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Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study

Keith Rohman

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Articles

Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*

Keith Rohman**

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We think of investigation as a road to truth, and truth as the goal of an investigation. Yet time and again, high-visibility investigations of public scandals not only fail to uncover the truth, they seem to redirect the focus in the wrong direction. The Department of Defense's ("DoD") investigations of the detainee abuse scandal at the Abu Ghraib prison are a recent example of this. With the departure of the Bush Administration, there is renewed interest in examining both the Abu Ghraib scandal and other aspects of the administration's interrogation policies. Senator

Patrick Leahy, the Senate Judiciary Committee chairman, has proposed a truth commission on the lines of the South Africa Truth and Reconciliation Commission.¹ Others have called for Congressional hearings,² criminal investigations,³ and even war crimes prosecutions.⁴ A *USA Today/Gallup* poll showed that Americans favored an investigation into the possible use of torture during the Bush administration by an almost two-to-one margin.⁵

As we debate what investigations to undertake, we should look closely at the investigations that have already been completed. DoD conducted fourteen separate investigations of detainee abuse at the Abu Ghraib prison and other locations,⁶ expending a tremendous amount of time, money, and personnel. Unfortunately, these investigations did not answer the most fundamental questions about who directed or ordered the use of abusive tactics on detainees, and the reports' findings were the subject of widespread criticism by the news media, congressional leaders, and human rights groups.

The failures of these investigations are not unique. Internal corporate investigations of wrongdoing at companies such as Enron, Apple, Oracle, and UnitedHealth have all been criticized for their inadequacies.⁷ Investigations of law enforcement scandals, such as the Rampart scandal by the Los Angeles Police Department (LAPD), have

1. See Kate Phillips, *Judiciary Chairman Calls for Commission to Delve into Bush Practices*, The Caucus Blog, N.Y. TIMES, <http://thecaucus.blogs.nytimes.com/2009/02/09/judiciary-chairman-calls-for-commission-to-delve-into-bush-practices/> (Feb. 9, 2009, 17:30 EST).

2. See Joseph Williams, *Some Call For Bush Administration Trials*, BOSTON GLOBE, Feb. 3, 2009, at A13, available at http://www.boston.com/news/nation/washington/articles/2009/02/03/some_call_for_bush_administration_trials/.

3. See John Conyers, Jr., *Why We Have To Look Back*, WASH. POST, Jan. 16, 2009, at A19.

4. See Scott Horton, *Justice After Bush: Prosecuting an Outlaw Administration*, ATLANTIC MONTHLY, December 2008, <http://www.harpers.org/archive/2008/12/0082303>.

5. See Jill Taylor, *Poll: Most want inquiry into anti-terror tactics*, USA TODAY, Feb. 12, 2009, at 1A, available at http://www.usatoday.com/news/washington/2009-02-11-investigation-poll_N.htm.

6. A listing of these reports can be found at DEPUTY INSPECTOR GENERAL FOR INTELLIGENCE, REVIEW OF DoD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE 32 (2006) [hereinafter YOUNG REPORT], available at <http://www.fas.org/irp/agency/dod/abuse.pdf>. There were also individual criminal investigations conducted by the Army's Criminal Investigation Division, some of which resulted in courts martial or other discipline by the Army. These investigations were generally not released publicly, and are not the subject of this article.

7. See Edward Iwata, *When Companies Investigate Themselves: Too Easy?*, USA TODAY, May 1, 2007, at 1B, available at http://www.usatoday.com/money/companies/management/2007-05-01-corp-investigations-usat_N.htm.

been criticized by outside observers as minimizing the scope and nature of the problems.⁸

For outside observers and the public, determining whether an investigation is legitimate poses a considerable challenge. These public investigations usually have all the outward appearances of legitimacy, having been conducted by experienced investigators or lawyers who interviewed numerous witnesses, reviewed mountains of documents, and issued extensive reports.

It is also difficult to evaluate these investigations because of a lack of recognized standards for what an investigation should be. While there is often considerable public comment about an individual public investigation, little literature or scholarship has looked at these investigations in a global manner, discussing how they should be structured or what protocols they should follow. There is some writing in the related area of corporate internal investigations, an area of the law that is expanding with the onset of Sarbanes-Oxley and other government regulation.⁹ Some scholarship, prompted largely by DNA exonerations of the wrongfully convicted, has studied flaws in criminal investigations.¹⁰ There is also relevant scholarly writing about the theory and standards for historical research.¹¹ However, none of this writing provides sufficient guidance for the larger problems posed by public investigations.

This article examines the DoD investigations of the Abu Ghraib scandal in an effort to provide a methodology for the identification of flawed public investigations and an analysis of how and why these investigations failed to reach the truth of the matter. It then proposes a protocol to be used when evaluating other public investigations by governments or corporations, and proposes guidelines on how to structure more public investigations in the future.

8. The Rampart scandal involved allegations of systematic police perjury at the Rampart Division of the LAPD which eventually led to the exoneration of at least 100 defendants, beginning in September 1999. See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001). A revised version of this article is available at <http://lr.lls.edu/volumes/v34-issue2/chemerinsky.pdf> (revised Sept. 21, 2005).

9. See generally Hon. Dick Thornburgh, *Organizing a Successful Corporate Internal Investigation*, LEGAL BACKGROUNDER, Apr. 21, 2006, at 1; David M. Brodsky, *Strategies for Conducting Internal Investigations*, 1418 PLI/CORP 941, 943 (2004); John R. Brantley & William S. Anderson, *A Director's Guide to Conducting Effective Internal Investigations*, 23 CORP. COUNS. REV. 233 (2004).

10. D. KIM ROSSMO, CRIMINAL INVESTIGATION FAILURES 133-34 (2008); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, SOC. SCI. RES. NETWORK, Sept. 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996629.

11. RICHARD J. EVANS, IN DEFENSE OF HISTORY 94-95 (2000).

The DoD reports provide an ideal case study to observe an investigation in action. The large number of different reports and the volume of material allow us to look beneath the surface of an investigation in a manner rarely available in other public scandals. This article first examines the reports' widely criticized findings regarding command responsibility for the abuse; findings that focused attention away from senior DoD officials, the CIA, and the White House. It then addresses the question of how, given the vast resources devoted to the investigations, the resulting findings were flawed.

The basic criteria for assessing these investigations reflect a review of the relevant literature and this author's own experience conducting investigations for public agencies and attorneys involved in public controversies. The criteria include:

- determining the proper scope of the investigation;
- the choice of investigators with appropriate independence, the right balance of staff, and the use of subject matter experts;
- the selection of witnesses who are relevant to the scope of investigation, and who give a balance of evidence from their different perspectives;
- identifying and addressing the barriers to witness disclosure;
- the appropriate use of documentary evidence such as prior investigative reports;
- pursuing relevant leads up the chain of command; and
- intellectual integrity in the report's analysis of evidence.

The DoD investigations were significantly flawed. The investigators were not independent of DoD, and utilized no subject matter experts from outside the military.¹² The reports failed to pursue obvious leads up the chain of command, even though the stated scope of the investigations clearly called for this.¹³ There was an almost single-minded reliance upon interviews with officers and soldiers, with little analysis about the barriers for disclosure faced by these witnesses, or any discussion of evidence from non-military witnesses.¹⁴ Many of the fourteen investigations relied uncritically upon the work of the earlier investigations, producing a series of reports that were often self-referential, providing little or no new information as each successive

12. See discussion *infra* Part III.B.

13. See discussion *infra* Part III.F.

14. See discussion *infra* Part III.C-D.

report was issued.¹⁵ In addition, the reports contained clear analytical errors with unsupported conclusions, mischaracterizations of the evidence, inconsistent logic, and the use of misleading language.¹⁶

The lessons learned from the mistakes in the Abu Ghraib investigations can be applied to a wide range of public investigations, whether they involve high-profile military or law enforcement controversies, corporate scandals, or issues of smaller scale wrongdoing in state and local governments. The miscues in the Abu Ghraib investigations can help us identify the warning signs, as well as the protocols and principles that can be used to structure future investigations. This knowledge is of importance today as the question of further investigations into the issue of torture is publicly debated, as well as for any future investigations of public controversy by a government or corporation.

I. OVERVIEW OF DOD INVESTIGATIONS

The Abu Ghraib Prison in Baghdad had a notorious reputation as Saddam Hussein's torture chamber before U.S. forces invaded in March 2003.¹⁷ After the fall of the Hussein regime, the U.S. Army took control of the prison and reopened it for use in August 2003.¹⁸ Initially used as a facility for criminals, when the insurgency intensified in the fall of 2003, U.S. forces began using the prison to detain those captured during combat operations.¹⁹ During the ensuing months, the number of detainees in the prison rose dramatically from 1,000 to 2,000 in October 2003, to over 5,000 in November 2003, and over 7,000 by February 2004.²⁰

In August 2003, Major General Geoffrey Miller, who had commanded the U.S. detention facility at Guantanamo Bay, was sent to Abu Ghraib to review detainee operations, specifically the interrogation procedures.²¹ It was Miller who reportedly directed that interrogation

15. See discussion *infra* Part III.E.

16. See discussion *infra* Part III.F-G.

17. See *Chronology of Abu Ghraib*, WASH. POST, May 9, 2004, http://www.washingtonpost.com/wp-srv/world/daily/graphics/abughraib_050904.htm.

18. See *id.*

19. See *id.*

20. See *Abuse at Abu Ghraib*, WASH. POST, Aug. 26, 2004, http://www.washingtonpost.com/wp-srv/nation/daily/graphics/prison_082604.html; Mark Follman & Tracy Clark-Flory, *The Abu Ghraib Files: Investigations and Other Resources*, SALON.COM, Mar. 14, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/investigations_resources/index.html.

21. See *Chronology of Abu Ghraib*, *supra* note 19.

practices from Guantanamo be used at Abu Ghraib.²² Brigadier General Janis Karpinski, who commanded the 800th Military Police Brigade at the prison, said that Miller's plan was to "Gitmo-ize" the Iraqi prison.²³

Before the allegations of the detainee abuse became public, Major General Ryder, the Army Provost Marshall, conducted the review of detainee operations in Iraq in October and November 2003.²⁴ Ryder's report concluded that conditions in the U.S. detention facilities met the standards set by the Geneva Conventions.²⁵

During October and November 2003, a number of detainees at the Abu Ghraib Prison were tortured and abused by U.S. military personnel.²⁶ In November 2003, Army Specialist Joseph M. Darby received a computer file with hundreds of images of detainee abuse from Army Corporal Charles A. Graner. Darby gave the file to the Army's Criminal Investigation Division (CID) on January 13, 2004.²⁷ CID initiated an internal criminal investigation at the prison by interviewing a number of military personnel and thirteen detainees.²⁸ Following these interviews, the Army appointed Major General Antonio Taguba to conduct an investigation into the abuse allegations, and the role of the Army's Military Police, who provided security at the prison, as well as into other issues regarding the prison's management.²⁹ The Taguba investigative report (the "Taguba Report") was completed on March 3, 2004, and six soldiers were charged criminally as a result on March 20, 2004.

On February 10, 2004, the Acting Secretary of the Army directed the Army's Inspector General, Lieutenant General Paul Mikolashek, to conduct a review of all the Army's detainee operations in Iraq and

22. See John Barry, Mark Hosenball & Babak Dehghanpisheh, *Abu Ghraib and Beyond*, NEWSWEEK, May 17, 2004, <http://www.newsweek.com/id/105304>.

