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ALLEGED MISCONDUCT:

LIEUTENANT GENERAL FRANCIS H. KEARNEY III, U.S. ARMY

DEPUTY COMMANDER

U.S. SPECIAL OPERATIONS COMMAND

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I. INTRODUCTION AND SUMMARY

We initiated the investigation to address allegations that while serving as Commander, Special Operations Command Central (SOCCENT), U.S. Central Command (USCENTCOM), Lieutenant General (LTG) Francis H. Kearney, III, U.S. Army, Deputy Commander, U. S. Special Operations Command (USSOCOM):

- Abused his authority and exerted improper command influence in the preferral of premeditated murder charges against [REDACTED], and [REDACTED], who participated in the shooting and killing of an insurgent in Afghanistan on October 13, 2006. [REDACTED] and [REDACTED] were reportedly previously exonerated of misconduct in the matter by Army criminal investigators.
- Abused his authority by redeploying Marine Special Operations Company-Foxtrot (MSOC-F) from Afghanistan after they responded to an enemy attack.¹

We did not substantiate the allegations. We concluded that LTG Kearney acted reasonably and within his authority in both matters. We determined that when LTG Kearney was advised of a “reportable incident” related to a possible violation of the Law of War, he had a responsibility under DoD Directive 2311.01E, “DoD Law of War Program,” to investigate thoroughly, and where appropriate, remedy by corrective action. He was further required to request formal investigation by the cognizant military criminal investigative organization, and provide for disposition to the respective Military Department, those alleged violations of law for which members are subject to court-martial jurisdiction. Regarding the redeployment of MSOC-F from Afghanistan, we determined that LTG Kearney’s actions were appropriate, as they were based on demonstrated command and operational failures within MSOC-F as well as on the recommendations and concurrence of other operational commanders who believed MSOC-F’s uncoordinated actions in their battle space were improper and counterproductive to operations.

With respect to the preferral of charges against [REDACTED] and [REDACTED], we found that after being made aware of the fatal shooting of a known local Afghan insurgent, LTG Kearney directed an investigation under AR 15-6, “Procedure for Investigating Officers and Boards of Officers,” to comply with the DoD Law of War Program, which implements our treaty obligations under the Geneva Conventions. The AR 15-6 investigation concluded that [REDACTED] and [REDACTED] violated the law of armed conflict (LOAC).

¹ LTG Kearney was a major general at the time of the alleged improprieties and was subsequently promoted to LTG. We will refer to him as LTG Kearney in this report.

Based on that conclusion, LTG Kearney referred the matter to the Army Criminal Investigation Command (Army CIC) in Afghanistan, the cognizant military criminal investigative organization, to determine whether a criminal violation occurred. While the Army's CIC investigation concluded that the actions of [REDACTED] and [REDACTED] did not violate the rules of engagement, the investigation did not address whether their actions violated the LOAC. We found that in an effort to ensure that the possible LOAC violation was investigated thoroughly, LTG Kearney, with the advice of his Staff Judge Advocate, concluded that a third investigation, under Article 32, UCMJ, was necessary. To initiate that hearing, LTG Kearney decided that appropriate charges should be preferred against the soldiers and those charges should be forwarded for review and appropriate action to the Commander, U.S. Army Special Forces Command (USASFC), who exercised general court-martial convening authority over the soldiers.

The Commander, USASFC, in turn, appointed a senior U.S. Army colonel, who was a Special Forces qualified officer, to conduct the Article 32 investigation. That investigating officer found insufficient evidence of wrongdoing and recommended the charges be dismissed. The Commander, USASFC, dismissed the charges against [REDACTED] and [REDACTED], in accordance with the recommendation of the Article 32 investigating officer.

In view of the questionable circumstances of the shooting incident, the differing conclusions of the AR 15-6 and Army CIC investigations, as well as the contrasting views of military attorneys who advised on those investigations, we concluded that LTG Kearney acted reasonably and in accordance with his command responsibilities under the DoD Law of War Program when he directed the referral of charges and the forwarding of those charges to the Military Department with the jurisdiction to conduct an independent, objective, and substantially public Article 32 investigation.

We found no evidence that LTG Kearney attempted to influence the results of his command's internal AR 15-6 investigation. Likewise, while LTG Kearney believed the Army's CIC criminal investigation was incomplete, there was no evidence he attempted to improperly influence its conclusions. Further, in seeking to ensure a prompt and thorough investigation of events, LTG Kearney forwarded preferred charges from his operational command to the Commander, USASFC, who had courts-martial jurisdiction over the soldiers, and thereby separated himself from any potential command influence in the matter. We found that LTG Kearney supported the USASFC Article 32, UCMJ, process as the appropriate mechanism to resolve whether a LOAC violation occurred. He likewise supported the resulting recommendations of the USASFC investigating officer and the decision of the convening authority to dismiss those charges.

With respect to the redeployment of MSOC-F, we found that LTG Kearney acted responsibly in the matter, and that his actions were based on continuing operational and command failures within MSOC-F. On March 4, 2007, U.S. Marines from MSOC-F reportedly sustained a Suicide Vehicle Borne Improvised Explosive Device (SVBIED) attack in Nangahar Province, Afghanistan. In response to the attack, MSOC-F conducted a series of follow-on engagements in which a number of Afghan non-combatants were killed. Moreover, on March 9, 2007, MSOC-F was involved in further serious incidents, to include two vehicle rollovers

(resulting in one Marine and two Afghans being injured) and a related escalation of force incident. In the course of these activities, MSOC-F was conducting operations outside their assigned geographic area of responsibility and without the knowledge of, and required prior coordination with, the commander in charge of the geographic area where those incidents occurred. Moreover, during their approximately 3-month assignment in Afghanistan, MSOC-F had reportedly conducted approximately 80 percent of their missions without the knowledge of and proper coordination with the responsible geographic area commander.

