FIRST GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[1]

JUDGE ADVOCATES, COURTS-MARTIAL, AND OPERATIONAL LAW ADVISORS

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I. Introduction

I am proud to be the first Major General (MG) George S. Prugh Memorial Speaker. General Prugh's leadership, scholarship, and friendship extended to all—even to Marines.

In 1990, I had recently retired from active Marine Corps duty. I was living in London, where my wife, a U.S. Navy civilian employee, had been transferred. I was a new Ph.D. candidate in the Law Department of The London School of Economics and Political Science. My dissertation topic was an examination of whether the Uniform Code of Military Justice (UCMJ) adequately meets the 1949 Geneva Convention requirement to seek out and try those who commit grave breaches of the law of armed conflict.

Separated from my Marine Corps support group, and not yet familiar with the few local Navy judge advocates (JAs), I wanted someone familiar with American military law to talk to about my direction and sources. Among other resources, I was working with articles and a book written by General Prugh. Having just written my own book on military law in Vietnam, his was a familiar name. In 1991, gathering my nerve, I cold-called General Prugh at his California home. On both personal and substantive levels, he could not have been more helpful. I knew how competent he was. What I didn't know, or expect, was how personable

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[1] This is an edited transcript of a lecture delivered on 18 April 2007 by Lieutenant Colonel (Ret.) Gary Solis to the members of the staff and faculty, distinguished guests, and officers attending the 55th Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The chair is named in honor of MG George S. Prugh (1920-2006).

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and kind he would be to an unknown Marine. What I didn't initially appreciate was his deep and broad legal scholarship.

Throughout the next two years, as I wrote my dissertation I phoned him several times, each call received with graciousness. I mailed him my most troublesome chapter, which he returned with perceptive and helpful comments. When I finally defended my dissertation before five glowering British law professors gathered from throughout the Kingdom, they told me that my dissertation was screwed up in significant ways—but none of them involved the guidance or advice of George Prugh! (After some sanding and polishing I squeaked through my second exam.)

I was privileged to know General Prugh. I hope that somewhere today he's smiling, pleased to see one of his acolytes honoring his memory by discussing legal history.

I'm going to talk about one Marine JA's case in Iraq, and about other instances in which military lawyers have been court-martialed. Some of my historical trial examples relate directly to the JA's performance of duty, some to unrelated misconduct. Each case is instructive and cautionary. Santyana urged us to understand history lest we repeat it. I suspect that we repeat history, regardless, but these cases have an import and resonance beyond their sometimes tawdry facts. Perhaps our understanding them *will* prevent their repetition. They provide a chart by which we can navigate the shoals of military lawyering. Not often do we encounter misconduct, criminality, or culpable negligence in our ranks. But the cases that I recount are reminders that professional and personal disaster can be one misjudgment away.

Marine Corps Captain (Capt) Randy W. Stone stands accused of dereliction of duty for events in Haditha, Iraq. We know the broad outline of what happened in Haditha. But how did Capt Stone, the battalion's operational law advisor, become an accused? What does his charging suggest for those of you who may soon find yourselves in a combat zone? Is there something you should be doing, right now, to ensure that his fate isn't yours? Is there some law or regulation that you should re-read? UCMJ, Article 31(b), for instance?

II. The Judge Advocate General of the Army on Trial

Before considering Capt Stone's case, let's recall that his is far from the first case to come before the military bar. Through the years many military lawyers, American and foreign, have run afoul of the law, domestically and internationally.

General Prugh was the twenty-eighth Judge Advocate General (JAG) of the Army and, needless to say, he was never the subject of a court-martial. Brigadier General (BG) David G. Swaim, the eighth JAG of the Army, was court-martialed in November 1884.

Appointed JAG of the Army in 1881, when he was but a major, General Swaim negotiated a personal promissory note receivable with civilian bankers, knowing the promissory note was not actually due him. Four specifications of conduct unbecoming an officer was the charge, in violation of the sixty-first Article of War. A second charge of neglect of duty (Article 62) related to Swaim's allegedly having obligated Army pay accounts as security for a loan to a friend, one Lieutenant Colonel Narrow. The impressive court-martial panel included MG John M. Schofield as president; BG Alfred Terry, who was Custer's commander at the Little Big Horn; BG Nelson Miles who, four years later would be Commanding General of the Army; and BG Samuel Holabird. The panel of thirteen was rounded out by another three BGs and six colonels.