23. *Id.*

24. See MAJ. GEN. DONALD RYDER, REPORT ON DETENTION AND CORRECTIONS OPERATIONS IN IRAQ (2003) [hereinafter RYDER REPORT], available at <http://www1.umn.edu/humanrts/OathBetrayed/Ryder%20Report.pdf>.

25. See *id.* at 7.

26. See Seymour M. Hersh, *Annals of National Security: Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

27. See *id.*

28. See Washingtonpost.com, Sworn Statements by Abu Ghraib Detainees, available at <http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/swornstatements/042104.html> [hereinafter Sworn Statements] (last visited Feb. 12, 2009); MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 15 (2004) [hereinafter TAGUBA REPORT], available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

29. TAGUBA REPORT, *supra* note 28, at 6.

Afghanistan.³⁰ This report (the “Mikolashek Report”) was completed on July 21, 2004.³¹

In April 2004, CBS News producers had obtained the photographs but delayed broadcasting the story for two weeks at the request of the DoD.³² Following CBS’s contact with DoD, the Army appointed Army Major General George R. Fay on April 15, 2004, to investigate the activities of military intelligence personnel in the burgeoning scandal.³³ Eventually, Lieutenant General Anthony Jones was appointed to head the investigation so he could interview officers and assess the conduct of officers who outranked Major General Fay.³⁴ This investigation (the “Fay/Jones Report”) was completed on August 23, 2004.³⁵

On April 28, 2004, the public learned of the prison abuse investigations through the release of some of the photos on the CBS program *60 Minutes II*,³⁶ and through an article by Seymour Hersch in *The New Yorker* magazine, which was published at about the same time the CBS program was aired.³⁷ On May 12, 2004, in response to the growing public controversy, Defense Secretary Donald Rumsfeld appointed what was described as an independent investigation panel composed of former Secretaries of Defense James Schlesinger and Harold Brown, retired Air Force General Charles Horner, and former Congresswoman Tillie K. Fowler, a Republican who had served on the House Armed Services Committee.³⁸ The investigation was headed by former Defense Secretary James Schlesinger.³⁹ The panel issued its report (the “Schlesinger Report”) on August 24, 2004.⁴⁰

The Abu Ghraib detainee abuse scandal became one of the most investigated government scandals since Watergate. Including the reports noted above, fourteen investigations were initiated by the Army and DoD

30. U.S. DEP’T OF THE ARMY INSPECTOR GEN., INSPECTION REPORT ON DETAINEE OPERATIONS, at Foreword (2004) [hereinafter MIKOLASHEK REPORT].

31. *Id.*

32. See Rebecca Leung, *Abuse Of Iraqi POWs By GIs Probed*, CBS NEWS, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

33. See MAJ. GEN. GEORGE R. FAY & LT. GEN. ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 10 (2004) [hereinafter FAY/JONES REPORT], available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

34. *See id.*

35. *See id.*

36. *See* Leung, *supra* note 32.

37. *See* Hersch, *supra* note 26.

38. See JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS, app. B (2004) [hereinafter SCHLESINGER REPORT], available at <http://www.globalsecurity.org/military/library/report/2004/d20040824finalreport.pdf>.

39. *Id.*

40. *Id.*

into the underlying causes of the scandal.⁴¹ These were conducted by teams of investigators headed by Army and DoD personnel from the rank of Major General up to former Secretaries of Defense. More than 1,700 witnesses were interviewed, and more than 15,000 pages of documents were assembled and reviewed.⁴² Lengthy reports were produced, with over 2,000 pages of findings, interviews, recommendations, and appendices. The findings dealt with issues ranging from the brutal conduct of specific soldiers to the lack of morale-boosting facilities for personnel at the prison.

The primary focus of this article is on the four reports that garnered the most national attention: the Taguba Report,⁴³ the Fay/Jones Report,⁴⁴ the Mikolashek Report,⁴⁵ and the Schlesinger Report.⁴⁶ The Taguba and Fay/Jones Reports were significant because they were the most immediate inquiries conducted, and their findings became the basis for many of the later investigations. The Mikolashek Report represented the Department of the Army's institutional response to the controversy, as it was conducted by the Army's Inspector General. Finally, the Schlesinger Report was the most high-ranking effort by DoD, utilizing former Defense Secretaries.

II. DISPUTED FINDINGS

The DoD reports generally acknowledged that some unacceptable abuses of detainees occurred at the Abu Ghraib prison in the fall of 2003.⁴⁷ However, the reports' findings about the causes of the abuse and the ultimate responsibility for it were controversial and disputed by many observers in the government, the military, and the news media as this section will demonstrate.

The most high-ranking investigation was conducted by the Schlesinger Panel. In this report, "[t]he Panel [found] no evidence that organizations above the 800th MP Brigade or the 205th MI Brigade-level were directly involved in the incidents at Abu Ghraib."⁴⁸ The Fay/Jones Report, led by Major General George Fay of Army Military Intelligence (MI), concluded that "[t]he chain of command above the 205th MI Brigade was not directly involved in the abuses at Abu Ghraib."⁴⁹

41. See YOUNG REPORT, *supra* note 6.

42. Josh White, *Top Army Officers Are Cleared in Abuse Cases*, WASH. POST, Apr. 23, 2005, at A01 (quoting Army spokesman Brig. Gen. Vincent K. Brooks).

43. See TAGUBA REPORT, *supra* note 28.

44. See FAY/JONES REPORT, *supra* note 33.

45. See MIKOLASHEK REPORT, *supra* note 30.

46. See SCHLESINGER REPORT, *supra* note 38.

47. See, e.g., YOUNG REPORT, *supra* note 6, at ii.

48. See SCHLESINGER REPORT, *supra* note 38.

49. See FAY/JONES REPORT, *supra* note 33.

Similarly, the Army's Inspector General unequivocally concluded as follows: "The abuses that have occurred are not representative of [Army] policy, doctrine or Soldier training. These abuses should be viewed as what they are—unauthorized actions taken by a few individuals. . . . These actions, while regrettable, are aberrations. . . ."⁵⁰

Many outside the military did not accept these findings, and even some within the military expressed skepticism. One of the Army's own investigators, Major General Taguba, a thirty-year career officer, stated, "From what I knew, troops just don't take it upon themselves to initiate what they did without any form of knowledge of the higher-ups."⁵¹ Rear Admiral John D. Hutson (ret.), who served as the Navy's Judge Advocate General from 1997 to 2000, stated, "The [DoD] investigations . . . failed to address senior military and civilian command responsibility and in doing so separate culpability from responsibility. This is antithetical to the way the military operates."⁵²

The skepticism was bipartisan. Senate Armed Services Committee member Lindsay Graham, a conservative Republican, stated, "This is not a few bad apples. This is a system failure, a massive failure."⁵³ Congressman David Obey, the ranking Democrat on the House Defense Appropriations Subcommittee, observed, "This [abuse] could not have happened without people in the upper echelon of the Administration giving signals. I just didn't see how this was not systemic."⁵⁴

A bipartisan report by Senate Armed Services Committee released in December 2008 contradicted the DoD report findings, concluding as follows:

The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.⁵⁵

50. See MIKOLASHEK REPORT, *supra* note 30.

51. See Hersh, *supra* note 26.

52. Jim Lobe, *Retired Brass Call for Independent Torture Probe*, INTER PRESS SERVICE, Sept. 8, 2004, <http://ipsnews.net/interna.asp?idnews=25402>.

53. See Barry et al., *supra* note 22.

54. See Hersh, *supra* note 26.

55. SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xii (2008), available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf> [hereinafter SENATE INQUIRY].

Others have questioned the DoD findings. As a *New York Times* editorial stated:

Most Americans have long known that the horrors of Abu Ghraib were not the work of a few low-ranking sociopaths. All but President Bush's most unquestioning supporters recognized the chain of unprincipled decisions that led to the abuse, torture and death in prisons run by the American military and intelligence services.⁵⁶

For many observers, the DoD investigations failed to resolve the most important questions about the scandal. Senate Armed Services Committee Chair Carl Levin stated it directly, "Department of Defense investigations into detainee abuse failed to adequately assign accountability to those senior military and civilian officials who authorized abusive interrogation techniques."⁵⁷ As one book about the scandal put it, "The stream of [DoD] reports . . . according to legal experts, did more to obfuscate the subject of detainee abuse than to shed light on the events at that prison."⁵⁸

III. INVESTIGATIVE STEPS

Investigations typically move through a series of steps. At the outset, those who have ordered the investigation must determine the scope or breadth of the inquiry.⁵⁹ Next, the investigator or investigative team must be selected.⁶⁰ Once the investigation is underway, decisions are made about who should be interviewed and what documents should be reviewed.⁶¹ Finally, based on an analysis of the evidence, investigators draw conclusions about what occurred.⁶² Investigative flaws can occur at any stage, resulting in disputed findings that may fall short of the investigation's initial goal or lack credibility. To understand how the DoD investigations failed, we need to look at each investigative step, evaluating and analyzing the process closely.

56. Editorial, *The Torture Report*, N.Y. TIMES, Dec. 18, 2008, <http://www.nytimes.com/2008/12/18/opinion/18thu1.html>.

57. Press Release, Office of Senator Carl Levin, Levin, McCain Release Executive Summary & Conclusions of Report on Treatment of Detainees in U.S. Custody (Dec. 11, 2008), available at <http://levin.senate.gov/newsroom/release.cfm?id=305735>.

58. TARA MCKELVEY, *MONSTERING: INSIDE AMERICA'S POLICY OF SECRET INTERROGATIONS AND TORTURE IN THE TERROR WAR* 177 (2007).

59. See Thornburgh, *supra* note 9; Ralph C. Ferrara, Ann M. Ashton & Jonathan R. Tuttle, *Internal Corporate Investigations and the SEC's Message to Directors in Cooper Co.*, 65 U. CIN. L. REV. 75 (1996).

60. See sources cited *supra* note 59.

61. See *id.*

62. See *id.*

A. *Scope of Investigations: How Far to Go?*

The first step in any investigation is the determination of its goal or scope.⁶³ The scope of an investigation determines what subjects will be covered and which questions will be answered.⁶⁴ It also determines who will lead the investigation and decide its findings.⁶⁵ It guides everything from the use of resources, to the specific questions asked of witnesses, to the subject matter of the final reports.⁶⁶ The scope defines the playing field upon which the entire investigation unfolds.⁶⁷

As the investigation's scope is generally set by the establishing agency, the scope informs the public of the inquiry's goal and can seek to have a public relations impact long before any findings result.⁶⁸ Defense Secretary Rumsfeld announced the formation of the Schlesinger Panel when he faced calls for his resignation over the scandal during contentious hearings in front of Senate Armed Services Committee,⁶⁹ stating, "I'm confident that these distinguished individuals will provide a full and fair assessment of what has been done thus far."⁷⁰

The Schlesinger Panel and several of the DoD investigations were given the broadest of ostensible scopes. In his letter appointing the Schlesinger Panel, Rumsfeld asked for their "views on the causes of the problems and what should be done to fix them."⁷¹ The Army's Inspector General Mikolashek was directed to prepare "a comprehensive review of how the Army conducts detainee operations in Afghanistan and Iraq."⁷² General Jones's investigation was "specifically directed to focus on whether organizations or personnel higher than the 205th MI Brigade chain of command, or events and circumstances outside the 205th MI Brigade were involved directly or indirectly in the questionable activities regarding alleged detainee abuse at Abu Ghraib prison."⁷³

The Taguba Report's scope was significantly more limited and is an example of how an organization can use a more limited scope of investigation to control a report's outcome. The Taguba Report was

63. See Thornburgh, *supra* note 9, at 1; Brodsky, *supra* note 9, at 3.

64. As an investigator, the author draws from his knowledge and experience in setting the scopes of investigations to elaborate on and explain the importance of this step.