We found that LTG Kearney had received complaints regarding MSOC-F from two senior tactical commanders responsible for operations in Afghanistan: the Commander, Task Force (TF) Spartan, Combined Joint Task Force-82 (CJTF-82), who was the geographic area commander, and the Commander, Combined Joint Special Operations Task Force-Afghanistan (CJSOTF-A), the special operations commander with operational authority over MSOC-F. Both commanders had recommended to LTG Kearney that MSOC-F be redeployed from Afghanistan. The commanders based their recommendations on MSOC-F's continued failure to properly coordinate their missions and to operate appropriately within their assigned battle space. The incidents of March 4 and 9, 2007, contributed to their loss of trust and confidence in the Commander, MSOC-F, and MSOC-F's performance had an adverse effect on the ability of TF Spartan and CJSOTF-A to accomplish their assigned missions.

We found that while LTG Kearney had considered reassigning MSOC-F within Afghanistan, he determined there was no U.S. commander to whom he could assign the unit. Both Major General (MajGen) Dennis J. Hejlik, U.S. Marine Corps, U.S. Marine Corps Special Operations Command (U.S. MARSOC) and Major General (MG) David M. Rodriguez, U.S. Army, Commander CJTF-82, were aware of and supported LTG Kearney's decision to redeploy the unit. We concluded that under the circumstances, as the commander with overall responsibility for Special Operations Forces in USCENTCOM, LTG Kearney's decision to redeploy MSOC-F from Afghanistan was reasonable and within his authority.

This report sets forth our findings and conclusions based on a preponderance of the evidence standard.

II. BACKGROUND

From March 2005 through July 2007, LTG Kearney commanded SOCCENT, a subordinate unified command of USCENTCOM with forces assigned from the various Services. As Commander, SOCCENT, he was responsible for planning, organizing, coordinating, directing, controlling, and leading Special Operations Forces within the USCENTCOM area of responsibility, and served as the principal advisor to and representative of the Commander, USCENTCOM, regarding all aspects of special operations. LTG Kearney conducted special operations and other activities in support of U.S. objectives in the USCENTCOM area of responsibility, and coordinated with other U.S. and coalition forces to accomplish assigned missions.

Additionally, LTG Kearney exercised operational command of CJSOTF-A. In that capacity, he had the authority to assign missions and reassign forces as necessary. Both military

organizations involved in this case -- Operational Detachment Alpha 374 (ODA 374), 3rd Battalion, 3rd Special Forces Group, USASFC ([REDACTED] and [REDACTED] unit), and MSOC-F -- were subordinate units in the operational chain-of-command of CJSOTF-A.

Also relevant to the matters at issue in this report is that, as Commander, SOCCENT, LTG Kearney had no court-martial convening authority. As a result, he was required to forward any court-martial charges to a convening authority with court-martial jurisdiction over the military members for appropriate disposition.

Regarding the first allegation, on October 13, 2006, ODA 374, commanded by [REDACTED], and attached Afghan forces, deviated from a scheduled mission after receiving intelligence on the whereabouts of [REDACTED], an identified local insurgent. According to reports of the event, after locating [REDACTED], [REDACTED] ordered Afghan forces to move to the compound where [REDACTED] was located. [REDACTED] then ordered [REDACTED] to form a 3-man assault element and proceed to the compound behind the Afghan forces.

The Afghan non-commissioned officer (NCO) in charge of the Afghan forces made contact with [REDACTED], embraced him with a traditional greeting, spoke with him about the coalition forces coming to see him, and directed him to remain standing outside of his house. After confirming [REDACTED] identity by having him identify himself to the Afghan forces, [REDACTED] ordered [REDACTED] to shoot [REDACTED]. [REDACTED] killed [REDACTED] with a single gunshot to the head from a distance of approximately 100 feet.

Regarding the second allegation, MSOC-F, created in 2006, was on its first deployment when the unit arrived in Afghanistan on January 14, 2007. They were expected to be in Afghanistan for approximately 120 days, but were redeployed on March 24, 2007. On March 4, 2007, elements of MSOC-F, commanded by [REDACTED] U.S. Marine Corps, reportedly sustained an SVBIED attack in Nangahar Province, Afghanistan. In response, the unit conducted a series of follow-on engagements that subsequently generated numerous reports and allegations that MSOC-F had unlawfully killed Afghan non-combatants. Further, on March 9, 2007, MSOC-F was involved in additional serious incidents which included two vehicle rollovers, with one Marine and two Afghans injured, and a related escalation of force incident. In the course of these activities, MSOC-F was operating outside its assigned geographic area of responsibility and without the knowledge of and required prior coordination with the commander in charge of the geographic area where those incidents occurred.

By letter dated, October 9, 2007, Representative Walter B. Jones, requested this Office investigate allegations that LTG Kearney improperly preferred charges against [REDACTED] and [REDACTED], and that LTG Kearney improperly redeployed MSOC-F from Afghanistan. Subsequent correspondence from Representative Solomon Ortiz, Senator Bob Corker, and Representative Dennis Moore, reiterated one or both of Representative Jones' concerns.

III. SCOPE

We interviewed LTG Kearney; [REDACTED], [REDACTED], [REDACTED], and [REDACTED], and five other witnesses. [REDACTED] had tactical operational control over MSOC-F. MSOC-F was responsible for coordinating all of their plans and missions with [REDACTED] ([REDACTED]) who owned the geographical “battle space” where MSOC-F operated.

We also reviewed documents, to include the AR 15-6 and Army CIC investigations into the shooting of [REDACTED], the Article 32 investigation, the U.S. Navy Judge Advocate General Manual (JAGMAN) investigation into the circumstances surrounding the MSOC-F response to the SVBIED attack and escalation of force incident, and numerous e-mail messages and documents.

IV. FINDINGS AND ANALYSIS

A. Did LTG Kearney abuse his authority and exert improper command influence in the referral of charges against two soldiers who were reportedly previously exonerated of misconduct in the matter by Army criminal investigators?

Standards

DoD Directive 2311.01E, “DoD Law of War Program,” dated May 9, 2006

Section 3.1 defines the law of war as that part of international law that regulates the conduct of armed hostilities. It is often called the Law of Armed Conflict (LOAC). The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

Section 3.2 defines “reportable incident” as a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.

