, and tell the whole truth in human rights investigations.
6. Spread the word: Order depends on respect for human rights.

THOU SHALL NOT COMMIT, NOR TOLERATE:

7. Murder, rape, torture, or the excessive use of force.
8. Disappearances.
9. The unnecessary destruction of property.
10. Extra judicial punishment.

[80] UNITED STATES DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, App. O, "The Role of the Law of War," 605, 605-32 (Apr. 92). This report to the American public dramatically – and in the most practical of ways – supports the Government's assertion regarding the comprehensiveness of its Law of War Program.

combination of the dictates of the law (primarily Law of War), of government policy, of diplomatic requirements, and of operational imperatives.[81] Rules of engagement translate domestic and international law and politics and the dictates of operational necessity into rules telling military personnel when and how to shoot. Historically, they have always included the written and unwritten codes of the profession of arms. Complex machinery increased the demand for such rules. Inter-operability between services and among allied armed forces increased the need for workable rules of engagement.

Thus, the timing was right for the tremendous advances that were made with the adoption of the Peacetime Rules of Engagement.[82] One set of rules now applies worldwide to all commands and to all services. Importantly, deliberative planning permitted the advanced drafting of various contingencies any one of which could be implemented within hours. Gone were the days when the United States military drafted rules of engagement on the back of an envelope in-flight to the drop zone as reportedly was done in 1965 in the Dominican Republic Crisis.

Of equal importance, "law" took its appropriate place in the battle staff. The Goldwater-Nichols invigoration of war fighting commands[83] coincided with these rules of engagement

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[81] *See generally* J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV. (Jan.-Feb. 1983).

[82] Secret Memorandum, Joint Chiefs of Staff (Oct. 28, 1988) (regarding "Peacetime Rules of Engagement"). Operational necessity and sensitive diplomatic-political context necessitate secrecy. The readable, instructive, definitive work analyzing and describing Rules of Engagement is Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3-160 (1994).

[83] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. 99-433, Oct. 1, 1986, 100 Stat. 992.

development to provide a climate for further integration of the Rule of Law.[84] Currently, senior combatant commanders have active staff cells that draft mission-specific rules of engagement at the same time that war plans are being made for troops, logistics, and operations. Control of force and protecting lives of both soldiers and non-combatants are the goals.

The focus on practical rules by the American armed forces had considerable useful international human rights implications. Other countries copied the practical training programs developed after My Lai. Increased international awareness of human rights problems accelerated not only the use of such rules, but also the blending of human rights concerns with traditional law of war training. In areas of human rights concern, the focus naturally and quickly turns to those who use force. Development and utilization of practical rules have had a profound effect. For example, "disappearances" dropped fifty percent in Peru when a Peruvian initiative, "Ten Commandments of Human Rights for Soldiers," was adopted.[85] This Peruvian Army initiative came as a result of a governmental program that encouraged foreign governments to explore such possibilities in the name of human rights.

Emphasis on a practical system of useful rules reinforces the leadership position of the United States in doing what it seems to do well, using the pen to articulate workable rules that balance legal requirements with the demands of workable practicality. This effort equals and

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[84] The Army developed a concept of "Operational Law." That term was defined as follows: "Operational Law (OPLAW) incorporates, in a single military legal discipline, substantive aspects of international law, criminal law, administrative law, and procurement-fiscal law relevant to the overseas deployment of US military forces. It is a comprehensive, yet structured, approach toward resolving legal issues evolving from deployment activities." CENTER FOR MILITARY LAW AND OPERATIONS AND INTERNATIONAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK (2nd ed.), Preface to Original OPLAW Handbook (1992). *See* Marc L. Warren, *Operational Law - A Concept Matures*, 152 MIL. L. REV. 33-73 (1996).

[85] *See supra* note 76.

parallels the result of our Civil War experience of the Lieber Code that provided an extremely comprehensive, humanely explicit and practically comprehensive document. This brilliant document with its groundbreaking methodology went on to become a model for military law reform among the Great Powers and further to become a foundation for the Hague and Geneva Conventions.[86] The current progress in the development of practical useful battlefield rules reinforces our proud military legal heritage.