65. See *supra* note 64.

66. See *id.*

67. See *id.*

68. See *id.*

69. See Philip Shenon, *Prison-Abuse Panel is Third In Bush's War on Terrorism*, N.Y. TIMES, May 8, 2004, at A8.

70. *Id.*

71. See SCHLESINGER REPORT, *supra* note 38, at 106.

72. See MIKOLASHEK REPORT, *supra* note 30, at 2.

73. See FAY/JONES REPORT, *supra* note 33, at 2.

initiated before the widespread publication of the Abu Ghraib photos, and General Taguba was ordered to focus on the lowest possible level: the role of the Military Police units. The report strongly condemned the conduct of the MPs, but Taguba also came to believe there was higher-level involvement in the abuse that he could not investigate. As Taguba told *The New Yorker* after he left the military, “I suspected that somebody was giving them [the MPs] guidance, but I could not print that. . . . Somebody was giving them guidance, but I was legally prevented from further investigation into higher authority. I was limited to a box.”⁷⁴

The Schlesinger, Mikolashek, and Fay/Jones Reports had appropriately broad scopes of investigation, but as will be discussed below these inquiries did not execute investigations consistent with their assigned scopes.⁷⁵

Investigators given the broadest mandates have the greatest responsibility in a situation like the Abu Ghraib scandal. The stated scope of an investigation provides a benchmark to which the investigation’s authors can be held accountable. In the Abu Ghraib case, the investigations with the broadest scopes were later widely cited by DoD and Bush administration officials as evidence that the causes of the scandal were narrowly contained.

B. Selecting the Investigators

The term “investigator” herein indicates the entire investigative team, including both the leaders of an investigation and the line investigators. For an investigation with a broad scope to be credible, its investigators must be willing and able to follow the evidence wherever it leads. They cannot be restricted by concern for their professional advancement, or by pre-existing biases or attitudes.⁷⁶ This is hard to achieve in any investigation, but is even more essential in the military where the chain of command is the key fact of life for military personnel.

74. See Hersh, *supra* note 26.

75. Another aspect of the abuse was the role of two defense contractors who helped run the prison: CACI provided interrogators, and Titan/L-3 provided translators. There is significant evidence that these contractors played a role in the abuse of the detainees, an issue which the DoD reports generally did not investigate. In fact, as of this writing, there has been no systemic DoD investigation of the role of the contractors in the abuse. This article does not address the role of contractors in the abuse of detainees at Abu Ghraib because of this author’s on-going involvement in the litigation between former detainees and these two firms. The article draws only from public source documents, and does not utilize materials from that litigation.

76. See Ferrara et al., *supra* note 59, at 84; Brodsky, *supra* note 9, at 1; Brantley & Anderson, *supra* note 9, at 2.

Expecting members in the military chain of command to conduct a credible investigation of those above them is unrealistic, a fact that the Army's standard investigative protocols recognize. Army regulations do not permit a junior officer to interview or investigate a more senior officer.⁷⁷

This situation led to the replacement of Major General Fay as the initial lead investigator of MI at Abu Ghraib. Fay, a two-star general, was appointed by Lieutenant General Ricardo Sanchez, a three-star general. However, when it became clear that the investigation could potentially implicate Sanchez as a link in the chain of command above the prison, Sanchez recused himself.⁷⁸ A four-star general, General Paul Kern, then appointed Lieutenant General Jones to head the investigation. Jones was a more senior officer than Sanchez, so he could interview and investigate Sanchez.

With the exception of the Schlesinger Panel, virtually all of the lead DoD investigators were active-duty military officers.⁷⁹ Some of these officers, like Department of the Army Inspector General Mikolashek, had specific oversight duties, but others were line-officers drafted from other assignments to conduct the investigations.⁸⁰

Several of the investigations conducted by active-duty military officers like Mikolashek and Fay/Jones had broad scopes; however, there is an inherent conflict of interest for military officers conducting an investigation that could implicate their superiors both at DoD and the White House. The use of these military officers as lead investigators raises questions about the seriousness of the stated scopes of these investigations. The Army's investigative protocols meant that the appointment of a Lieutenant General (Anthony Jones) was a direct statement that his investigation would go no higher on the chain of command than another Lieutenant General, Ricardo Sanchez, irrespective of the broad language of its scope.

77. See *General in Iraq Abuse Probe Seeks Removal*, USA TODAY, June 10, 2004, http://www.usatoday.com/news/washington/2004-06-10-prison-probe_x.htm.

78. See News Transcript, Office of the Assistant Secretary of Defense (Public Affairs), Special Defense Department Briefing on Results of Investigation of Military Intelligence Activities at Abu Ghraib Prison Facility (Aug. 25, 2004) available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2698>.

79. The one exception was Shelton Young, the Deputy Inspector General for Intelligence, a career employee of the Department of Defense. Young authored the *Review of DoD-Directed Investigations of Detainee Abuse* (the Young Report), issued on Aug. 25, 2006. For further discussion of the Young Report, see *infra* Part III.E (Use of Prior Reports).

80. Taguba had been the Deputy Commanding General for Support, Third Army, U.S. Army Forces Central Command, Coalition Forces Land Component Command (CFLCC), based in Kuwait. Jones was the Deputy Commanding General, U.S. Army Training and Doctrine Command. Fay was the Deputy Chief of Staff for Intelligence.

These conflicts of interest were not academic questions for investigators. Major General Antonio Taguba issued a report that was critical of the Army.⁸¹ In January 2006, after an otherwise spotless military career of thirty years, Taguba was directed to retire by the Army's Vice-Chief of Staff, an action Taguba attributed directly to his blunt investigation.⁸² Taguba stated, "They always shoot the messenger. To be accused of being overzealous and disloyal—that cuts deep into me. I was being ostracized for doing what I was asked to do."⁸³

One DoD investigation that did not use active duty officers as the lead investigators was the Schlesinger Panel. However, while none of the Panel members were employed by DoD at the time, all had previously been influential members of the armed forces management structure.⁸⁴ All had previous responsibilities for overseeing the very military systems that were now in question.⁸⁵ They were technically "independent," but their collective histories with DoD raised significant questions about their functional independence.

Following the release of the DoD reports, a group of eight retired generals and admirals wrote to President Bush calling for the appointment of a bipartisan, independent commission into U.S. detention and interrogation practices, stating the following:

Investigations that are purely internal to the military, however competent, cannot examine the whole picture. . . . Internal investigations, by their nature, also suffer from a critical lack of independence. Americans have never thought it wise or fair for one branch of government to police itself. But that has been exactly the case in many of the abuse inquiries to date.⁸⁶

Another issue for the DoD investigations was their failure to utilize outside subject matter experts, either as part of their investigative teams, as consulting experts, or to utilize non-DoD investigators from other U.S. government agencies.⁸⁷ Outside subject matter experts were readily available through organizations like the International Criminal Court (ICC) at the Hague, the various War Crimes Tribunals, as well as human rights groups. Numerous U.S. judges, former criminal prosecutors, and

81. See TAGUBA REPORT, *supra* note 28.

82. See Hersh, *supra* note 26.

83. *Id.*

84. See *supra* text accompanying note 38.

85. See *id.*

86. Press Release, Retired Generals, Admirals Call for Independent Probe into Torture; Human Rights First Report Shows Gaps in Investigations So Far (Sept. 8, 2004) available at http://www.humanrightsfirst.org/media/2004_alerts/0907.htm.

87. See Brantley & Anderson, *supra* note 9, at 2; Thornburgh, *supra* note 9, at 2.

law enforcement officials have gained experience in investigating potential human rights abuses for the ICC and related entities.⁸⁸

There were good reasons to utilize *some* active duty military personnel in these investigations. A command structure like the Army's requires ranking officers to be involved in the investigation in order to compel the cooperation of lower ranking soldiers by direct order. Also, this author's own experience conducting investigations in military and law enforcement structures highlights the importance of having some team members who are familiar with an organization's unique culture, structure, rules, and policies. Investigators who have shared backgrounds with witnesses, and speak the language of the organization, can make some organization witnesses more comfortable about speaking openly.

To be consistent with the stated scopes of the investigations, investigators should have been both functionally and personally independent of the chain of command.⁸⁹ The teams should have utilized outside subject matter experts working alongside military personnel familiar with the Army's structure and culture.

The type of investigator directly impacts what evidence becomes available. Witnesses may be more or less willing to speak openly about their experiences, based on their perceptions of who the investigators are. In this author's experience, witnesses do a remarkably rapid calculation about how safe it is to come forward with controversial revelations. If the investigators are perceived as independent of an organization's culture, and as neutral and unbiased, witnesses who were on the fence about speaking candidly will be more willing to speak out. On the other hand, using investigators who are too closely associated with the subject organization can have an insidious self-limiting effect. Some witnesses will quickly decide that the interview is not a safe venue in which to speak candidly.

Other problems flowed from the choice of investigators. Any investigator makes dozens of judgment calls, and their attitudes and views impact each of these decisions. Many of these decisions are analyzed below, and include the selection of witnesses and other evidence, how the investigators dealt with the barriers to disclosure by

88. See Gerald F. Uelman, *Californians at The Hague*, CAL. LAWYER, Dec. 2006, at 27-28. For example, the International Criminal Tribunal for the former Yugoslavia included Gabrielle Kirk McDonald, the first black woman appointed to the federal court in Texas, and Patricia M. Wald of the U.S. Court of Appeals for the D.C. Circuit. See *id.* at 27. Lawyers at the Tribunal included former U.S. Attorney for the Central District of California, Terree A. Bowers, as well other former DOJ prosecutors. See *id.* at 28.

89. See Thornburgh, *supra* note 9, at 1. "Investigators involved in these types of undertakings [internal corporate investigations] must, of course, be totally independent of the organizations that engaging them." *Id.*

witnesses, the quality and type of analysis conducted, and finally, the findings and recommendations.

Independence is a matter of context and appearances as well. The Abu Ghraib scandal played out internationally. The bad publicity had an increasingly negative impact on the reputation of the U.S. military around the world, and on the war effort in Iraq.⁹⁰ An investigation by a truly independent panel would have garnered far greater respect from the international community, and the findings would have been more widely accepted.

C. Choice of Witnesses

With the scope of the inquiry delineated and the investigators chosen, the process turns to the collection of evidence. Any investigation is a series of choices. With an event like the Abu Ghraib scandal, the universe of potential evidence is so large that it is unrealistic to interview every potential witness or review every document. The choice of witnesses obviously influences the type of evidence collected, but also reveals something about the investigative team's values, and influences its views on the case as a whole.

The DoD investigations focused overwhelmingly, and in some cases exclusively, on interviews with current military personnel.⁹¹ The Mikolashek Report interviewed and surveyed over 650 soldiers from the ranks of Private to Major General at twenty-six different locations in Iraq, Afghanistan and the United States. They interviewed no non-military witnesses.⁹² Generals Fay and Jones, with an investigative team of twenty-six personnel, conducted over 170 interviews, all but three of which were with soldiers and officers.⁹³ As will be discussed below, the Schlesinger Report's list of witnesses included some civilian leaders in the Pentagon, but was otherwise largely limited to soldiers and officers.⁹⁴

Given the broad scope of the Mikolashek, Schlesinger, and Fay/Jones investigations, interviewing those higher up on the chain of command with authority to direct the activities of detainee detention and

90. Former Navy General Counsel Alberto Mora reported that some high-ranking military officers "maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively the symbols of Abu Ghraib and Guantanamo." Press Release, *supra* note 57.