Section 4.2 states it is DoD policy that all reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly through their chain of command, investigated thoroughly, and, where appropriate, remedied by corrective action.

Section 5.8 states that the Secretaries of Military Departments will develop internal policies and procedures in support of the DoD Law of War Program to ensure that:

In coordination with the Combatant Commanders, promptly report and investigate reportable incidents committed by or against members of their respective Military Departments or persons accompanying them.

Where appropriate, provide for disposition, under the UCMJ, of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction.

Section 6.4 requires that the commander of any unit that obtains information about a reportable incident shall immediately report the incident through the applicable operational command through the most expeditious means.

Section 6.5 requires that those higher authorities receiving an initial report will request a formal investigation by the cognizant military criminal investigative organization.

AR 600-20, "Army Command Policy," dated June 7, 2006

This regulation sets forth general policies and responsibilities of command, which include the well-being of the force, and military discipline and conduct. Of particular relevance is the requirement in Section 5-8 (b), "Complaints or accusations against military personnel," which states that when commanders are apprised of complaints or accusations against military personnel, they are expected to inquire into the matter and attempt a resolution.

UCMJ

Article 32, "Investigation," states that no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.²

Article 37, "Unlawfully Influencing Action of Court," states in part, that unlawful command influence is prohibited. Unlawful command influence occurs when senior personnel, wittingly or unwittingly, have acted to influence court members, witnesses, or others participating in military justice cases. Such unlawful influence not only jeopardizes the validity of the judicial process, it undermines the morale of military members, their respect for the chain of command, and public confidence in the military.

Manual for Courts-Martial, United States, (2005 Edition)

The Manual for Courts-Martial, an Executive Order of the President of the United States, is the official guide for the conduct of courts-martial. One component of the Manual is the Rules for Courts-Martial or RCMs.

² The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations on whether the charges should go to trial.

RCM 104, "Unlawful Command Influence," states that unlawful command influence is an attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

RCM 303, "Preliminary Inquiry into Reported Offenses," states that upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

RCM 307, "Preferral of Charges," states that any person subject to the Uniform Code of Military Justice may prefer charges.

RCM 307(b), "How charges are preferred; oath," requires that the person who prefers charges must:

(1) Sign the charges and specifications under oath and before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

The "Discussion" section following RCM 307(b) states, "The accuser's belief may be based upon reports of others in whole or in part."³

Facts

On October 22, 2006, LTG Kearney appointed [REDACTED], to investigate under the provisions of AR 15-6, the facts and circumstances surrounding the fatal shooting of [REDACTED] on October 13, 2006.⁴ He advised [REDACTED] that [REDACTED], would be his legal advisor during the investigation.

[REDACTED] testified that in addition to getting the facts, LTG Kearney instructed him to identify the rules of engagement that applied to ODA 374's mission, and to determine if a LOAC

³ "Accuser" is defined to include a person who signs and swears to charges.

⁴ AR 15-6 procedures generally govern Army investigations requiring detailed fact gathering and analysis and recommendations based on those facts. An "investigation" is simply the process of collecting information for the command, so that the command can make an informed decision.

violation occurred. He testified that at no time during his investigation, did LTG Kearney attempt to influence the investigative process or direct him to achieve a particular result.

██████████ testified that in his opinion, ██████████ and ██████████ committed a LOAC violation when they shot ██████████. ██████████ recommended that Army CIC determine if the alleged LOAC violation constituted a criminal offense under the UCMJ. ██████████ reported that he found competing and contradictory evidence that needed to be reconciled by means of a criminal investigation. He testified LTG Kearney approved his report of investigation and forwarded the report to the Army CIC in Afghanistan.⁵

██████████ testified that SOCCENT could not convene courts-martial because the Commander, SOCCENT, was not a court-martial convening authority. He explained that in cases requiring judicial disposition, SOCCENT would forward the cases to the accused's Service for appropriate action. ██████████ testified that in November 2006, after he and LTG Kearney agreed with ██████████ findings that a LOAC violation occurred, he provided the Army CIC with a copy of ██████████ report of investigation and requested that they focus their efforts on the potential LOAC violation. On December 13, 2006, the Army CIC in Afghanistan initiated a criminal investigation.

██████████ testified he contacted the Army CIC in Afghanistan in March 2007, and learned Army CIC planned to opine that there was no violation of the rules of engagement by members of ODA 374. ██████████ explained he was shocked to learn that the Army CIC had focused its investigation into potential violations of the rules of engagement and failed to address the potential LOAC violation. He added that he and LTG Kearney agreed with the anticipated Army CIC conclusion that ODA 374 did not violate the rules of engagement, but that LTG Kearney still believed Army CIC should investigate the potential LOAC violation. ██████████ explained that despite his repeated requests for Army CIC to focus on the potential LOAC violation, Army CIC never addressed the issue.

Army CIC completed its final report on April 7, 2007. The report concluded that members of ODA 374 did not violate the rules of engagement and that ██████████ killing was lawful. ██████████ said he did not receive a copy of the CIC report when it was issued. Though ██████████ requested, on behalf of LTG Kearney, that Army CIC conduct the investigation, Army CIC did not include ██████████ or SOCCENT on the distribution list of addressees. ██████████ stated that he had to rely instead upon his discussions with the Army CIC and ██████████ Staff Judge Advocate, USASFC. ██████████ provided the legal review of the April 7, 2007 CIC final report.

██████████ did not receive a copy of the final CIC report until November 2007. The Army CIC report stated that diligent efforts positively identified ██████████ as an enemy combatant who did not surrender to U.S. or Afghan forces prior to his death. Moreover, Army CIC investigators found that while ██████████ complied with directions given to him by the Afghan NCO, his actions did not amount to a clear and unequivocal act of submission or surrender. The report stated that military authorities could therefore conclude that ██████████ was a legitimate target. The report did not address whether ██████████ and

⁵ Portions of ██████████ AR 15-6 investigation were classified.

actions in the shooting of Mr. might have constituted a LOAC violation.

testified that after two separate investigations with two conflicting conclusions, LTG Kearney believed that the unusual circumstances of s killing deserved a formal on-the-record review by a proper case disposition authority. stated that because LTG Kearney was not a court-martial convening authority, he could not take this action himself.