## C. COMMUNICATION BETWEEN THE MILITARY, THE PUBLIC, AND THE GOVERNMENT.

The necessity of communication is one of the most important lessons learned from My Lai and from the Vietnam War. The combination of three important principles of the German Philosopher of War, Carl von Clausewitz, underscores this necessity. First, force should be used only in pursuit of political objectives. Mindless use of force is counter productive. There must be a policy joinder of political objective and military means. Second, an enemy should be attacked at the weak point – the center of gravity. For the United States, that center of gravity is maintaining the delicate, democratically determined consensus to use force. That important political consensus is easily attacked by those who point to violations of the Rule of Law in the conduct of the war. The trend to use "things legal" against a war effort clearly accelerated with Vietnam and is quite evident in the My Lai Incident, which became a legal anti-war battle cry. Third, effective defense and war policy can only be formulated after an appropriate dialogue between and among the military, the people, and the government. These three different groups

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[86] *See generally* William G. Eckhardt, *Nuremberg - Fifty Years: Accountability and Responsibility*, 65 UMKC L. REV. 1, 3-4 (1996).

represent varying points on a triangle, all of which must be fully heard. The implementation of these principles is present in lessons to be learned from My Lai.[87]

After My Lai, a practical result of these three Clausewitzian teaching points is the addition of a fourth component of military operations. Traditionally, military operations consisted of planning, training and execution. To these three components, justification has been added. This new element can be seen in the increasingly detailed explanations used by Presidents when military action is undertaken and in the direct participation of military officers in "CNN-type" news coverage. Communication is the hallmark of this trend. Responsible command is the result. Justifying, or being accountable for, the legitimacy (morally and legally) of military operations in the court of public opinion is the objective.

Nothing could be more important than a clearly articulated political objective. Renewed emphasis on that articulation demonstratively began with President Reagan's address justifying the bombing of Libya for terrorist acts committed against United States' service personnel in Germany.[88] Its most recent culmination came in the speech of President Clinton before the expected use of force against Iraq to support the United Nations inspection regime.[89] This address is noteworthy for its systematic discussion of previously unreported factual evidence and demonstrates the manner in which the Government collects, articulates, and releases such information to justify its actions morally and legally. Most significantly, internally, a

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[87] *Id.* at 9-10.

[88] President's Address to the Nation, United States Air Strike Against Libya, April 14, 1986, 22 WEEKLY COMP. OF PRES. DOC. 491-92 (April 21, 1986).

[89] Text of Clinton Statement on Iraq – February 17, 1998 (visited April 12, 2000) <http://www.cnn.com/ALLPOLITICS/1998/02/17/transcripts/clinton.iraq>.

presidential justification for the use of force, contained in the War Powers Notification Letter to Congress, requires the Government to state clearly the "mission."[90] That paragraph quickly becomes an essential document for appropriate war fighting planning. It is often the first complete and comprehensive articulation of the precise task that the military is expected to execute. This mission paragraph is invaluable for the mental discipline required to gain consensus and to articulate for the public record the goal of the Government.

Justification by commanders of a military operation is the hallmark of responsible command. What is done, why, how, and at what cost is a vital part of appropriate dialogue between and among the military, the government, and the people. Such direct military justification has been made possible by technology but necessitated by the lack of competent news reporting. Reporters without necessary education or background are incapable of reporting what they do not know or understand. Misinformation articulated by novices can be devastating.

Communication is thus essential in the use of force in a democracy. Justifying conduct in the court of public opinion, explaining the cost of military options in lives and treasure, and explaining the nuances of battlefield behavior are all necessary to keep the political consensus to use force. Since the attack on that consensus increasingly involves Rule of Law questions, the lessons learned from My Lai have increased importance.

## PART IV: THE FUTURE: REMEMBERING MY LAI

What is the purpose of examining past events? Is not the whole purpose of history to

[90] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 50 U.S.C. § 1541-48 (1982). Section 4 Reporting, § 1543(a) (reporting req.).

learn from the past to prevent repeating it in the future? One of the most important prosecutorial functions is prevention of similar misconduct. Indeed, the amazing "saga" of My Lai is the willingness of the United States to discuss this institution-staining tragedy and to "use" it to insure professional conduct on the battlefield. The history of the event itself and the problem it represents are critical to the "ending" of this American Tragedy.

## A. THE EVENT ITSELF.

The answer to the question, "What should we remember about My Lai?" came with an institutional thunderbolt on March 6, 1998, at the Vietnam Memorial in Washington, D.C., as the Thirtieth Anniversary of this tragedy approached. On that date, the United States Government presented the Soldier's Medal (the highest award for bravery not involving conflict with the enemy) to Hugh Thompson and to his door gunner assistants, Larry Colburn and Glenn Andreotta (posthumously). These three individuals did precisely what soldiers should do: when something goes wrong on the battlefield, they intervened to correct it and they reported it.