91. A key exception is the Taguba Report. *See infra* text accompanying note 104.

92. *See* MIKOLASHEK REPORT, *supra* note 30, at 2.

93. *See* FAY/JONES REPORT, *supra* note 33, at 3.

94. *See* SCHLESINGER REPORT, *supra* note 38, at 23-25. The Schlesinger Panel did have some contact with the ICRC and the Human Rights Executive Directors' Coordinating Group, but the report did not discuss any evidence provided by either group. *Id.* at 23-25, 85-87.

interrogation would seem natural. This did not occur even though, as will be discussed below, Fay/Jones and Schlesinger uncovered leads that clearly pointed to these potential witnesses. None of the investigations included interviews of anyone in the White House or in the CIA.

Mikolashek's report interviewed Privates and even Army chaplains, but went no higher than a group he described as "selected leaders at the Combined Forces Land Component Command and the Combined Joint Task Force, division."⁹⁵ Fay/Jones interviewed Lieutenant General (LTG) Ricardo Sanchez, Commander of Combined Joint Task Force-7, but no one higher. The Schlesinger Panel conducted interviews up through the DoD chain, including Secretary Rumsfeld, but provided no details about those interviews. The Panel did not report what was asked of these high-level witnesses or what their responses were, nor did it cite these interviews as a basis for its conclusions.

Numerous other potential witnesses could have been interviewed. Several reports noted the presence of employees of Other Government Agencies (OGA) at the prison, a euphemism generally used for CIA and other intelligence personnel.⁹⁶ A senior member of the National Security Council toured the prison.⁹⁷ Iraqi Police were stationed inside Abu Ghraib.⁹⁸ Numerous government contractors with the firm CACI, who served as interrogators, and with the firm Titan, who worked as translators, were also present at the prison.⁹⁹ The International Committee of the Red Cross (ICRC) also had access to the prison.¹⁰⁰

Many of the investigations interviewed few or no detainees. Detainee interviews were a potential source of evidence on many issues, including the question of higher level involvement in the abuse. While the detainees were not present at staff meetings where orders regarding interrogations were given, they could have provided other relevant information such as the types of questions they were asked during interrogations, what torture techniques were used during specific time periods, who was present during interrogations, and what roles they played. This author interviewed detainees who provided detailed physical descriptions of their interrogators and of the officers overseeing the interrogations. Several detainees spoke English and could understand discussions between the interrogators. All of this evidence could later have been compared with interviews of soldiers and interrogators, and

95. See MIKOLASHEK REPORT, *supra* note 30, at 6-8.

96. See *e.g.* YOUNG REPORT, *supra* note 6, at 14 (discussing the presence of OGA's operating with military units without "interagency agreements").

97. See SCHLESINGER REPORT, *supra* note 38, at 65-66.

98. See *id.* at 74.

99. See discussion *supra* note 75.

100. See SCHLESINGER REPORT, *supra* note 38, at 85-88.

documentary evidence such as emails and policy memos, to track the evolution of interrogation approaches and potentially assign responsibility for the approaches being utilized.

Interviews with detainees might have led to a more comprehensive understanding of the breadth of the detainee abuse problem. Human rights groups have repeatedly asserted that detainee abuse was a widespread problem in U.S. detention facilities,¹⁰¹ a view that was rejected in the DoD reports. However, if the DoD investigations had been conducted differently, their findings might have had a different emphasis. For instance, the Mikolashek investigation energetically interviewed hundreds of soldiers all over Iraq and Afghanistan; if the investigation had interviewed as many detainees in these areas with equal vigor, we might have an entirely different view of the breadth and scope of abuse. In any event, with only a relative handful of DoD detainee interviews to depend upon, we have no effective way of evaluating the DoD's narrowly focused findings.

In the first week after the Army obtained the now infamous photos, the Army's Criminal Investigation Division (CID) interviewed thirteen detainees.¹⁰² These interviews focused only on individual acts of abuse, with an eye towards proving direct culpability for specific violations of Army rules.¹⁰³ The goal of the interviews was limited to extracting evidence that could be used in potential courts martial. There is no indication that other detainees were interviewed, and the interviews did not appear to deal with any broader potential issues.

All of the DoD investigations included the CID investigation among the documents they reviewed, but most disregarded the detainee interviews in their analysis. The reasons for this are not clear. It could mean that the CID interviews were inadequate for these later investigators; but if so, why didn't these other investigators conduct their own detainee interviews more focused on their own scopes of investigation? Another possibility is that the later DoD investigators gave little credence to the detainees because of the investigators' institutional biases, or their preconceived notions about the value of this evidence. A final possibility is that these DoD investigators were fearful that further detainee interviews would reveal additional evidence of abuse, further complicating their task.

101. HINA SHAMSI, *COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN*, (Deborah Pearlstein ed., Feb. 2006), available at http://www.humanrightsfirst.org/us_law/etn/dic/index.asp; REED BRODY, *THE ROAD TO ABU GHRAIB* (Widney Brown, ed., June 8, 2004), available at <http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib>.

102. See Sworn Statements, *supra* note 28.

103. See *id.*

The Taguba Report was the only DoD report that utilized detainee evidence in any significant manner. Taguba specifically cited the detainee evidence in his findings, stating, “I have carefully considered the statements provided by the following detainees, which under the circumstances I find credible, based on the clarity of their statements and supporting evidence provided by other witnesses.”¹⁰⁴

The failure to consider non-military points of view in the DoD reports led to a blind reliance on the statements by these officers and soldiers. Mikolashek repeatedly cited his interviews with soldiers and officers as the only basis for numerous factual findings, but provided no justification for this. The following example is typical: “Of the interviewed point of capture battalion and company leaders, 61% (25 of 41) stated their units . . . held detainees at their locations from 12 hours up to 30 days.”¹⁰⁵ The report provided no other evidence relating to this issue, and appears to be relying completely on the officers’ self-reporting.

Mikolashek’s “Finding 1” stated, “All interviewed and observed commanders, leaders, and soldiers treated detainees humanely.”¹⁰⁶ It is unreasonable, even naive, to expect that military personnel are going to routinely self-report behavior that violates written norms or regulations, and that could result in discipline or criminal prosecution. This was even more the case in the Army during the period following the release of the Abu Ghraib photographs.

Witness selection can have other, more subtle impacts on an investigation. This author’s experience as a career investigator has shown him that the perspective gained from different witnesses affects the investigator’s point of view and analysis. When virtually all of the witnesses are from one group, it cannot help but impact the investigator’s view of the facts. Conducting the Abu Ghraib investigations without interviewing the victim—the detainees—is akin to doing a rape investigation in civilian law enforcement without interviewing the rape victim. Critical investigative insights are lost when this happens.

Most of the DoD reports drew narrow conclusions about the causes of the abuse. These conclusions were not surprising given the reports’ reliance on mostly military witnesses. By contrast, the Taguba Report utilized more non-military witnesses, and its conclusions provided the most specific, unqualified statements regarding the abuse, describing “numerous incidents of sadistic, blatant and wanton criminal abuses”¹⁰⁷

104. See TAGUBA REPORT, *supra* note 28.

105. See MIKOLASHEK REPORT, *supra* note 30 at v.

106. See *id.* at 10.

107. See TAGUBA REPORT, *supra* note 28, at 17.

Taguba provided these findings as clear, stand-alone factual conclusions, without self-serving language excusing the conduct.¹⁰⁸

Having interviewed only military witnesses, the Mikolashek, Fay/Jones, and other DoD reports focused first on the challenges faced by the military, rather than detainee treatment. The first lines of the Mikolashek Report stated that “the overwhelming majority of our leaders and soldiers understand the requirements to treat detainees humanely and are doing so,” and only then speaks of the “unauthorized [abusive] actions taken by a few individuals.”¹⁰⁹ Similarly, the Fay/Jones Report first carefully described the troops’ “operational environment” of hostile forces, under-staffing, and inadequate equipment, before concluding that the primary cause was misconduct by “a small group of morally corrupt soldiers and civilians,” a lack of discipline, and a failure of leadership.¹¹⁰ The types of direct findings found in Taguba’s report were buried under a blizzard of exculpatory language in the other reports.

D. *Barriers to Witness Disclosure*

It is not enough for investigators to simply select their witnesses, show up, and ask questions. The investigator must consider who the witnesses are, what will motivate them to speak, and what the witnesses’ barriers to disclosure are.¹¹¹ This is particularly important in military and para-military organizations where the witnesses’ loyalties to their own units and comrades may be stronger than their obligations to follow orders and cooperate with an investigation.¹¹²

These loyalties, sometimes referred to as a “code of silence,”¹¹³ played a role in the Abu Ghraib investigations. The Taguba Report made specific reference to this, stating that the MI unit “seemed to be operating

108. Taguba did not ignore other contributing or mitigating factors. He discusses the dangerous external threats, under staffing, inadequate training, shortages of equipment, detainee overcrowding, and shortage of morale facilities in a separate section. *See id.* at 36-44.

109. *See* MIKOLASHEK REPORT, *supra* note 30, at 1.

110. *See* FAY/JONES REPORT, *supra* note 33, at ii-iii.

111. *See* DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 221-22 (1984); PAUL J. ZWIER & ANTHONY J. BOCCHINO, FACT INVESTIGATION: A PRACTICAL GUIDE TO INTERVIEWING, COUNSELING, AND CASE THEORY DEVELOPMENT 16-22 (2000).

112. *See* Robin Abcarian, *Who You Gonna Call When the Abuser Wears a Badge?*, L.A. TIMES, Apr. 9, 1997, at E1; Michael Gordon, *As Policy Decisions Loom, a Code of Silence Is Broken*, N.Y. TIMES, Apr. 15, 2006, at 18, available at <http://www.nytimes.com/2006/04/16/washington/16assess.html>; Vincent J. Schodolski, *Panel Urges Civilian Oversight for LAPD*, CHI. TRIB., Nov. 17, 2000, at 3.

113. *See* Richard A. Serrano, *Prosecutors Strike out with Tailhook Scandal*, L.A. TIMES, Dec. 19, 1993, at A41; Gordon, *supra* note 112.

in a conspiracy of silence.”¹¹⁴ One MI soldier at the prison, Sergeant Samuel Provance, reported the following:

When I made clear to my superiors that I was troubled about what had happened, I was told that the honor of my unit and the Army depended on either withholding the truth or outright lies. . . . Everything I saw and observed at Abu Ghraib and in Iraq convinced me that if I filed a report [about the abuse], I wouldn't be listened to, that it would be covered up. I thought that the best case [scenario] was that I would be considered a troublemaker and ostracized, but that potentially, I might even place my life in danger.¹¹⁵

In addition to understanding the code of silence, investigators should know the legal consequences that witnesses face. Soldiers can be charged for whatever misconduct they engage in, but also for failing to report the misdeeds of others, even when they did not participate in that misconduct. This concern was more than a hypothetical issue for witnesses in the DoD investigations, even for those who wanted to come forward. When Sergeant Provance was interviewed by General Fay, Fay told him, “You should have said something earlier. You could have busted this thing wide open.”¹¹⁶ Fay then said he was going to recommend administrative action against Provance for his failure to report the abuse, in spite of the fact that Provance was not implicated in any of the abuse himself.¹¹⁷

There were no indications in the DoD reports that the investigators recognized or acknowledged these barriers to disclosure, or took any steps to address them. In fact, they sometimes took just the opposite approach. During the initial CID investigation at the prison soldiers were called down in groups and directed to fill out generic questionnaires about whether they had witnessed abuse. Then, the few soldiers who had answered “yes” to any of the questions were publicly called back for further questioning. Sergeant Provance recalled:

I got worried when the [unit's] leadership announced to everybody who was being called back for interviews. I noticed very few others were called back, which implied they had nothing to say. As a result,

114. See TAGUBA REPORT, *supra* note 28, app. A.

115. Sgt. Samuel J. Provance, Prepared Statement before the National Security Subcommittee of the House Committee on Government Reform (Feb. 13, 2006), <http://www.humanrightsfirst.info/pdf/06214-usls-provance-statement.pdf>.

