

# Investigating Abu Ghraib

BY RET. COL. HOWARD MCGILLIN

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**F**or a moment, try to forget everything you've read about the mistreatment of prisoners at the infamous Abu Ghraib prison in Iraq. Let me share with you a part of how the Army as an institution tried to come to grips, and is still coming to grips, with this horrendous tragedy.

The inspector general is called the eyes, ears and conscience of the Army. "IGs" assist commanders and soldiers by conducting inspections and investigations. In the days following the first reports of Abu Ghraib, the Department of the Army IG ("DAIG") conducted a comprehensive examination of the systems to determine what established processes may have contributed to the problem (the so-called "Mikolašhek report"). Later, DAIG conducted a series of investigations into the actions of several high-ranking officials.

Lawyers were involved at every stage. A lawyer gathered evidence with the inspection teams in Iraq and Afghanistan. Back in D.C., a number of lawyers, including my deputy and I, were deeply involved in the analysis of evidence and review of the final written product.

The legal work was made more challenging by the heightened political rhetoric and press criticism. When the various reports would seem to exonerate someone, the hue and cry would rise that the Army could not investigate itself. The team would spend hours on every word of the various reports, only to see the popular press throw out critical phrases and modifiers that were the glue that held complex legal concepts together — all in search of a sound bite.

The reality was, and remains, that military lawyers — both uniformed and civilian — worked very hard to assist the investigators in making legally sound conclusions. In both an inspection and an investigation, the standard was a preponderance of the evidence. That is, at times, a difficult



**Tom Taylor, senior deputy general counsel of the Army, presents Col. McGillin, right, with his retirement certificate.**

standard — not because of the quantum of proof necessary to achieve it — but because reasonable people can so easily view the outcome so differently.

Layer on top of that the fact that the issues we were reviewing dealt with matters of international law — both our treaty obligations and "customary" international law. Many scholars, on left and right, will agree the "black letter law" (when you can discern it) of the so-called "Law of War" is not well suited to the current operating environment. We are engaged in a war against an enemy who is not a nation state and therefore cannot legally declare war yet wages one anyway, and who uses violations of the law as a primary tactic.

The work was at once exciting, intimidating, interesting and tedious; most of us sensed that history was watching us.

I came away from the process with several conclusions. First, the Army could investigate itself. Ongoing debate about the conclusions proves the issues were close. The inspection report has, I believe, become a blueprint for the military to reform its prac-

tices — not just to prevent abuse, but also to gather, analyze and disseminate intelligence legally, effectively and rapidly. Second, while the process of self-analysis is admittedly imperfect, I am not convinced any objective external review would arrive at different conclusions. Finally, I believe we, as lawyers, must be very careful whenever we advise clients on matters that are "close to the edge" of the law. What might appear an attractive answer may prove unworkable in an imprecise and dangerous environment and may result in unimaginable unintended consequences.

As an American soldier-lawyer, I was deeply embarrassed and angered the scandal ever happened. I was profoundly sorry the reputation of many hardworking soldiers in our Army was sullied by the misdeeds of a few. Ultimately, however, I remain proud of what the DAIG team did in trying to find the roots of the abuses and set a course to correct the wrongs. Someday, after the trials and litigation are over and the documents are declassified, I firmly believe historians will vindicate the work we did and the conclusions we made.