With regard to the conflicting legal opinions, testified that in late March 2007, he discussed the potential LOAC violation with . vehemently disagreed with that a LOAC violation occurred. In addition, in April 2007, said that he discussed with , Staff Judge Advocate, USCENTCOM, the disagreement he and had over the potential LOAC violation. advised that if he and LTG Kearney believed that a LOAC violation occurred, and believed that a third investigation should be undertaken using the process of an Article 32, UCMJ, investigation, SOCCENT personnel could prefer charges against and , and forward the charges to USASFC for review and appropriate action, if any, under the UCMJ.

testified that after his conversation with , he advised LTG Kearney that SOCCENT should prefer charges against and and forward the charges for review and appropriate action to the Commander, USASFC, the general court-martial convening authority with jurisdiction over and . emphasized that by sending the case to an Article 32 investigation, an independent and “unbiased fact-finder” would review the evidence, determine whether a violation occurred, and make a recommendation to the general court-martial convening authority as to whether court-martial proceedings would be appropriate.

recalled that sometime in early May 2007, he provided his paralegal, with a copy of the narrative of facts taken from AR 15-6 investigation.⁶ stated that during his discussions with , he explained to him the differences between LOAC and the rules of engagement. He added he did not have a copy of the CIC report to give to , but that he explained to several times that the CIC planned to opine there was no criminal violation because the rules of engagement had not been violated. told us he informed that the CIC essentially ignored the LOAC issue and focused its investigation on potential violations of the rules of engagement. further stated that the CIC’s lack of a written decision on whether ODA-374 violated the LOAC, and based on the information contained in the narrative of facts, especially as it pertained to the LOAC violation, he asked to draft and sign charge sheets preferring charges against and

⁶ explained that because SOCCENT was a joint command, there was no requirement to use one Service’s investigative procedures. He added that investigation was akin to a Navy preliminary inquiry or administrative investigation.

██████████.⁷ ██████████ stated he did not think it was unusual for ██████████ to serve as the accuser since it was common in the Navy for a “legalman” (an enlisted military paralegal) to serve as a nominal accuser. ██████████ testified that ██████████ did not express reservation or hesitation about preferring the charges.

On June 12, 2007, after being sworn to the charges by ██████████, ██████████ signed the charge sheets. The charges and specifications against ██████████ and ██████████ were then forwarded to USASFC for disposition. ██████████ testified that LTG Kearney had no involvement in having ██████████ prefer charges against ██████████ and ██████████.

██████████ testified that shortly after arriving at SOCCENT, his first assignment in a joint command, his supervisor, ██████████, informed him of the case involving ██████████ and ██████████ who were alleged to have unlawfully killed ██████████. ██████████ explained that ██████████ gave him a 14 page narrative of facts about the killing of ██████████ to read, but could not recall if ██████████ told him where the narrative of facts originated. ██████████ testified that while he did not know who authored the narrative of facts, he believed the circumstances unquestionably warranted preferral of charges. He added that at the time, he did not know the narrative of facts had originated from ██████████ AR-15-6 investigation.

██████████ testified that after he read the narrative of facts, ██████████ asked him to prepare and sign charge sheets against ██████████ and ██████████. ██████████ stated he thought ██████████ made the request because it was in his arena as the paralegal and he was the only other person in the legal office. ██████████ explained he had never signed charge sheets before, so before he did, he researched the RCMs and the MCM and found he was authorized to do so. He told us that he concluded that signing the charge sheets was within the scope of his duties.

██████████ stated that when ██████████ asked him to sign the charge sheets, it was his understanding that either an AR 15-6 investigation or CIC investigation was ongoing. He stated that he was not aware ██████████ had already completed an investigation that concluded that ██████████ and ██████████ committed a LOAC violation. Similarly, he added he had no idea Army CIC planned to opine there was no rules of engagement violation or that the Army CIC investigation failed to address the potential LOAC violation. ██████████ testified that it was not until August 2007, during discussions before his Article 32 testimony, that a civilian defense counsel told him about the two investigations, the AR 15-6 investigation and the Army CIC investigation. He said that the defense counsel also told him that the investigations found inconclusive evidence, that the “kills were righteous,” and that the “soldiers did nothing wrong.”

⁷ Preferral of charges is the first formal step in the court-martial process. Preferral of charges consists of drafting a charge sheet containing the charges and specifications against the accused. The charge sheet must be signed by the accuser under oath before a commissioned officer authorized to administer oaths. An “accuser” must have either personal knowledge of a UCMJ offense, or a belief based upon the reports of others, in whole or in part.

██████████ appeared surprised after we explained to him that the narrative of facts he reviewed in preferring the charges was actually taken from ██████████ AR 15-6 investigation that concluded that ██████████ and ██████████ had committed a LOAC violation. ██████████ acknowledged that the two investigations presented unresolved, conflicting conclusions, but said that he would have still felt uncomfortable signing the charge sheets and would have asked ██████████ to find someone else to sign them, had he known about the Army CIC conclusions in the final report of April 7, 2007.

██████████ told us he was not aware of any actions LTG Kearney took to have the charges preferred, nor did he know if LTG Kearney was even involved in the process. ██████████ testified he had no involvement with LTG Kearney, and in fact, had never spoken with him.

██████████, USASFC, testified he received and reviewed the charges against ██████████ and ██████████ in June 2007. He explained that before receiving the charge sheets, he reviewed ██████████ report of investigation and documents from the Army CIC investigation, and concluded that the evidence did not support the charges. He discussed the charges with Major General (MG) Thomas R. Csrnko, U.S. Army, Commander, USASFC, the court-martial convening authority, ██████████.