The Washington Post headline says it all: "30 Years Later, Heroes Emerge from Shame of My Lai Massacre."[91] A military medal normally is not presented at a national monument with the Army Band playing, is not attended by dozens of foreign journalists, is not reported in national newspapers with photographs and citations, and is not attended by the Army Chief of Staff and Members of Congress. Yet, thirty years after this tragic incident, the Government publicly and permanently acknowledged what transpired and took steps to insure that in remembering and in teaching this tragedy, the appropriate conduct exemplified by Hugh

[91] David Montgomery, *30 Years Later, Heroes Emerge From Shame of My Lai Massacre,* WASH. POST, Mar. 7, 1998 at A1, *available in* 1998 WL 24716057.

Thompson and his crew would become an essential lesson. Although Lieutenant William Calley's actions will always be remembered with horror, shame, and revulsion, the selfless, professional actions of Hugh Thompson and his assistants should not only be remembered, but emulated.

The tone and purpose of this ceremony began with an invocation, prominently reported by The New York Times: "We stand in honor of their heroism, and we have taken too long to recognize them. Remembering a dark point in time, we are now a richer nation as their personal heroic service is woven into the fabric of our history."[92] Nothing could be more important than to honor the moral courage represented by Hugh Thompson. He is the Sir Thomas More of our current military. Life-risking action to perform the basic duty of a soldier, protecting the defenseless, coupled with the moral courage to report and to testify mark him as someone to emulate. My personal admiration knows no bounds for the additional moral courage that is *not* reflected in the citation. Hugh Thompson, over the course of some two years during the My Lai hearings, told the truth despite peer pressure, ostracism, threats of prosecution, and a nationally televised congressional brow-beating. All of these acts were an attempt to prevent him from testifying or to punish him for doing so.

The most fitting official end of the My Lai "saga" is the approved Governmental wording in the citation for the Soldier's Medal awarded to Hugh Thompson. This is the My Lai of history:

> For heroism above and beyond the call of duty on 16 March 1968, while saving the lives of at least 10 Vietnamese civilians during the unlawful massacre of noncombatants by American forces at My Lai, Quang Ngai province, South Vietnam. Warrant Officer Thompson landed his helicopter in the line of fire between fleeing Vietnamese civilians and pursuing American ground troops to

[92] *3 Honored for Saving Lives at My Lai*, N.Y. TIMES, Mar. 7, 1998, at A2.

> prevent their murder. He then personally confronted the leader of the American ground troops and was prepared to open fire on those American troops should they fire upon the civilians. Warrant Officer Thompson, at the risk of his own personal safety, went forward of the American lines and coaxed the Vietnamese civilians out of the bunker to enable their evacuation. Leaving the area after requesting and overseeing the civilians' air evacuation, his crew spotted movement in a ditch filled with bodies south of My Lai Four. Warrant Officer Thompson again landed his helicopter and covered his crew as they retrieved a wounded child from the pile of bodies. He then flew the child to the safety of a hospital at Quang Ngai. Warrant Officer Thompson's relayed radio reports of the massacre and subsequent report to his section leader and commander resulted in an order for the cease-fire at My Lai and an end to the killing of innocent civilians. Warrant Officer Thompson's heroism exemplified the highest standards of personal courage and ethical conduct, reflecting distinct credit on him and the United States Army.[93]

Most importantly, the Army, the very institution shamed by My Lai, has explicitly and prominently heralded Hugh Thompson's battlefield example in its all important leadership guide. The Army's Field Manual notes that "[i]n combat physical and moral courage may blend together. The right thing to do may not only be unpopular, but dangerous as well. Situations of that sort reveal who's a leader of character and who's not."[94] Prominently displayed across the whole printed page is the Hugh Thompson Example.[95]

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[93] David Montgomery, *supra* note 91 at A10.

[94] UNITED STATES DEP'T OF ARMY, *Field Manual 22-100. Chapter 2 The Leader and Leadership: What the Leader Must Be, Know, and Do,* ¶ 2-39, p. 2-10 (1999) <http://155.217.58.58/cgi-bin/atdl.dll/fm/22-100/toc.htm>

[95] *Id.* The example is similar to the Soldier's Medal citation.