116. See McKelvey, *supra* note 58, at 178.

117. See *id.* Provance was later disciplined by the Army for speaking with the media about his observations at Abu Ghraib. *Id.* He received a reduction in rank. *Id.*

the other soldiers there felt that I must be in trouble, or was telling on those who were.¹¹⁸

These barriers to disclosure do not mean that every soldier was lying, or that all the information obtained from these interviews was worthless. However, the investigative reports should have identified these issues for the reader and discussed what approaches were taken to address them. It should also have discussed these issues when analyzing how much relative weight to give to a witness's evidence.

The DoD investigations did not do this. None of these issues was discussed in any manner in the reports. The impression was that every soldier always answered questions fully and honestly, and what they were saying could be taken at face value. The reports appeared to assume that all soldiers will tell the truth at all times.¹¹⁹

The DoD investigations were conducted in an environment with tremendous barriers to witness disclosure: a military command and control structure with soldiers and officers facing potential court martial and against a backdrop of an international scandal. Without making significant efforts to address these barriers, the resulting process was guaranteed to elicit non-controversial statements. Only the most courageous or foolhardy person would conceivably speak out in this context.

E. Use of Prior Reports

Documents can be a critical source in an investigation, particularly when they provide first-hand evidence about the underlying events. Unfortunately, the documents that many of the DoD investigators relied upon most heavily were the earlier reports by other DoD investigators. Arranged like a set of Chinese boxes with each report containing the prior ones, the reports referenced and, generally uncritically relied upon their predecessors. The Taguba Report referenced the Miller and Ryder Reports.¹²⁰ The Mikolashek Report referenced the Taguba, Miller, and Ryder Reports.¹²¹ Fay/Jones, in turn, referenced Mikolashek, Taguba, Miller, and Ryder.¹²² The Schlesinger investigation, which was

118. See Provance, *supra* note 115.

119. While the Mikolashek Report utilizes this approach most overtly, the same critique can be applied to all of the investigations that relied so heavily on interviews with the military.

120. See TAGUBA REPORT, *supra* note 28, at 6-14.

121. See *e.g.* MIKOLASHEK REPORT, *supra* note 30, at 2.

122. See *e.g.* FAY/JONES REPORT, *supra* note 33, at i.

completed in an unbelievable forty-five days, was forced to rely heavily on all the prior reports.¹²³

The final link in the chain was literally a “report of reports,” prepared by the Army’s Deputy Inspector General for Intelligence.¹²⁴ This was a review of the “13 senior-level . . . investigations of detention and interrogation operations that were initiated as a result of detainee abuse. The purpose . . . was to evaluate the reports to determine whether any overarching systemic issues should be addressed.”¹²⁵

For the Army and the report authors, this approach had obvious advantages. As the conclusions of the prior reports were already acceptable to the organization, the subsequent investigators were on safe ground. They could praise the work of the prior investigators and base their new findings upon this earlier work, while not having to conduct further, potentially problematic inquiries. DoD management was then able to point to a string of reports that exonerated their upper level management, without subjecting themselves to fourteen truly separate investigations.

The problem with this approach is obvious. Whatever flaws existed in the earlier reports were carried wholesale into the new “findings.” The earlier results were adopted, irrespective of the fact that the prior investigations were conducted with different goals and scope, and looked at the events through different prisms. The later investigators had no way of evaluating the earlier witness interviews, their credibility, and how much weight to give them. The result was the stringing together of a series of inadequate, but numerous, prior investigations, and then preparing an overview of those inadequate investigations, to reach inadequate conclusions.

This process had a particularly insidious effect on the DoD investigations because of the linchpin role the Taguba Report served for many of the reports that followed. The Taguba Report was specific about the abuse by MPs, and was widely praised by outside observers.¹²⁶ However, Taguba’s investigation was explicitly limited to an investigation of the MPs, and made no findings regarding the conduct of Military Intelligence, OGAs, or higher-level officials. Subsequent DoD investigators then “relied” on the generally respected Taguba Report,

123. See SCHLESINGER REPORT, *supra* note 38, at 15, 21.

124. See YOUNG REPORT, *supra* note 6, at 5.

125. *Id.*

126. See McKelvey, *supra* note 58, at 172 (“The Taguba Report, is according to legal experts who have studied the issue of detainees and U.S. Policy, the most thorough official account of the Abu Ghraib events.”); Hersh, *supra* note 26.

misleadingly stating that no evidence of upper level involvement had been found by Taguba or other earlier investigations.¹²⁷

The reliance by some investigators on the problematic Ryder Report demonstrated other hazards of the uncritical adoption of earlier work product. Major General Ryder, the Army Provost Marshall, conducted a review of detainee operations in Iraq in October and November 2003.¹²⁸ He concluded, “Generally, conditions in existing prisons, detention facilities and jails meet minimal standards of health, sanitation, security, and human rights established by the Geneva Conventions.”¹²⁹

This sanguine view of the situation was tragically wrong. The Taguba Report, completed just four months later, noted that the Ryder investigation was conducted during the period of the most serious abuses at Abu Ghraib, and that abuses were presumably going on as the Ryder team was working at Abu Ghraib.¹³⁰

Only the Taguba and Schlesinger Reports raised critiques of the Ryder Report,¹³¹ although they also relied in part on Ryder. There was no mention of Ryder’s critical errors in the Fay/Jones, Mikolashek, or Young Reports.

F. Failure to Pursue Leads Up the Chain of Command

Even though the investigations were flawed, several of the reports contained evidence that pointed up the chain of command beyond Abu Ghraib. The manner in which this important evidence was dealt with tells us a good deal about the quality and effectiveness of these investigations.

The Schlesinger Report would seem the most likely to uncover high-level involvement in the abuse. Its investigation was the closest to an independent inquiry, as it was not conducted by active-duty military officers or current DoD staff.¹³² Their witness list went higher up the chain of command than any of the other investigations, and included

127. The Schlesinger Panel “concur[red] with the findings of the Taguba and Jones investigations that serious leadership problems [at the Brigade level] . . . allowed the abuses at Abu Ghraib.” See SCHLESINGER REPORT, *supra* note 38, at 15. Fay/Jones concluded, “Assessing the materials from both MG Fay and from MG Taguba, I agree that leadership failure, at the brigade level and below, clearly was a factor in not sooner discovering and taking actions to prevent” the abuse-related incidents. FAY/JONES REPORT, *supra* note 33, at 17.

128. See RYDER REPORT, *supra* note 24, at 1.

129. *Id.* at 7.

130. See TAGUBA REPORT, *supra* note 28, at 12.

131. See *id.* at 12, 18-20; SCHLESINGER REPORT, *supra* note 38, at 72-73.

132. See SCHLESINGER REPORT, *supra* note 38, at 43-46, app. B.

Defense Secretary Rumsfeld.¹³³ The report also examined some of the relevant policy memoranda from the White House and the Department of Justice Office of Legal Counsel (OLC), and discussed the impact of these memos on the handling of detainees.¹³⁴

While the Schlesinger Panel stated unequivocally that there was no high-level involvement in the Abu Ghraib abuse,¹³⁵ significant evidence in the report raised questions about this finding. There are several examples of this.

In a paragraph headed, “Pressure on Interrogators to Produce Actionable Intelligence,” the report listed sources of what it refers to as pressures on interrogators to produce results, stating,

With lives at stake, senior leaders expressed, forcibly at times, their needs for better intelligence. A number of visits by high-level officials to Abu Ghraib undoubtedly contributed to this perceived pressure. Both the CJTF-7 commander and his intelligence officer, CJTF-7 C-2¹³⁶ visited the prison on several occasions. MG Miller’s visit in August/September 2003 stressed the need to move from simply collecting tactical information to collecting information of operational and strategic value. In November 2003, a senior member of the National Security Council Staff visited Abu Ghraib leading some personnel at the facility to conclude, perhaps incorrectly, that even the White House was interested in the intelligence gleaned from their interrogation reports.¹³⁷

This “forcible expression” by senior leaders in the Army and “perceived pressure” by the interrogators cries out for investigation. However, the report provided no additional information on this subject, and blandly concluded, “Despite the number of visits and the intensity of interest in actionable intelligence, however, the Panel found no undue pressure exerted by senior officials. Nevertheless, their eagerness for intelligence may have been perceived by interrogators as pressure.”¹³⁸ The report cited no interviews with witnesses nor any documents to support this remarkable assertion.

133. Among the others interviewed by the Schlesinger Panel were Under Secretary Douglas Feith, Deputy Secretary Paul Wolfowitz, Under Secretary Steve Cambone, and Gen. John Abizaid, Commander, U.S. Central Command. See SCHLESINGER REPORT, *supra* note 38, at 22-23.

134. See *id.* at 6-8, 33-38.

135. See *id.* at 43.

136. Combined Joint Task Force-7 Commander LTG Ricardo Sanchez and Combined Joint Task Force-7 C-2, MG Barbara Fast, Director for Intelligence, respectively.

137. SCHLESINGER REPORT, *supra* note 38, at 65-66.

138. *Id.* at 66.

The report did not criticize, or even adequately investigate, actions by high-level officials.¹³⁹ This contrasted with how the report dealt with the actions of lower-level leaders, criticizing both the MI and MP Battalion commanders as “weak and ineffective leaders [who] . . . by not communicating standards, policies and plans to soldiers . . . conveyed a sense of tacit approval of abusive behaviors toward prisoners.”¹⁴⁰ It also endorsed discipline for these commanders.¹⁴¹

If the “tacit approval” of these weak Battalion commanders was of sufficient importance to warrant discipline and specific mention as a factor leading to the abuse, how much more weight should be given to the approval or direction of interrogation techniques from the highest levels of the U.S. government? Any pressure from the Defense Secretary or the White House would be a very important source of direct or tacit approval. To explain it away as merely “perceived pressure” seems, at best, inconsistent with other points in the report and, at worst, misleading and disingenuous.

There is also the reference to a visit by “a senior member of the National Security Council (NSC) Staff” that led some personnel to conclude “that even the White House” was following their work closely.¹⁴² This November 2003 visit occurred at the time of some of the worst abuses at the prison. Neither this senior NSC staff person nor anyone from the NSC was interviewed by Schlesinger or other DoD investigators. No one from the White House was interviewed about this.¹⁴³

There is also something revealing in this sentence about the NSC staff person. Given the subject matter, we can assume that the report’s authors chose their language with care. The authors did not state that the personnel were wrong about the White House interest in their interrogations. Instead, they stated that some personnel concluded “*perhaps incorrectly*, that even the White House was interested” in their interrogation reports.¹⁴⁴ The use here of the equivocation “perhaps” raises the distinct possibility that the White House was playing a role in the interrogation process. At a minimum, the equivocation pointed strongly to the need for further investigation on the question of White House involvement. No such investigation happened.

139. *Id.*

140. *Id.* at 75.

141. *See id.* at 15.

142. *See* SCHLESINGER REPORT, *supra* note 38, at 66.

143. In fact, this is one of the few places the words “White House” appear in the DoD reports. *See id.*

144. *See id.* (emphasis added).