We asked ██████████ to respond to the allegation that LTG Kearney abused his authority and exerted improper command influence in having charges preferred against ██████████ and ██████████. ██████████ replied that the allegation was not valid and stated he did not think LTG Kearney ordered ██████████ or ██████████ to prefer charges. He added that he did not believe there was any abuse of power or any impropriety. He stated he believed SOCCENT simply made mistakes in addressing its concerns with the action. He continued by stating,

The bottom line is, the judicial process kicked in with the Article 32. . . . It worked the way it was supposed to work I think a lot of [the concern expressed in this case] is because the public just doesn't understand the military justice process. . . . I see no evidence at all to question anybody's integrity or their intentions as far as trying to serve justice. I just don't see that.

On August 8, 2007, MG Csrnko appointed ██████████, to conduct an investigation under Article 32, UCMJ, into the circumstances surrounding the death of ██████████ and the charges and specifications against ██████████ and ██████████. The appointment directed ██████████ to make a recommendation as to whether the case should proceed to a trial by court-martial. On September 19, 2007, ██████████ conducted a public Article 32 hearing, except for portions in which classified documents or testimony were presented. Media representatives, family members of the accused, and interested spectators, all observed the public portions of the hearing. ██████████ concluded that no LOAC violation occurred, and therefore, that the premeditated murder charges should be dismissed because while ██████████ killing was intentional, it was not "unlawful." On September 28, 2007, after considering the findings and

recommendations of the Article 32 hearing officer, MG Csrnko dismissed the charges against [REDACTED] and [REDACTED], and stated it was his decision that a court-martial was not warranted.

LTG Kearney testified that the charges against [REDACTED] and [REDACTED] resulted from [REDACTED] AR 15-6 investigation which concluded that the killing of [REDACTED] was a LOAC violation. LTG Kearney said that because he believed a crime had been committed, he referred [REDACTED] investigation to the Army CIC for investigation. LTG Kearney told us that [REDACTED] later informed him the Army CIC did not dispute the facts contained in [REDACTED] report of investigation, but concluded that the shooting was justified. LTG Kearney stated he believed the Army CIC investigation did not exonerate [REDACTED] or [REDACTED] of wrongdoing because it did not address whether a LOAC violation occurred.

LTG Kearney stated that with two different investigative conclusions, had he been a court-martial convening authority, he would have directed an Article 32 investigation to resolve the inconsistent findings. He added that he was neither a lawyer nor a judge, and did not have the expertise to reconcile the opposite conclusions himself. Moreover, he said that as the senior commander he believed it was his duty to prefer the charges in an effort to resolve the conflict.

LTG Kearney confirmed that while he made the decision to prefer the charges, he was not involved in the mechanics of the preferral process and did not sign the charge sheets. Rather, [REDACTED] took care of the administrative matters associated with preferring the charges. LTG Kearney told us he understood [REDACTED] signed the charge sheets, but confirmed that he had no contact with [REDACTED], and denied improperly influencing [REDACTED]. With regard to the preferral of the charges, LTG Kearney noted, "I made the decision. I would still make the decision today."

LTG Kearney recalled that MG Csrnko appointed an officer to investigate the matter and ultimately determined a court-martial was not warranted. LTG Kearney added that because he supported the process by which the incident and the charges were considered by an Article 32 investigation, and by which the charges were dismissed, he "support[ed] the decision" and was "satisfied with the process."

Discussion

We concluded that LTG Kearney acted reasonably and did not exert improper command influence in the preferral of charges against [REDACTED] and [REDACTED]. The preponderance of evidence established that LTG Kearney was obligated by the Geneva Conventions, as implemented by DoD Directive 2311.01E, "DoD Law of War Program," to not only ensure that credible allegations (i.e., "reportable incidents") of LOAC violations were "reported" through command channels, but also to ensure that such allegations were "investigated thoroughly."

We determined that when LTG Kearney became aware of the fatal shooting of [REDACTED], he complied with his duties under the DoD Law of War Program by using an

investigation process under AR 15-6 to preliminarily investigate a “reportable incident” of a potential LOAC violation. That investigation concluded that [REDACTED] and [REDACTED] committed a LOAC violation. Based on that investigation, LTG Kearney initiated the next step required by the DoD Law of War Program, which mandates investigation of alleged LOAC violations by a military criminal investigative organization. LTG Kearney acted within his authority by sending the case to the Army CIC, a cognizant military criminal investigative organization, to determine whether the alleged violation was criminal. Although the Army CIC investigation determined the actions of [REDACTED] and [REDACTED] did not violate the rules of engagement, the investigation did not address LTG Kearney’s stated concern of determining whether a LOAC violation occurred.

We further concluded that LTG Kearney acted reasonably, within his authority, and upon the advice of his Staff Judge Advocate when he decided charges should be preferred against [REDACTED] and [REDACTED]. LTG Kearney’s actions in this regard were consistent with his duty under the DoD Law of War Program to thoroughly investigate the lawfulness of [REDACTED] killing, and were motivated by a valid concern that “lawfulness” had not yet been properly resolved by an independent fact finder. Moreover, DoDD 2311.01E required that cases involving alleged violations of the LOAC be provided to the appropriate court-martial jurisdiction for disposition. As such, we determined that LTG Kearney’s actions, in having charges preferred against [REDACTED] and [REDACTED] and forwarding the case to MG Crsnko for disposition, were appropriate. Moreover, we found no evidence that LTG Kearney influenced, or attempted to influence, any of the investigations.

We were unable to resolve the conflict in testimony between [REDACTED] and [REDACTED] regarding [REDACTED] awareness of the status of the AR 15-6 and CIC investigations and their potentially conflicting findings. Additionally, while we note [REDACTED] testimony that in retrospect he would have asked someone else to sign the charge sheets, we do not find that his involvement in the process made the preferral of the charges improper. Evidence established that [REDACTED] researched the process for preferral of charges in the RCM, was aware of the requirements for signing charge sheets as the accuser, and concluded that he was authorized to do so. He reviewed the narrative of facts from the AR 15-6 investigation which concluded a LOAC violation occurred; he then drafted the charge sheets and signed each under oath. Additionally, [REDACTED] testified that he neither spoke with LTG Kearney about the preferral of charges nor was he influenced in that process by LTG Kearney.