After fifty-two trial days, General Swaim was found guilty of charge one and sentenced to suspension of rank, duty, and pay for three years. In that era, the reviewing authority for the convictions of all officers was the President of the United States.[3] Also, court-martial results that dissatisfied the convening authority could be returned to the court for revision which, in practice, meant either that "not guilty findings" be changed to "guilty," and/or an upward revision of the sentence.[4] Finally, after the case was returned to the panel for revision not once but twice (!) President Chester Arthur reluctantly approved a sentence of suspension from rank, duty and *half* pay for *twelve* years. Arthur was dissatisfied

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[3] COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 459-62 (2d ed. 1920) (1886). Article 108 of the 1874 Articles of War states, "No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President." *Id*. at 459.

[4] *See id*. at 454-59 (providing an account of proceedings in revision, provided for in regulations of the Navy, 1870). The Supreme Court approved the practice in *Ex parte* Reed, 100 U.S. 13 (1879).

that, despite his sending it back twice, the sentence included no kick—no dismissal. That being the case, Swaim remained the JAG of the Army, despite being unable to exercise any portion of his duties—effectively rendering the office of the JAG vacant for twelve years.

Swaim continued to seek vindication and, nine years later, the remaining portion of his sentence was remitted and he was retired, much to the relief of Guido Norman Lieber, who had been the acting JAG for nine years—on colonel's pay. Lieber was then promoted and appointed Judge Advocate General of the Army.[5] (Lieber was the son of Francis Lieber, author of *Army General Orders 100*, the *Lieber Code*.)[6]

III. Hell-Roarin' Jake

Students of military history (and the law of war) are familiar with the 1902 general court-martial of Army BG Jacob H. Smith. In 1901, Smith commanded Army and Marine Corps troops on the island of Samar during the 1899-1902 U.S.-Philippine War. Samar had proven a difficult area to subdue—the *insurrectos*, a battle-hardened lot, not given to observing the law of war, such as it was. Smith, "a short, wizened sixty-two-year-old who had earned the nickname 'Hell-Roarin' Jake,'"[7] who was seriously wounded at Shiloh and who had spent twenty-seven years in grade as a captain, was determined to succeed where his predecessors had failed and quell all enemy resistance. General Smith summoned Marine Major (Maj) Littleton Waller, who was about to initiate a patrol against the *insurrectos*. According to his charge sheet, before witnesses General Smith told Waller, "I want no prisoners. I wish you to kill and burn. The more you kill and burn, the better you will please me. The interior of Samar must be made a howling wilderness." He added that he wanted all persons killed who were capable of bearing arms: anyone ten years of age or older.[8]

Referred to a general court-martial when his statements became public, Smith already had a record marred by not one, but two prior

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[5] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 79-83 (1975). Shamefully, no author is credited.

[6] *See* Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988).

[7] MAX BOOT, THE SAVAGE WARS OF PEACE 120 (2002).

[8] LEON FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 801 (1972).

general court-martial convictions! Five years before, he had been saved from dismissal from the Army pursuant to a court-martial sentence only by the intervention of President Grover Cleveland. This time, Smith was convicted merely of conduct to the prejudice of good order and discipline and was merely ordered retired.[9]

These facts are widely known, but it is usually overlooked that in 1869, as a brevet major, Smith had a four-year appointment as an acting JA.[10] He was not a law school graduate. (Neither were most Supreme Court justices of that day.)[11] Smith's efforts to make his appointment permanent were derailed by still other misconduct that, although recommended for court-martial, he escaped with no more than a poor efficiency report.[12]

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[9] Adjutant Office Documents, File 309120 (1901); Record Group 94; National Archives at College Park, College Park, MD.

[10] U.S. WAR DEPARTMENT, THE MILITARY LAWS OF THE UNITED STATES 1915, para. 194 (5th ed. 1917).

> 469. Acting judge-advocates . . . shall be detailed from officers of the grades of captain or first lieutenant of the line of the Army, who, while so serving, shall continue to hold their commissions in the arm of the service to which they permanently belong. Upon completion of a tour of duty, not exceeding four years, they shall be returned to the arm in which commissioned . . . .

Id. Colonel Winthrop describes the duties of a judge advocate of that day: "The designation of 'judge advocate' is now [1896], strictly, almost meaningless; the judge advocate in our procedure being neither a judge, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the court, and a recorder." WINTHROP, *supra* note 3, at 179.

[11] On the 1869 Court, although several Justices had privately studied law before their appointments to the Court, only Justice Benjamin Curtis was a law school graduate. Neither Chief Justice Chase nor any of the other Justices were. This is unsurprising, considering how very few law schools there were in early America. One of the last Supreme Court Justices not to have graduated from law school was Justice Robert Jackson, Chief Prosecutor at the post-World War II Nuremberg International Military Tribunal.

[12] David L. Fritz, *Before the 'Howling Wilderness': The Military Career of Jacob Herd Smith, 1862-1902*, MIL. AFFAIRS 186-90 (Dec. 1979).