**WO1 Thompson at My Lai**

> Personal courage - whether physical, moral, or a combination of the two - may be manifested in a variety of ways, both on and off the battlefield. On March 16, 1968 Warrant Officer (WO1) Hugh C. Thompson Jr. and his two-man crew were on a reconnaissance mission over the village of My Lai, Republic of Vietnam. WO1 Thompson watched in horror as he saw an American soldier shoot an injured Vietnamese child. Minutes later, when he observed American soldiers advancing on a number of civilians in a ditch, WO1 Thompson landed his helicopter and questioned a young officer about what was happening on the ground. Told that the ground action was none of his business, WO1 Thompson took

Thus, a prosecutor's duty is concluded. The Government investigated and did not cover-up. The Government publicly condemned the atrocity and persistently prosecuted despite unprecedented odds. The Government focused on this horrible lesson and, in the corrective actions that followed, significantly advanced the Law of War. The Government, assisted by the passage of time, formally and publicly admitted the tragic events and publicized for future instruction and emulation the heroic selfless action of an intervenor. The prosecution lesson for the future is clear. ACT LIKE HUGH THOMPSON.

## B. THE PROBLEM.

Our world seems to have entered an era of internal conflicts. Humanitarian intervention has moved from an obscure idea to the dominant topic of discussion.[96] Old, long-established concepts of sovereignty are being eroded. Attempts to enforce the Law of War and even to establish an International Criminal Court[97] seem to indicate a return to international legal idealism and an attempt to use international law to "control" the use of force reminiscent of the

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off and continued to circle the area.

> When it became apparent that the American soldiers were now firing on civilians, WO1 Thompson landed his helicopter between the soldiers and a group of 10 villagers who were headed for a homemade bomb shelter. He ordered his gunner to train his weapon on the approaching American soldiers and to fire if necessary. Then he personally coaxed the civilians out of the shelter and airlifted them to safety. WO1 Thompson's radio reports of what was happening were instrumental in bringing about the cease-fire order that saved the lives of more civilians. His willingness to place himself in physical danger in order to do the morally right thing is a sterling example of personal courage.

[96] For an excellent discussion of humanitarian intervention, see RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 188-93, 224-25 (1989).

[97] *See* Rome Statute of the International Criminal Court, A/CONF.183/9 (July 17, 1998).

international thinking between 1890 and 1940.[98] We are in an age of peace keeping, peace enforcing, and peace making in which militaries are more "police-like" and have more complicated political objectives. Professional conduct during military operations and rules of engagement are even more important.

Current realities require continued focus on the lessons of My Lai. There has never been a greater need for training to produce competent soldiers who can perform in a more complex operational environment with the increased demands of modern technology. The consequences of operational ill-discipline become starker. The need for practical rules of engagement are even more necessary as the new era produces greater difficulty in defining, both domestically and internationally, clearly agreed upon political objectives for the use of force.

The lessons of My Lai are further highlighted with the fall of the Berlin Wall. That historic event, of course, is a symbol of the increase in free market economies, of the movement toward democracy, and of the general integration of former communist countries into the West. No one seeks that integration more than autocratic militarized former communist regimes. Former communist military leaders look to the West as a model to emulate. They seek to adopt and to utilize military doctrine. Yet military doctrine, for the United States specifically and for the West in general, has three essential components: (1) civilian control; (2) respect for the Rule of Law – including the Law of War; and (3) respect for the rights of individual soldiers. It has been especially surprising to me that military doctrine would be one of the "keys" to effective

[98] *See* William G. Eckhardt, *'We the People' Go to War: The Legal Significance of the Weinberger Doctrine*, in THE RECOURSE TO WAR: AN APPRAISAL OF THE "WEINBERGER DOCTRINE" 59, 61-67 (U.S. Army War College Strategic Studies Institute, Alan Ned Sabrosky & Robert L. Sloane eds. 1988).

democratization.[99] In such changing times, nothing is more important to the professional use of force and to human rights than the lessons learned from My Lai.

[99] For example, I have participated in this process by presenting formal papers in two conferences. The first involved the Legal Advisors of the former Warsaw Pact countries who met in a "Military Law in a Democratic Society Conference" in Stuttgart, Germany, on September 22, 1992. My paper was entitled "Basis and Role of the Military in a Constitutional Democracy." The second conference in Heidelberg, Germany, on June 28-30, 1994 entitled "Conference on Military Support of Democratization in Europe" involved the Ministers of Defense of the former Warsaw Pact countries. My presentation was entitled "The Rights and Obligations of the Citizen Soldier."