Moreover, we do not believe that had [REDACTED] withdrawn himself from the process his absence would have prevented the preferral of charges in this case. RCM 307 authorizes any person subject to the UCMJ with knowledge of the matter to sign a charge sheet as accuser. The RCM further points out that the accuser’s knowledge may be based in whole or in part on the reports of others. Had [REDACTED] actually asked to be excused from signing the charge sheets, any other person subject to the code who reviewed the AR 15-6 narrative of facts could have signed the charge sheets as accuser. [REDACTED] told us that [REDACTED] expressed no reservation about signing the charge sheets as accuser, but if he had, [REDACTED] would have found someone else qualified to accomplish that task. Consequently, we concluded whether or

not [REDACTED] was involved in the process, the end result of preferring and forwarding the charges in this case would not have been substantially different or otherwise improper.

Similarly, we determined that the Article 32 investigation directed by the Commander, USASFC, protected the rights of the two accused soldiers, while it also provided a public forum by which the incident could be reviewed to determine whether a LOAC violation occurred.

[REDACTED] Article 32 hearing, attended by national media, demonstrated that U.S. forces take seriously their obligations under the LOAC, and provided U.S. commanders a formal report by which they could explain the facts and legal analysis of the situation to all concerned, to include Afghan authorities. Given the nature of the incident itself, the conflicting investigative conclusions, and the disparate views of the attorneys who reviewed the matter, it is our view that the Army and LTG Kearney would have been open to criticism for not acting to resolve the differences with objective finality.

B. Did LTG Kearney abuse his authority by redeploying a Marine Special Operations unit from Afghanistan?

Standard

AR 600-20, "Army Command Policy," dated June 7, 2006

This regulation sets forth general policies and responsibilities of command, which include the well-being of the force, and military discipline and conduct. Of particular relevance is the requirement in Section 5-8 (b), "Complaints or accusations against military personnel," which states when commanders are apprised of complaints or accusations against military personnel, they are expected to inquire into the matter and attempt a resolution.

**Joint Publication 1-02, "DoD Dictionary of Military and Associated Terms,"
May 30, 2008**

Joint Publication 1-02 contains all approved joint definitions for the DoD. The Joint Publication explains "operational control" as the command authority exercised by the operational chain of command over assigned forces. Operational control normally provides full authority to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions.

Joint Publication 3-05, "Doctrine for Joint Special Operations"

Chapter III, "Command and Control of Special Operations Forces," states at Paragraph 3, "Command and Control of Special Operations Forces in Theater," that geographic combatant commanders have established theater special operations commands as the primary mechanism by which the geographic combatant commander exercises command and control over special operations forces. As the commander of a subunified command, a theater special operations command commander exercises operational control of assigned commands and forces.

As noted in the “BACKGROUND” section of this report, SOCCENT is the subordinate theater special operations command of USCENTCOM. As Commander, SOCCENT, LTG Kearney exercised command and operational control of CJSOTF-A. In that capacity he had the authority to assign missions and reassign forces as necessary. MSOC-F was a subordinate unit in the operational chain of command of CJSOTF-A.

Facts

██████████ ██████████ commanded and controlled approximately 8,000 U.S. and Coalition Special Operations Forces in Afghanistan, including MSOC-F. ██████████ testified that on March 4, 2007, a Provincial Reconstruction Team advised him that Marines from MSOC-F reportedly sustained an SVBIED attack in Nangahar Province, Afghanistan, and in response, conducted a series of follow-on engagements in which a number of Afghan non-combatants were killed. ██████████ testified that he immediately asked LTG Kearney to appoint an officer to investigate the incident.

On March 5, 2007, LTG Kearney appointed ██████████ to investigate the facts and circumstances surrounding the MSOC-F response to the SVBIED. LTG Kearney tasked ██████████ to follow the procedures outlined in the JAGMAN.⁸ ██████████ testified that LTG Kearney directed him to interview all relevant and available witnesses, and to review documentary evidence, MSOC training and preparation prior to the attack, MSOC standing operating procedures, the attack itself, and events subsequent to the attack. He added that LTG Kearney did not give him any restrictions or attempt to influence the investigative process. He stated, “LTG Kearney just wanted me to find the facts” surrounding the MSOC-F response to the SVBIED attack. ██████████ testified that the only thing LTG Kearney was interested in was “making sure that we got an investigation done, didn’t give the impression we were dragging our feet or trying to cover anything up, do it above board, just get the facts out there, and then let him make a decision on it.”

██████████ ██████████, who as Commander, CJSOTF-A, had exercised operational command over MSOC-F, testified that the incident of March 4, 2007, had strained his relationship with ██████████ Commander, MSOC-F, and a period of great tension existed between them. He told us that by March 9, 2007, when MSOC-F suffered two vehicle rollovers which injured one Marine and two Afghans, and a second escalation of force incident occurred, his relationship with ██████████ deteriorated to the point that he lost trust and confidence in ██████████ abilities. ██████████ added that ██████████ had failed to coordinate his actions with the CJSOTF-A Joint Operations Center and was not operating in his assigned battle space.

██████████ testified that on March 10, 2007, he instructed ██████████ ██████████ to cease all operations for an unspecified period of time because the “trust, confidence, and credibility the

⁸ The primary purpose of an administrative investigation under the provisions of JAGMAN is to provide the convening authority and reviewing authorities with information regarding a specific incident which occurs in the Department of the Navy. These officials will then make decisions and take appropriate action based upon the information contained within the investigative report.

CJSOTF-A has established with CJTF-82 are all being questioned and scrutinized.”⁹ [REDACTED] added that CJTF-82 initiated an inquiry into the March 9, 2007, vehicle rollovers and escalation of force incidents.