These unanswered questions and dangling leads contrast with the Schlesinger Report's otherwise comprehensive approach and tone. The Panel had the widest possible scope of investigation. It conducted interviews at the highest levels of the Defense Department, and the resulting report is generally more candid and critical than the other DoD reports. And yet, the investigation did not follow up on obvious leads it produced in this most critical area.

A close reading of the Fay/Jones Report revealed similar unpursued leads and raised similar questions. One such lead was buried mid-paragraph in an unrelated discussion of the interrogation teams' organization: "JIDC¹⁴⁵ personnel at Abu Ghraib believed the thirst for intelligence reporting to feed the *national level systems* was driving the train. There was then a focus to fill that perceived void and feed that system."¹⁴⁶ This belief by MI interrogators that "national level systems [were] driving the train" at the prison was squarely within the scope of the Fay/Jones investigation. It raises a number of obvious questions: Why did this personnel believe this? What was the basis for this belief? Who communicated this to them? What were they told? Pressures from "national level systems" clearly raised the possibility that high-level officials were responsible for the abuses at the prison, but the Fay/Jones Report did not address this possibility.

The report addresses this issue of high-level pressure in a confusing, illogical manner with evidence of questionable relevance: "LTG Sanchez did not believe significant pressure was coming from outside of CJTF-7, but does confirm that there was great pressure placed upon the intelligence system to produce actionable intelligence."¹⁴⁷ Lieutenant General Sanchez was as an off-site manager numerous levels of command above the actual interrogators. His "belief" that there was no significant outside pressure on the interrogators cannot carry the same evidentiary weight as the statements of on-the-ground Army intelligence professionals at the prison. In fact, as noted below, the Fay/Jones Report revealed that these interrogators were, in fact, receiving direction from outside the chain of command, possibly bypassing Sanchez himself.¹⁴⁸ There is also a troubling contradictory quality to Sanchez's statement. He reported there were no significant outside pressures, but at the same time confirmed "great pressure placed upon the intelligence system."¹⁴⁹

145. The Joint Interrogation and Debriefing Center (JIDC) coordinated interrogations in the Hard Site of the prison where most of the abuses occurred.

146. FAY/JONES REPORT, *supra* note 33, at 42 (emphasis added).

147. *Id.* at 42.

148. *See id.* at 45.

149. *See id.* at 42.

The Fay/Jones Report contained more about pressures from outside the prison, stating, “COL Pappas¹⁵⁰ perceived intense pressure for intelligence from interrogations. This began soon after he took Command in July 2003. . . . That pressure for better results was passed from COL Pappas to the rest of the JIDC leadership . . . and from them to the interrogators and analysts operating at Abu Ghraib.”¹⁵¹ The report stated that the pressure included

deviation from doctrinal reporting standards (pressure to report rapidly any and all information in non-standard formats such as Interrogator Notes in lieu of standard intelligence reports), directed guidance and prioritization from “higher,” outside of doctrinal or standard operating procedures, to pursue specific lines of questioning with specific detainees, and high priority “VFR Direct”¹⁵² taskings to the lowest levels in the JIDC.¹⁵³

The report was quite specific about the forms the pressure took, but the ambiguous description of the source of the pressure (“from ‘higher’”) signaled a reluctance by the authors to address this issue directly. The detailed listing of the forms of pressure presumably came from witnesses who reported they received specific directions from specific individuals and organizations. However, the report did not provide information about the sources of the pressure, how it was transmitted, and whether there were discussions of interrogation approaches. Who were the individuals or organizations providing the “VFR Direct taskings?” Who was present at the meetings where this was discussed? What was said? What documents exist recording this?

The Fay/Jones Report provided additional evidence of higher-level involvement in the Abu Ghraib interrogations:

During our interviews, leaders within the MI community commented upon the intense pressure they felt from higher headquarters, to include CENTCOM,¹⁵⁴ the Pentagon, and DIA [Defense Intelligence Agency] for timelier, actionable intelligence. These leaders have stated that this pressure adversely affected their decision making. . . . Based on the statements from interrogators and analysts, the pressure was allowed to be passed down to the lowest levels.¹⁵⁵

150. Colonel Thomas M. Pappas was the Brigade Commander in the 205th Military Intelligence Brigade at Abu Ghraib.

151. FAY/JONES REPORT, *supra* note 33, at 45.

152. “VFR direct” is military lingo for jumping several levels in the bureaucratic chain, as in “he went VFR direct to the Chief of Staff.” VFR stands for Visual Flight Rules, a practice that calls for use of actual landmarks to take the most direct route.

153. FAY/JONES REPORT, *supra* note 33, at 45.

154. CENTCOM stands for U.S. Central Command.

155. FAY/JONES REPORT, *supra* note 33, at 112.

In an extraordinary example of avoiding the obvious, the Fay/Jones Report did not pursue this lead, which pointed to the involvement of high level officials in the abuse. Instead, it leapfrogged over this problematic evidence, ignoring it except to conclude that MI “leaders failed to take steps to effectively manage pressure placed upon JIDC personnel.”¹⁵⁶ In the Fay/Jones analysis, the problem became the failure of lower-level managers to interpose themselves between these unnamed high-level individuals and the interrogators, rather than the instructions and orders issued by these high-level individuals.

G. *Analytical Errors*

The DoD reports contained analytical errors including unsupported conclusions, mischaracterizations of the evidence, exaggerations, inconsistent logic, and the use of minimizing or misleading language.

The Schlesinger Report catalogued a list of high-level visits and interventions at Abu Ghraib, and Fay/Jones documented that the commander of MI at the prison perceived “intense pressure” from high-level officials; however, both reports concluded that no one above the Brigade level bore responsibility for the abuses.¹⁵⁷ No substantive evidence or analysis was provided to address these apparent contradictions. These unsupported conclusions about the high-level officials also contrasted with how the reports dealt with allegations against lower-level leaders.

Several of the investigations were undercut by an obvious hole in their analyses relating to the actions of Other Government Agencies (OGAs) at the prison. It is clear from the Fay/Jones Report that OGAs played a significant role at the prison. The report detailed how LTC Jordan “became fascinated” with the OGAs, and allowed them to conduct interrogations without Army personnel present.¹⁵⁸ It included accounts of “ghost detainees” associated with the OGAs,¹⁵⁹ the death of a detainee in OGA custody at the prison, and the bringing of a weapon into an interrogation room by an OGA officer.¹⁶⁰ There were reports of unsupervised OGA involvement in the handling of detainees at a number

156. *See id.*

157. *See* SCHLESINGER REPORT, *supra* note 38, at 43; FAY/JONES REPORT, *supra* note 33, at 112.

158. *See* FAY/JONES REPORT, *supra* note 33, at 44.

159. Ghost detainees were detainees brought into the prison by OGAs and who were not recorded in any official records as having been at the facility.

160. *See* FAY/JONES REPORT, *supra* note 33, at 52-55, 118-19.

of points.¹⁶¹ The report even acknowledged that “OGA interrogation practices led to a loss of accountability” at the prison.¹⁶²

None of the DoD investigators received access to anyone associated with the OGAs.¹⁶³ They conducted no interviews with OGA personnel, nor reviewed any documents related to OGAs.¹⁶⁴ In spite of this obvious gap in its review of Abu Ghraib operations, Fay/Jones still concluded that “no organization or individual higher in the chain of command . . . were directly involved in the questionable activities.”¹⁶⁵ There is no caveat or asterisk associated with this finding. Without investigating OGA involvement at the prison, this sweeping conclusion was simply not credible.

Fay/Jones’s approach contrasted with how the Schlesinger Report dealt with the same problem in its analysis. While Schlesinger made similar sweeping conclusions, it specifically delineated the missing evidence, and called for further investigation. It stated they “did not have full access to information involving the role of the Central Intelligence Agency in detention operations; this is an area the Panel believes needs further investigation and review.”¹⁶⁶ At another point it stated that “[t]he Panel did not have sufficient access to CIA information to make any determination in this regard.”¹⁶⁷

The Mikolashek Report mischaracterized the evidence at several points. In one illustration of this, Mikolashek cited four incidents of abuse as examples of situations in which “the abuse was *discovered immediately* by the command, and corrective actions were taken to prevent a recurrence.”¹⁶⁸ However, one of the four examples demonstrated just the opposite. Describing an incident when an interrogator struck a detainee on the head during questioning, the report stated that “[t]he International Committee of the Red Cross, via the mayor of the detainee’s compound, discovered this after the fact. Once he was made aware of the incident, the soldier’s commander investigated and ultimately issued a field-grade article 15.”¹⁶⁹ This is hardly an example of the abuse being “discovered immediately.”

The Mikolashek Report’s first finding stated, “*All* interviewed and observed commanders, leaders, and soldiers treated detainees humanely

161. *See id.*

162. *See id.*

163. *See id.* at 118-19.

164. *See id.*

165. *See* FAY/JONES REPORT, *supra* note 33, at 2.

166. SCHLESINGER REPORT, *supra* note 38, at 6.

167. *Id.* at 70.

168. MIKOLASHEK REPORT, *supra* note 30 (emphasis added).

169. *Id.* at 19.

and emphasized the importance of the humane treatment of detainees.”¹⁷⁰ Two lines later, the report contradicts this, stating, investigators “conducted numerous interviews and sensing sessions with leaders and soldiers that revealed *most* leaders and soldiers have treated detainees humanely.”¹⁷¹ The contrast between the two statements is immediately evident: While the finding asserts that all interviewed soldiers treated detainees humanely, at least some soldiers apparently reported that detainees had not been treated humanely.

Mikolashek repeatedly compared what he described as the “94 cases of confirmed or possible abuse of any type,” to the estimated 50,000 detainees who were held by U.S. forces.¹⁷² He used this comparison to conclude that the abuses were merely an unauthorized aberration. However, his estimate of ninety-four cases was based solely on Army CID and unit summaries of investigations as of June 9, 2004.¹⁷³ He did not consult reports by the International Committee of the Red Cross. He did not consult any Non-Governmental Organizations (NGOs). He did not include any estimates for incidents involving detainees held by OGAs. In a striking contrast, nineteen months after Mikolashek’s estimate of only ninety-four incidents, the Army’s Deputy Inspector General for Intelligence reported that DoD components had 842 criminal investigations or inquiries of detainee and prisoner abuse.¹⁷⁴ A report by Human Rights First documented over 330 cases “in which U.S. military and civilian personnel were credibly alleged to have abused or killed detainees” as of April 10, 2006.¹⁷⁵

Mikolashek used other minimizing or misleading language. In a discussion of the detention facilities, the report stated, “Of all facilities inspected, only Abu Ghraib was determined to be undesirable for housing detainees because it is located near an urban population and is under frequent hostile fire,”¹⁷⁶ leaving a positive impression of the overall state of U.S. detention facilities. The use of “only” in this context is misleading because, as the Schlesinger Report pointed out, Abu Ghraib was the “primary operational level detention facility”¹⁷⁷ and was the largest in Iraq or Afghanistan by a considerable factor. In addition, Mikolashek ignored that the placing of a detention facility under hostile

170. *Id.* (emphasis added).

171. *Id.* (emphasis added).

172. *See id.* at iv.

173. *See id.*

174. *See* YOUNG REPORT, *supra* note 6, at I.

175. SHAMSI, *supra* note 101.

176. MIKOLASHEK REPORT, *supra* note 30, at 22.

177. SCHLESINGER REPORT, *supra* note 38, at 59.

fire is a direct violation of the Third and Fourth Geneva Conventions and AR 190-8.¹⁷⁸

H. Transparency of the Investigative Process

Investigative reports need to provide a certain level of transparency and professionalism in order to be found credible. This transparency takes many forms, some of which can be found in the DoD investigations. Steps to insure transparency included providing the initiating documents for an investigation, identifying the investigators, and listing which witnesses were interviewed and what documents were reviewed.¹⁷⁹ Unfortunately, most of the DoD investigations lacked other elements that are generally considered vital in an unbiased professional report.

