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## **Courts-Martial In Lieu of Leadership: Not Enough Military Justice**

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The conduct giving rise to the recent court-martial and sentencing of United States Army dog handler Sergeant Michael J. Smith on March 22, 2006 could have been completely averted. At General Court-Martial, Sgt. Smith faced up to 8 1/2 years in prison, because in the end, his chain of command failed him. A lack of supervision, guidance, and leadership allowed his and other soldiers' actions to devolve into an "anything goes" mentality that culminated in the abuse against detainees, as well as other offenses that were allowed to occur in this command environment. During a recent panel discussion at which the topic of Abu Ghraib prosecutions came up, a retired Army General stated that the senior officers in these commands have been investigated and cleared. Cleared? If this is the perception in the senior ranks, then it is apparent why accountability problems plague these cases.

Observers had hoped that Sgt. Smith's court-martial might reveal something about how dogs were authorized to be used against detainees, but as the court-martial unfolded, it was apparent that this information would not be forthcoming. Colonel Thomas M. Pappas, United States Army, who had been given immunity in exchange for his testimony, did not reveal more than being aware that dogs were used, and admitted not giving adequate guidance or training for proper use of the canines. Quoted in the New York Times on March 22, 2006, Avi Cover, a lawyer with Human Rights Watch who monitored the trial stated, "The testimony in these proceedings revealed an appalling level of confusion and implicated the chain of command - certainly Pappas - for blame in authorizing these techniques in some instances." During his testimony, Colonel Pappas revealed that he discussed with Major General Geoffrey D. Miller, the team leader and commander at Guantánamo Bay, the "Arab fear of dogs" as a reason to "set the conditions" for interrogations. So what has happened to General Miller? He's awaiting retirement.

The New York Times also reported as part of its coverage on Smith's court-martial that two months ago, General Miller took the unusual step of invoking his right not to give testimony that might incriminate him, and said he would not answer questions in the court-martial proceedings against Sergeant Smith and another dog handler, Sergeant Santos A. Cardona, who is scheduled to face court-martial in May 2006. In response to questions about why the General chose to invoke his rights to remain silent, a military lawyer representing General Miller said that "he had already fully answered all questions put to him on the issue by Congressional committees, Army investigators and other court proceedings. General Miller has said he only advised using working dogs to keep order."

While every member of the armed forces has the right to remain silent under the conditions outlined under Article, 31, Uniform Code of Military Justice (UCMJ), there is a disconnect between the invocation by a senior officer and the prosecution of many of his subordinates for unchecked conduct under his command. Article 31(b), states, "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." The triggering words of the rule are "accused or suspected." There is also a portion in Article 31 that stated that a person cannot be forced to answer questions which might incriminate him. Certainly there is no equation between invoking one's rights under Article 31 and culpability, but invocation does not equal exoneration. The New York Times further reported that General Miller had been

expected to retire from the Army soon, but that the Senate Armed Services Committee earlier this month told the Army to delay that until the dog handlers' cases were resolved. Couple the invocation of rights with a delayed retirement, and the picture is not one that suggests higher ranking officers have been cleared - only excused.

During just about every court-martial regarding misconduct with detainees, prosecutors argued that the soldiers were a rogue group of individuals - an anomaly in the United States armed forces. But now that a trend of illegal behavior continues to be revealed, it can no longer be effectively argued that the actions of these soldiers were an exception. The command should have known about this conduct. It would be unthinkable that the senior enlisted non-commissioned officer community would have ignored knowingly illegal conduct. They would have been obligated to raise any questionable trends in conduct to the senior levels of the command. Either, this conduct was condoned and the senior enlisted ranks knew this - and thus did not report it - or the senior officers disregarded the advice of their senior enlisted professionals, a failure that belongs with the senior leadership, not a handful of dog handlers.

At Sgt. Smith's trial, Colonel Pappas testified under a grant of immunity. According to the New York Times, his answers were at best contradictory and just confusing. If Colonel Pappas's answers were confusing to a Times reporter, imagine what they were to the men and women sworn to obey his orders. Paragraph 14.c.(2)(a) of the Manual for Courts-Martial defines the duty to obey orders. It provides that soldiers and sailors must only follow lawful orders, but states "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate." It is not surprising that someone told to use dogs to control prisoners would follow such an order. Without knowing the boundaries of whether this conduct would be defined as criminal, it would seem the safer course of action. This is precisely why the laws of war are defined, taught, and heeded in civilized countries. Doing so not only protects the detainees, it protects the soldiers.

Alberto J. Mora, the former Navy General Counsel, fought an internal battle at the Pentagon seeking clear and accurate guidance. From both a story and a Navy memo published in the New Yorker magazine on February 27, 2006, one can see the internal turmoil that contributed to the confusing guidance that was revealed at Smith's court-martial. It becomes more obvious how this turmoil did not translate to the troops on the ground needing definitions and boundaries. But where were Mr. Mora's counterparts in the Army? Moreover, why is the only Army officer on record requesting clear guidance on this topic Captain Ian Fishback - a junior officer? One would have expected, or at least hoped, such a request for definition be made at the flag levels.

So, why do these lower ranking soldiers, such as Sgt. Smith and soon to be Sgt. Cardona, continue to be prosecuted and punished exclusively? The answer is simple. The world and international community demand accountability. By court-martialing these young and more powerless enlisted troops, the senior officials can claim that the United States is holding them accountable for their actions.

In some ways, the military justice system is not so different from civilian state and federal systems. Those with the means and power can afford better counsel and have greater influence with those operating the system. They have the knowledge to invoke their rights to remain silent and a greater ability to secure immunity from prosecution in return for their cooperation. But the military justice system also has safeguards that the civilian system does not against abuse, such as the right to free counsel for everyone charged of an offense - regardless of rank or paygrade. There is also an opportunity to litigate any adverse effects imposed by the exercise of "unlawful command influence." The system, as written, has the ability to be extremely fair. Those who administer it, however, must not just be managers, they must be leaders. The numerous detainee mistreatment cases to date should not raise questions about a failed military justice system; instead these questions should be focused on failed leadership. For the sake of our military, its justice system, and the future, let us hope for more officers like Captain Fishback.

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