[REDACTED] testified he informed LTG Kearney he had lost trust and confidence in the ability of MSOC-F to operate in his battle space, and that the incidents of March 4 and 9, 2007, made it almost impossible for MSOC-F to conduct any more operations. [REDACTED] added he notified MG David M. Rodriguez, U.S. Army, Commander, 82d Airborne Division and CJTF-82 and LTG Kearney that he had canceled MSOC-F operations because of “incredibly poor staff work,” which resulted in MSOC-F executing an uncoordinated mission.

[REDACTED] explained that another factor that contributed to his recommendation that MSOC-F redeploy was that his command (3rd Special Forces Group) was being replaced by another Special Forces Group on April 1, 2007. Moreover, he knew from talking to [REDACTED], Commander, TF Spartan, that [REDACTED] was adamant about not wanting MSOC-F in TF Spartan’s battle space. [REDACTED] recalled [REDACTED] telling him that MSOC-F was not “working with” [REDACTED] as the owner of the battle space, and that such conduct was “unacceptable.”

[REDACTED] testified that he commanded nearly all American service members in the eastern part of Afghanistan and worked directly for MG Rodriguez, Commander, CJTF-82. [REDACTED] testified he was responsible for conducting counterinsurgency operations in Nangahar Province where the March 4, 2007, incident involving MSOC-F occurred. He added that MSOC-F was assigned to CJSOTF-A, under the command of [REDACTED], and had an operational relationship in support of TF Spartan, which required MSOC-F to coordinate and synchronize all of its operations with TF Spartan.

[REDACTED] testified that on March 4, 2007, he was surprised to learn about MSOC-F’s response to the SVBIED attack because he had not approved any mission in the geographic area in which MSOC-F had been operating. [REDACTED] [REDACTED] asserted that his major concern was that he never knew MSOC-F was conducting operations in the area where the incident occurred, and added that a few days after the incident he learned that MSOC-F conducted approximately 25 other missions in TF Spartan’s area of operations without his knowledge or approval.

[REDACTED] testified that while he did not have any jurisdiction to investigate the incident of March 4, 2007, the incident had significant second-order effects in his area of operations. He noted there were several investigations following the incident to include investigations by a general from the Afghanistan Ministry of the Interior, the International Human Right’s Commission, [REDACTED], and the Naval Criminal Investigative Service.

[REDACTED] said that the incidents of March 4 and 9, 2007, along with poor staff work and lack of coordination by MSOC-F, raised serious concerns about MSOC-F’s ability to

⁹ CJTF-82 was a U.S. led subordinate formation of the International Security Assistance Force, which served as the National Command Element for U.S. forces in Afghanistan, reporting directly to the Commander, USCENTCOM.

operate within TF Spartan's battle space and led him to question [REDACTED] actions. He stated the second incident "totally undermined" his trust and confidence in MSOC-F and was the proximate reason for his recommendation that they no longer operate in his area of operations.

[REDACTED] testified he recommended that MG Rodriguez redeploy MSOC-F as soon as possible and not permit them to operate in his TF Spartan battle space any longer.

[REDACTED] told us that in explaining his rationale, he also informed MG Rodriguez of the latest uncoordinated mission involving MSOC-F on March 9.

Meanwhile, on March 10, 2007, [REDACTED], a liaison officer who worked for [REDACTED], sent [REDACTED] an e-mail and counseled him about his inability to effectively integrate within CJSOTF-A, his ineffective communications structure, ineffective teamwork, and his ineffective leadership. [REDACTED] testified that after becoming aware of the MSOC-F incidents of March 4 and 9, 2007, his relationship with [REDACTED] became strained and tense. He told us following these events, the trust and confidence CJSOTF-A had in MSOC-F was gone. [REDACTED] added, "The atmosphere there was poisoned." He further stated that although he and [REDACTED] had numerous conversations about MSOC-F's failure to effectively integrate within CJSOTF-A, [REDACTED] told us he did not get much of a response from [REDACTED] one way or the other.

In an e-mail message to LTG Kearney on March 9, 2007, Major General (MajGen) Dennis J. Hejlik, U.S. Marine Corps, Commander, MARSOC, informed LTG Kearney that he had been following all of the e-mails on MSOC-F and "regardless of how it turned out," he was disappointed in [REDACTED].¹⁰ He stated he hoped LTG Kearney would keep the company in theater, but regardless, he was at the 95% mark of relieving [REDACTED] and his senior enlisted member and bringing them back to the States. He added, "Your call on redeploying unit, but [I] ask for your and [REDACTED] consideration - - I know this is a very good company."¹¹

The following day, LTG Kearney replied by e-mail message to MajGen Hejlik by explaining that MG Rodriguez and [REDACTED], who owned the battle space in which MSOC-F operated, had lost faith in MSOC-F. He added that redeploying MSOC-F was a tough call to make and, "Not what we hoped for on the maiden voyage." On March 10, 2007, MajGen Hejlik replied to LTG Kearney's e-mail stating he had nothing but respect for him and [REDACTED] and that he was very disappointed in [REDACTED]. He stated he wanted, with LTG Kearney's approval, to send the battalion commander and battalion sergeant major over for a "what the hell is going on" visit.

¹⁰ As Commander, MARSOC, MajGen Hejlik's mission was to organize, man, train and equip Marine Special Operations Forces. His subordinate units provided training to foreign military units and performed specific special operations missions. Although the MARSOC Headquarters is a non-deployable unit, MajGen Hejlik's command has the capability to provide intelligence, logistics and fire support coordination to form, deploy, and employ a Joint Special Operations Task Force.

¹¹ In an Associated Press article in November 2007, MajGen Hejlik was quoted as saying, "Obviously it was not my decision to bring the company (MSOC-F) out of theater. It was the theater commander's (LTG Kearney's) decision. I will never second guess the commander on the ground."