During the war in the Philippines, at least eight Army and Marine Corps officers were court-martialed for acts constituting war crimes, in most instances for subjecting prisoners to the "water cure," a variation on today's "waterboarding." Among the most notorious of the convicted officers was Army Captain (CPT) Edwin Glenn who, besides torturing prisoners, was alleged to have burned to the ground the town of Igbaras while still occupied by its 10,000 inhabitants. Glenn was the JA of the island of Panay, even while committing the war crimes of which he was convicted.[13]

IV. Judge Advocate War Criminals

We hardly have time to detail all the JAs, flag or otherwise, who have been court-martialed, but a few additional cases merit our attention, some of the cases far more serious than that of Generals Swaim and Smith.

World War II's International Military Tribunals (IMTs) in Nuremberg and Tokyo were where the highest leaders of the Nazi and Japanese war-making machines were tried. Some of us are also familiar with Nuremberg's "Subsequent Proceedings."

In the European Theater immediately following the War, the Allied powers established a "Control Council" in Berlin, essentially a government of occupation. Berlin was divided into four sectors: the American, British, French, and Russian. The arrest and trial of suspected Nazi war criminals was high among the concerns of the allies. One of the first Control Council edicts was Law No. 10, establishing procedures for the prosecution of war criminals other than the twenty-four about to be tried by the IMT at Nuremberg. Control Council Law No. 10 provided that "[e]ach occupying authority, within its Zone of Occupation, (a) shall have the right to cause persons within such Zone suspected of having committed a crime . . . to be arrested . . . [and] brought to trial before an appropriate tribunal."[14] United States tribunals would consist of three judges and an alternate, all civilian lawyers and

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[13] MOORFIELD STOREY & JULIAN CODMAN, SECRETARY ROOT'S RECORD: "MARKED SEVERITIES" IN PHILIPPINE WARFARE 62 (1902). Glenn's sentence was a fine of fifty dollars and suspension from duty for one month, a risible sentence reflecting the military court's permissive view of the water cure. Glenn was subsequently promoted to major. *See id*.

[14] Control Council L. No. 10, art. III 1 (Dec. 20, 1945).

judges brought from the United States especially for the tribunals. The crimes to be charged at the Subsequent Proceedings were, with some variation, the same as those tried by the IMT: crimes against peace, war crimes, crimes against humanity, and conspiracy. Uniquely, the tribunals would group classes of defendants—Nazi doctors who had committed war crimes, jurists who had perverted justice in the name of National Socialism, government ministers, industrialists, and members of the Nazi military high command. Each category of criminality, with groups of accused in each trial, would be jointly tried. German defense lawyers were hired and paid for by the United States. There was a real effort to achieve fairness.

From August 1946 through April 1949, twelve "Subsequent Proceedings," were tried. The chief prosecutor was Army BG Telford Taylor, formerly a senior prosecutor in the Nuremberg IMT, and later the Dean of Columbia University's School of Law.

Perhaps the most significant of the Subsequent Proceedings was "The High Command Case," the defendants being Field Marshall Wilhelm von Leeb and thirteen other Nazi general officers. One of the thirteen was Lieutenant General Judge Advocate (*Generaloberstabsrichter*) Rudolf Lehmann, JAG of the OKW—the High Command of the German Armed Forces.[15] Lehmann had executed no POW. He commanded no extermination camp. He was perfidious on no World War II field of battle. But he was no less a military criminal.

In a perversion of his military and legal training, Lehmann had contributed substantial staff legal work to High Command plans for the invasions of Denmark, Norway, Greece and Yugoslavia. He contributed the legal gloss to the infamous Commissar Order, directing the summary execution of captured Russian political officers. He reviewed and wrote portions of the Barbarossa Order, ordering the summary execution of captured guerillas, partisans, or civilian suspects, and directing the execution of 100 Communists for each German Soldier killed. He played a leading role in writing the *Commando Order*, which directed the summary execution of any Allied Soldier captured behind Nazi lines or in any commando operation. He was a lead staff officer in creating the

[15] U.S. v. Wilhelm von Leeb ("The High Command Case"), vols. 10 and 11, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1951).

Nacht und Nebel (Night and Fog) Order, directing the arrest, secret removal, and execution of civilians suspected of resistance or sabotage.[16]

We know as Field Manual 27-10, *The Law of Land Warfare*, states in paragraph 502, that obedience to orders is not a defense to war crime charges. Unlawful orders, if obeyed, render the subordinate as well as the senior guilty. Moreover, staff officers who knowingly pass on unlawful orders are subject to the same prosecution, conviction and punishment as the officer issuing the orders. It's the simple criminal law concept of principals, aiders, and abettors, found in both the common law and in civil law. Lehmann, who never fired a round in anger and never laid eyes on an enemy, was convicted of crimes against peace, crimes against humanity, and war crimes. He was sentenced to seven years confinement. The world will never know how many murders, and worse, might be laid at his feet. Seven years was a small price for the criminality of a senior Nazi JA.