1. Providing Sources and Footnoting

Transparency enables the reader to evaluate the quality of the findings by examining the underlying sources for those conclusions. By providing the sources for findings through footnotes or other means, investigative reports build in some inherent accountability.¹⁸⁰

The Taguba Report provided sourcing information for most of its assertions on an almost a paragraph-by-paragraph basis.¹⁸¹ By contrast, Mikolashek had pages and pages of findings with little or no sourcing information to support them.¹⁸² The Schlesinger Report also provided little or no sourcing for its findings, which is a particularly frustrating omission given the report's sweeping conclusions and the high-level nature of its investigation.¹⁸³ Schlesinger interviewed personnel at the highest level of the Defense Department, and it would be helpful to know which of the report's conclusions were based on which of the high-level interviews.¹⁸⁴ The Fay/Jones Report was inconsistent in providing footnotes and sourcing, providing sourcing in some sections of the report, but not in others.¹⁸⁵

178. See FAY/JONES REPORT, *supra* note 33, at 111.

179. In a laudable step, the Mikolashek Report provided the actual question lists used to interview witnesses.

180. See Thornburgh, *supra* note 9, at 3. Have footnotes for "every statement or fact in the body of the report." *Id.*

181. See TAGUBA REPORT, *supra* note 28.

182. See MIKOLASHEK REPORT, *supra* note 30.

183. See SCHLESINGER REPORT, *supra* note 38.

184. See *id.*

185. See FAY/JONES REPORT, *supra* note 33.

2. Acknowledging Gaps in the Evidence

No investigation can get to all the facts. There can be many reasons for this, ranging from the innocent to the more suspicious. Whatever the reason, the unavailability of important evidence becomes a fact that must be reported and evaluated.

The Taguba Report did this well. The scope of Taguba's investigation was limited to the MPs, but in the course of that inquiry, he developed views on the culpability of MI personnel in the abuses. Taguba reported this, stating, "there is sufficient credible information to warrant an inquiry . . . be conducted to determine the extent of culpability of MI personnel."¹⁸⁶ He specifically identified two officers and two military contractors whom he suspected of involvement in the abuse.¹⁸⁷

Other DoD reports failed to identify important areas of evidence that were missing from their reports, or failed to highlight the missing evidence's potential significance. Most contain little or no evidence collected from the White House or other Executive Branch offices, but this absence received no mention, comment, or analysis.

None of the investigations included evidence from OGAs. Some, like the Schlesinger Report, clearly identified this as a gap in the data and recommended further investigation, but even Schlesinger did not cite this gap as a caveat to its very broad findings.¹⁸⁸ The Fay/Jones Report made similar sweeping conclusions while ignoring the absence of any data on the role of OGAs in the abuse.

3. Style and Tone

In a professional investigation, the overall text has a neutral and unbiased tone. The report may find misconduct or violations of policy, but until that point the reader should not find hints of the author's own views.

The Taguba Report handled this matter correctly. While the report provided context and background for the abuse, the findings of misconduct were presented in a clear and direct manner. While Taguba praised the service of most of the personnel at the prison, he did this separately from his findings and did not suggest that their service mitigated the abuse.¹⁸⁹ The Schlesinger Report, irrespective of its other

186. TAGUBA REPORT, *supra* note 28, at 48.

187. *See id.*

188. *See* SCHLESINGER REPORT, *supra* note 38, at 13.

189. *See* TAGUBA REPORT, *supra* note 28, at 47.

flaws, also had a tone and presentation that were consistent with the independent investigation it purported to be.

The Mikolashek Report took a different approach. From the very first paragraphs of the report, it took pains to review all the dangers and hazards of service for the military personnel at the prison: “We found that soldiers are conducting operations under demanding, stressful and dangerous conditions against an enemy who does not follow the Geneva Convention. They are in an environment that puts a tremendous demand on human intelligence.”¹⁹⁰ Later, the report stated, “Soldiers are placed in extremely dangerous positions on a daily basis. They face the daily risks of being attacked by detainees, being taunted or spat upon, having urine or feces thrown upon them, and having to treat a detainee humanely who has just attacked their unit or fellow soldier.”¹⁹¹

Without minimizing the tremendous challenges U.S. troops faced, these obstacles have regrettably become relatively standard fare during the Iraq war and other conflicts in the modern era. Similarly, the dangers described in Mikolashek of working in an Iraqi detention facility are not dissimilar from those a non-military correctional officer would experience working in some high-security prisons in the U.S.

In any event, these difficult conditions cannot trump or even significantly mitigate the overall responsibility to treat detainees humanely. Discussing these issues at the very outset of the investigative report, as Mikolashek did, exaggerated their significance. The Fay/Jones Report was similar to the Mikolashek Report in the care it took to first describe the challenges confronting the troops before documenting the abuse.

Mikolashek combined the listing of challenges with almost fulsome praise for those serving in these conditions:

We found through our interviews and observations . . . that leaders and soldiers in Afghanistan and Iraq were determined to do what was legally and morally right for their fellow soldiers and the detainees under their care. We found numerous examples of military professionalism, ingrained Army Values, and moral courage in both leaders and soldiers. These leaders and soldiers were self-disciplined and demonstrated an ability to maintain composure during times of great stress and danger.¹⁹²

While this author does not doubt the accuracy of many of these statements, the inclusion of this type of cheerleading for the United States Army is inconsistent with the tone expected in a unbiased report.

190. MIKOLASHEK REPORT, *supra* note 30, at ii.

191. *Id.* at 16.

192. *Id.* at ii.

Reading text like this, it is unsurprising to learn that Mikolashek determined that there were “no systemic failures” in the Army’s handling of the detainee abuse scandal.¹⁹³

IV. PROTOCOLS FOR FUTURE INVESTIGATIONS

The question of ultimate command responsibility for the abuses at Abu Ghraib may never be fully addressed. The reason for this is clear: the DoD investigations had flaws at every step. From the choice of the investigators at the outset, to the selection of witnesses and the reliance on prior flawed reports, continuing through the failure to pursue important leads, and the inclusion of analytical errors, we see mistakes that influenced the findings in fundamental ways. In the end, despite an enormous expenditure of time, money, and manpower, many outside observers challenged the reports’ conclusions that the abuse was an aberration caused by a small group of graveyard shift guards.

In a close examination of the reports, we can find a guide to the types of mistakes to avoid in future investigations, as well as a guide to what an effective investigation should look like. What follows is a proposed protocol for effective independent investigations of public controversies, building from the problems with the DoD Abu Ghraib investigations.

A. *Selection of Investigators*

1. Independence

The lead investigators must be functionally independent of the organization that they are investigating.¹⁹⁴ They cannot rely upon that organization for their professional advancement or survival. The possibility of uncovering potentially damaging information about one’s superiors has both a conscious and unconscious impact on the types of information investigators gather and the conclusions they reach. Only an extremely rare individual can overcome this chilling effect.

But independence is not just an issue of a person’s position in a chain of command; it is also an attitude or a perspective. Investigators must be free of direct institutional loyalties, and emotionally and intellectually independent of the organization.¹⁹⁵ The Schlesinger Panel

193. *See id.* at iv.

194. *See Ferrara et al., supra* note 59, at 5; Brodsky, *supra* note 9, at 1; Brantley & Anderson, *supra* note 9, at 2.

195. *See Thornburgh, supra* note 9, at 1.

was functionally independent of the chain of command, but tightly bound to DoD by history and experience.

2. Balance of Perspectives

Independence is not the only goal in choosing an investigator; the investigative team should draw on a balance of perspectives from outside and inside the organization.¹⁹⁶ There are many good reasons to have members of the subject organization on an investigative team. In an organization like the Army, soldiers and officers not only work together, but live together on a twenty-four-hour basis. Not surprisingly, there is a strong internal Army culture that is suspicious of those who are not part of that culture. An investigation staffed solely by human rights activists, for instance, would have difficulty conducting interviews with soldiers and officers used to military procedures and processes.

At the same time, there are many reasons to include investigators from outside the organization. An investigation staffed solely by active duty military officers would discourage some witnesses from coming forward with information critical of the Army. The goal is a balanced team of investigators from different backgrounds and perspectives.¹⁹⁷

3. Use of Outside Subject Matter Experts

Effective investigations need to utilize outside subject matter experts, either as investigators on the team or as consultants.¹⁹⁸ One of the goals of an investigation of a public controversy is to report to those outside the organization in the news media or oversight bodies like Congress. Consequently, the organization will not only be judged by its internal standards, but by those in the larger community. Outside subject

196. Among the reasons that a balance of professional perspectives is necessary is that each profession brings its own investigative approach. In a book regarding another public controversy, the Challenger disaster, the author quotes from a study of mental health professionals evaluating the potential dangerousness of mental health patients. *See* DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE AND DEVIANCE AT NASA 412* (1997). The patients were examined by a team consisting of a social worker, a psychiatrist and a psychologist. *See id.* The researchers found that each of these three professional types “had distinctive worldviews . . . that channeled themselves into specific diagnostic interactions: [with] selective structures for question asking and answer hearing.” *Id.* This, in turn, significantly impacted the type of data they obtained from the same patient. *See id.*

197. Writing about assembling criminal investigative teams which are more likely to prevent criminal investigative failures, one author’s recommendation is to “[h]ire and respect . . . a diversity of experience, perspectives and ways of thinking about and approaching problems. A team reflecting professional diversity is more productive and less likely to fail.” *See* ROSSMO, *supra* note 10, at 133-34.

198. *See* Thornburgh, *supra* note 9, at 2; Brantley & Anderson, *supra* note 9 at 2.

matter experts can provide insight into wider professional and community standards of conduct. Their clear independence provides credibility to the resulting findings.¹⁹⁹

An effective investigative team should have functional and emotional independence from the subject organization, and include both internal staff familiar with the organization and culture, along with outside subject matter experts who can provide perspective and expertise from the wider community.

B. Scope of Investigation

In a public scandal, the more serious the underlying allegations are, the broader the scope of the investigation should be. The questions of “what did management know and when did they know it” become of increasingly greater concern. Investigators need to be free to follow leads wherever they reasonably go.²⁰⁰

Decision makers should be cautious about limiting the scope of any investigation on the front end because they cannot predict where the evidence will lead. Former U.S. Attorney General Dick Thornburgh acted as a court-appointed examiner in the WorldCom bankruptcy proceeding, and led the investigation of the CBS *60 Minutes Wednesday* segment on President Bush’s Texas Air National Guard service. He noted that both investigations began with a more narrow focus, but widened into much broader inquiries. He wrote, “Recognize that you may not be sure of the direction at the outset, nor the extent of the work involved.”²⁰¹

C. Selection of Witnesses

1. Balance of Witnesses

Events and scandals like the Abu Ghraib case involve highly charged controversies or disputes over what actually happened. Facts are inevitably in dispute.

Sometimes, investigators reject interviewing one group of witnesses based upon assumptions about what they will say. They take the view that this group of witnesses are biased, or could not have made useful observations given their perspective. These kinds of assumptions can be seductive for an investigator, but also potentially misleading. Without

199. See Brodsky, *supra* note 9, at 4.

200. See ROSSMO, *supra* note 10, at 134. “Keep the focus on the goal of developing the corrective narrative, not . . . confirming any one narrative.” *Id.*

201. Thornburgh, *supra* note 9, at 1-2.

interviewing witnesses from all sides, it is impossible to know what they will say or what perspective they will provide.