LTG Kearney responded by informing MajGen Hejlik of the escalation of force incident involving MSOC-F on March 9, 2007, and that [REDACTED] had suspended MSOC-F's operations. LTG Kearney explained to MajGen Hejlik that the only solution at this time was to take MSOC-F out of Afghanistan "sadly because the people have no trust in them." He stated, "I am convinced we need to move them out. I need to look at what the best option is." LTG Kearney told MajGen Hejlik he could send the battalion commander, but it would not salvage anything. He added, "This is a hard one for me, no one wants this to work more than you and I." That same day, MajGen Hejlik replied to LTG Kearney's e-mail stating he "hated this" but understood. MajGen Hejlik stated "I believe you and I prepared the unit correctly but we do need to look at this and make it better."

On March 10, 2007, LTG Kearney sent an e-mail message to MG Curtis Scaparrotti, U.S. Army, Director of Operations, USCENTCOM, stating [REDACTED] and MG Rodriguez had lost confidence in MSOC-F because of their continual failure in coordinating their operations with [REDACTED] and their failure in responding to his corrections and orders. He further stated,

Since the Afghans will not accept [MSOC-F] in the operating area and they will be a negative; I have decided to move them.
MG Rodriguez concurs but it is really my decision. I will work on getting them out of Afghanistan.

In a March 10, 2007, e-mail message to General Bryan D. Brown, U.S. Army, Commander, USSOCOM, LTG Kearney stated he intended to redeploy MSOC-F because of multiple incidents. He added that the escalation of force incident involving MSOC-F on March 4, 2007, and the incident in which MSOC-F was involved in an uncoordinated mission in civilian clothes and civilian vehicles on March 9, 2007, was problematic. LTG Kearney explained that MSOC-F was unable to follow instructions, coordinate, and communicate. After receiving LTG Kearney's input, General Brown advised LTG Kearney that he agreed with his decision.

On March 26, 2007, the results of the CJTF-82 inquiry into the incidents of March 9, 2007, involving the vehicle rollovers and escalation of force incidents involving MSOC-F were provided to LTG Kearney. The inquiry concluded [REDACTED] was ultimately responsible for the unit's poor reputation and the events of March 9, 2007. Furthermore, it stated, "It was clear, that [REDACTED] lost operational control and should be held responsible for his actions and those of his unit."

On March 30, 2007, [REDACTED] completed his JAGMAN investigation and concluded that MSOC-F reactions on March 4, 2007, which led to civilian Afghan deaths, were unreasonable under the circumstances. On April 5, 2007, LTG Kearney approved the investigative report and determined that the circumstances surrounding the apparently unlawful killings of March 4, 2007, warranted a further inquiry by the Naval Criminal Investigative Service.

In a public release statement dated April 3, 2007, USSOCOM announced that after extensive consultation with MajGen Hejlik, [REDACTED], U.S. Marine Corps, Commander, 2nd Marine Special Operations Battalion, relieved [REDACTED] and the senior enlisted Marine of their duties because he had lost trust and confidence in their leadership.

LTG Kearney testified that in January 2007, MSOC-F was on its first deployment following the 2006 creation of the MARSOC. He stated in early March 2007 after [REDACTED] notified him of the MSOC-F incident on March 4, 2007, and the other mishaps on March 9, 2007, he made the decision to redeploy MSOC-F. LTG Kearney told us MSOC-F had problems following instructions and coordinating their missions with [REDACTED] and [REDACTED].

LTG Kearney recalled an e-mail message from [REDACTED] on March 9, 2007, in which [REDACTED] told him he had lost confidence in MSOC-F and stated that “we have a question of the integrity of the commander, [REDACTED]. [REDACTED] doesn’t trust them, and wants them out of his battle space.” LTG Kearney testified that he conferred with MG Rodriguez, and then reported his decision to redeploy MSOC-F to General Brown, MG Scaparatti, and General Dan K. McNeill, U.S. Army, Commander, International Security Assistance Force, all of whom concurred with the decision.

LTG Kearney explained his decision to redeploy MSOC-F before all of the investigations into MSOC-F incidents were completed. He testified that in order to do the right thing for the war, in order to do what [REDACTED] and [REDACTED] asked, “It was a unanimous consensus” to redeploy them. He added that he had enough information based on [REDACTED] JAGMAN investigation, his knowledge of the other incidents, and the recommendations from MSOC-F’s operational chain of command. LTG Kearney stated he stood by his decision because he thought it was the right decision to make at the right time. He stated,

My actions were tactical actions, based on the situation on the ground, no different, made for tactical reasons. I did not take any administrative or other actions against anybody in MSOC-F. I made a tactical commander’s decision to respond to the request of the battle space owners to move a unit that they had lost confidence in, out of their battle space.

Discussion

We concluded LTG Kearney’s decision to redeploy MSOC-F from Afghanistan was reasonable and within his authority as Commander, SOCCENT. In that capacity, he exercised command and operational control of his subordinate forces (to include MSOC-F), and had the authority to assign missions and reassign those forces as he deemed necessary.

Evidence disclosed that on March 4, 2007, MSOC-F responded to an SVBIED attack in Nangahar Province with a series of follow-on engagements in which a number of Afghan non-combatants were killed. Moreover, on March 9, 2007, MSOC-F was engaged in other serious incidents to include two vehicle rollovers, with one Marine and two Afghans injured, and an

escalation of force incident involving an uncoordinated mission where Marines were conducting an operation in civilian clothes and civilian vehicles outside their assigned area of operation.

We determined that LTG Kearney received complaints from two senior Army tactical commanders whose commands were negatively affected by the incidents involving MSOC-F. Both commanders recommended MSOC-F be redeployed from Afghanistan due to MSOC-F's documented inability to operate appropriately within its assigned battle space, coordinate its missions, and other issues related to the competence of the MSOC-F commander. We concluded that under the circumstances, LTG Kearney's tactical decision in redeploying MSOC-F from Afghanistan was within his broad discretion and did not constitute an abuse of authority.

V. CONCLUSIONS

A. LTG Kearney acted reasonably and did not exert improper command influence in the preferral of charges against two soldiers.

B. LTG Kearney acted reasonably and within his authority by redeploying a Marine Special Operations unit from Afghanistan.

VI. RECOMMENDATIONS

We make no recommendations in this matter.

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Inspector General
Department of Defense

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