Just as local police in the United States would not conduct a criminal investigation without interviewing the crime victim or the victim's survivors, a full investigation requires contacting those impacted by the alleged misconduct. After an interview is completed, a decision can then be made regarding how much weight or credibility to give to that witness. However, not to interview an entire group of percipient witnesses is poor investigative practice. An effective investigation should interview witnesses from all sides of a dispute.

2. Choosing Witnesses Consistent with the Investigation's Scope

The scope of an investigation provides a clear guide to who must be interviewed. The witness list must include individuals who can address the scope at the highest level necessary.

Investigators often come from somewhere well below the top of the organizational chart, and there is a natural reluctance to confront higher-level managers. Often, investigators look for witnesses from the lowest possible levels inside an organization.

The rule of thumb should be the opposite. The question of leadership's role is always in play in public scandals, and any report that fails to address this will lack a critical element. The results of the higher level interviews must be part of the report findings and cited as such. At a minimum, any failure to interview a critical witness should be documented.

In a situation where something controversial has occurred, the investigator should continue up the chain of command to interview all those who would reasonably have information regarding the controversy.

D. Barriers to Disclosure

Barriers to disclosures for witnesses exist in all investigations, and any effective investigation must deal with them.²⁰²

1. Identifying and Addressing Barriers to Disclosure

Identification of the barriers to disclosure is especially important in a military or paramilitary organization where witnesses can be disciplined for any bad actions they participated in, as well as for failing to report the bad acts of others. These regulations about failing to report

202. See BINDER & BERGMAN, *supra* note 111, at 221-43; ZWIER & BOCCHINO, *supra* note 111, at 16-35.

misconduct may be well-meaning, but once an investigation begins, they can have a chilling effect that discourages witnesses from speaking candidly about what they observed.

Effective investigators must have a plan to deal with each case's unique challenges.²⁰³ For instance, in a case involving female rape victims, it may be useful to utilize female investigators for some interviews. The South African Truth and Reconciliation Commission used paired teams of investigators from the pre-apartheid police forces and liberation movements to encourage disclosures by witnesses from both sides of the apartheid-era conflict.²⁰⁴ Investigations, such as those at Abu Ghraib, where witnesses may have potential criminal or disciplinary exposure for their statements could utilize offers of immunity, anonymous "tip" lines, or craft some forms of confidentiality or anonymity into their dealings with witnesses.

At a minimum, investigators should take steps to avoid exacerbating the barriers to disclosure.²⁰⁵ Interviews should be conducted at times and locations where witnesses can attend without others in their organization being aware of it. Investigators should provide assurances that information will be kept confidential, if and when that is possible. Witnesses should be provided information about anti-retaliation policies, if the organization has these, as well as contact numbers for the witnesses to call if they perceive retaliation.

Investigators must identify the barriers to witnesses' disclosure of critical evidence in their case, and plans must be implemented to address and mitigate these barriers.²⁰⁶

2. Acknowledging Disclosure Barriers in the Report's Analysis

Even the best efforts to address these barriers will fall short of their goals. Inevitably, some witnesses will not provide full disclosure, or will lie about their knowledge of important events. The investigative report must acknowledge this as it reviews and analyzes the evidence collected.²⁰⁷ It should identify the potential barriers in the text of the report. As the report analyzes witness testimony, these issues may affect

203. See BINDER & BERGMAN, *supra* note 111, at 222. "It is important to acknowledge that nearly everyone you interview has his or her own agenda or set of objectives." See Thornburgh, *supra* note 9, at 3.

204. See Keith Rohman, *Investigating the Past: An Examination of the Investigative Unit*, in NAT'L LAWYERS GUILD, TRUTH AND RECONCILIATION: EXPOSING OFFENSES OF THE SOUTH AFRICAN APARTHEID PAST 7, 8-9 (2004).

205. See Ames Davis & Jennifer L. Weaver, *A Litigator's Approach to Interviewing Witnesses in Internal Investigations*, 17 HEALTH LAW. 8, at 3-4 (2005).

206. See Thornburgh, *supra* note 9, at 3.

207. See *id.* at 3.

the credibility given to a particular witness, or the weight given to an aspect of his or her testimony.

E. Appropriate Use of Prior Investigations

Prior investigations can be useful, and an effective investigator will not ignore them. The earlier investigations may allow the investigator to check for inconsistent statements by a witness, to find an overview of the facts, or guide the investigator to other documentary or witness evidence. However, the prior reports need to be evaluated carefully, looking at factors such as the methodologies used, the level of access to information, and the perspective of the report's authors.²⁰⁸ The investigator should treat the prior investigations as they would any other piece of evidence: examining it critically before citing it as reliable evidence.

F. Intellectual Integrity in the Analysis of Evidence

An investigation is not a mere collection of facts, and the investigator is not a mere transcriber. Investigation calls for both the collection and analysis of relevant evidence. This analysis should occur while the inquiry is underway, and in reaching factual conclusions. It must be undertaken with intellectual honesty and integrity, and with the goal of determining the full implications of all the evidence collected.²⁰⁹ There are several components to this process.

1. Consistency in Analysis

Investigators should apply the same analytical standards and requirements to all the facts they encounter. If an investigator requires external corroboration before believing the statements of one category of witnesses, such as detainees, they should apply similar standards to other types of witnesses, such as soldiers. If the report has extensive evidence and analysis about one set of critical facts, such as the actions of lower

208. There is writing in the field of historical scholarship on related points. See Evans, *supra* note 11, at 94-95. "We use the same procedures in reading secondary sources as we do in reading primary: We ask who has written the document, and why, and to whom the document is addressed and why; we check it out for internal consistency and for consistency with other documents relating to the same subject; and if it contains information derived from other sources, we ask where this information came from and do our best to check it out, too." *Id.*

209. See Thornburgh, *supra* note 9, at 3. "Be fair. Remember that you are neither prosecutors nor defense counsel. . . . Be thorough. Issues will inevitably come to your attention from virtually every imaginable source and they all must be carefully evaluated." *Id.*

level managers, it should provide a similar level of analysis to other critical facts, like the actions of high-level managers.

2. Critical Examination of All the Evidence

The analysis must be comprehensive; it must include all relevant evidence and not cherry-pick those facts that appear consistent with certain desired findings.²¹⁰ Even inconvenient facts must be identified and addressed analytically.²¹¹

There can be no unquestioned or unsupported acceptance of any important facts.²¹² No one witness or group of witnesses can be assumed to be truthful at all times, or, alternatively, to lack credibility at all times, unless there is a clearly stated analysis as to why. Some views that are strongly held inside an organization may not be shared by others outside the group. These views need to be supported by specific evidence.²¹³

There will be times when important gaps in the evidence cannot be filled by the investigation. An investigation with intellectual integrity will identify these gaps, and call for further investigation in the future.²¹⁴ It will not leap over the gap in order to reach sweeping definitive conclusions.²¹⁵

An effective investigation will include a critical examination of all the evidence collected. All important assertions of facts must be supported by evidence that is clearly identified for the reader.

210. *See id.*

211. In criminal investigations, the failure to address inconvenient facts can be seen in confirmation biases. “Confirmation bias is a type of selective thinking in which an individual is more likely to notice or search for evidence that confirms his or her theory, . . . [including] failure to seek evidence (e.g., a suspect’s alibi) that would disprove the theory, not utilizing such evidence if found, refusing to consider alternative hypothesis, and failure to evaluate evidence diagnostically.” ROSSMO, *supra* note 10, at 17.

212. *See* Thornburgh, *supra* note 11 at 3. “Consider having a separate footnoted version of any final written report which provides support from the investigative record for every statement or fact in the body of the report.” *Id.*

213. For example, the Mikolashek Report justified its findings by stating that soldiers were engaged in a conflict “against an enemy who does not follow the Geneva Convention”; a view that is not without controversy in some circles. *See* MIKOLASHEK REPORT, *supra* note 30, at i.

214. *See* ROSSMO, *supra* note 10, at 18. “Investigators often fail to account for the absence of evidence, something that can be quite important in certain circumstances.” *Id.*

215. Good examples of this can be found in the Taguba and Schlesinger Reports. The Taguba Report did this in regards to the role of MI at the prison, as did the Schlesinger Report in connection with the role of the CIA in the handling of detainees.

3. Following Leads to Logical End Points

For an investigation to have credibility, it must follow all leads to their logical conclusions, fleshing out and examining all the reasonable implications of the evidence. Obviously, the scope of the inquiry must be broad enough to permit this, but once that is delineated, the investigator's responsibility is clear. Evidentiary leads must be pursued as high up the relevant management chain as possible. If such an inquiry is prevented from going further, this limitation must be clearly identified for the reader and the reasons for the limitation provided.²¹⁶

The investigation must continue until the investigator reaches the level where responsibility clearly lies, or they are prevented from going further.

4. Transparent Process

The report should be written in as transparent and professional a manner as possible. Assertions and conclusions should have sources or footnotes connected with them.²¹⁷ Gaps in available data must be identified and addressed. The style and tone of the report should be neutral in its presentation.

V. THE ROLE OF INVESTIGATIONS IN PUBLIC SCANDALS

For an organization confronted by a scandal like Abu Ghraib, investigation is a powerful tool. It enables the organization to appear serious about the controversy without having to make any immediate changes. It provides a short-term, but relatively painless response to the media, the public, or government regulators. It buys time to gauge the seriousness of the problem, as well as the outside reaction to the scandal. And if the conclusions are favorable, it provides the basis for the organization to move on.

But an investigation is also a potentially dangerous thing for an organization. If conducted in a truly independent manner, the organization may be opening its doors to individuals who do not share its corporate culture or values, and who can be hard to control. Even when the investigation is conducted by a less independent-minded investigator, the results may be hard to control. Damaging facts can be like toothpaste, hard to get back in the tube once out. Documents may come

216. There are certainly potential legitimate reasons for information or witnesses being unavailable. These can include national security concerns, a witness's unavailability due to illness or even death, or a lack of time or resources to contact them.

217. See Thornburgh, *supra* note 10, at 124.

to light that lead to problematic questions. A witness may make a problematic statement that is then captured in a report or a transcript.

Confronted with these challenges, organizations seek to carefully structure internal investigations. The top-down coverup of the Watergate-era is not an option in today's 24-hour news environment; there are just too many people watching too closely. Instead, organizations attempt to structure investigations in a manner that can withstand public scrutiny and address public concerns, but also to limit and control the investigation to prevent further damage to the organization.

The DoD investigations were classic examples of this. The tremendous resources devoted to the investigations lent a veneer of seriousness and credibility to the effort. The use of high-ranking generals and former Defense Secretaries gave the reports an air of respectability. The large number of reports gave the impression that a wide-ranging and comprehensive inquiry had been conducted.

Yet, the reality was very different. There were a series of controls and limitations designed into the structure of the investigations that impacted their findings. In some cases, these took the form of a limited scope of inquiry, as in the Taguba Report. In other cases, the controls included the selection of investigators from the military or retired DoD leaders, or the deliberate selection of witnesses who were most likely to provide limited evidence. Looking at all these controls and limitations together, the limited findings of the DoD reports appear pre-ordained.

The truth can be elusive, but it matters. The issues raised by the Abu Ghraib scandal and similar governmental controversies are too important to be left to the vagaries of internal organization interests and loyalties. A process must be followed that gets to the truth, no matter where it leads. The goal is not a perfect investigation, but one that seeks, at all critical points, to hold itself to as high a standard as possible, and when it falls short, to identify those shortcomings in a transparent manner. A close study of the failures of the DoD investigations can show us a pathway to more effective investigations that can get to the truth of the matter.