In 1942, MG Shigeru Sawada was the Commanding General of the Japanese Imperial 13th Expeditionary Army in China. Eight Doolittle raiders were captured by his troops after their thirty seconds over Tokyo (and, in some cases, Nagoya, Kobe, and Osaka). While Sawada was visiting the front, 300 miles away from his Shanghai headquarters, the eight U.S. Army fliers were court-martialed. In a two-hour "trial," the Americans were not allowed to enter a plea, there was no defense counsel, no witnesses, and no evidence was offered. All eight were found guilty and sentenced to death. Tokyo confirmed three of the death sentences and, without explanation, ordered that five be commuted to life imprisonment. Three weeks after the court-martial General Sawada returned to his headquarters, where he was given a record of the trial to review. Sawada put his chop on the record, then went to Nanking, where he protested the death sentences as being too severe to the Commanding General of China Forces. But Imperial Headquarters trumped officers in the field. The three Americans were executed.

At a 1946 U.S. military commission, General Sawada was convicted of

> knowingly, unlawfully and willfully and by his official acts cause eight named members of the United States forces to be denied the status of Prisoners of War and to be tried and sentenced . . . in violation of the laws and

[16] *Id.* vol. 10 at 13-48 and vol. 11 at 690-96.

> customs of war . . . . [t]hereby causing the unlawful death of four of the fliers and the imprisonment of the others . . . .[17]

The same military commission convicted Lieutenant Wako Yusei, a JA, of being the judge at the bogus court-martial, and convicted JA Second Lieutenant Okada Ryuhei of being a member at the trial. The military commission record reads that they "unlawfully tried and adjudged the eight fliers under false and fraudulent charges without affording them a fair trial . . . counsel, or an opportunity to defend . . . ."[18] The military judge was sentenced to nine years confinement, the court member to five.

Each time I read the Sawada case, I think of the present star-crossed Guantanamo military commissions, and the ethical minefield they are. I do not equate them with the proceedings described in Sawada, but I wonder what history's assessment of the lawfulness of the Guantanamo proceedings, and the involvement of their senior participants, will be.[19]

V. Judge Advocates and Heroes

There no doubt were JAs prosecuted during the Vietnam War, but I'm unaware of them. Rather, when I think of JAs in Vietnam I recall the lieutenant and captain lawyers of the 3d Marine Division who served as combat platoon leaders and company commanders when there was a critical shortage of junior infantry officers.[20] The JA-infantrymen were all volunteers, all performed well, and some were notably valiant. None were killed, although two earned Purple Hearts. Eleven were awarded Bronze Stars, one the Silver Star. First Lieutenant (1st LT) Mike Neil was eighteen months out of law school when he led his surrounded platoon in an all-night battle, including hand-to-hand fighting, against a North Vietnamese battalion. Lieutenant Neil, later a Marine Corps

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[17] U.N. WAR CRIMES COMMISSION, 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS, CASE NO. 25, TRIAL OF LIEUTENANT-GENERAL SHIGERU SAWADA AND THREE OTHERS 1 (1948).
[18] *Id.*
[19] Some suggest that they, and others, including civilian government lawyers, may be subject to war crime charges. *See* Scott Horton, When Lawyers Are War Criminals, Remarks at the American Society of International Law's Centennial Conference on the Nuremberg War Crime Trial (Oct. 7, 2006).
[20] LIEUTENANT COLONEL GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 93-96 (Government Printing Office 1989).

Recruit Depot trial counsel, earned the Navy Cross that night. One of his squad leaders, Corporal (Cpl) Larry Smedley, was posthumously awarded the Medal of Honor.[21]

In two of his books, Colonel (COL) Fred Borch, your Army JAG Corps Regimental Historian and Archivist, has documented the combat intrepidity of many Army JAs in Vietnam. As COL Borch notes, more than 350 Army JAs served in the field, often with combat units.[22] One of those JAs, CPT Howard R. Andrews, Jr., was initially an enlisted artilleryman with the 101st Airborne Division. He received a direct commission and proved himself a skilled JA. He was killed in action on 17 April 1970—thirty-seven years ago, yesterday—when the helicopter he was aboard crashed on takeoff, the only JA of any armed service killed in the Vietnam War.[23]

VI. Judge Advocates . . . Not

Another Vietnam-era JA should not go unmentioned. He was not a combatant lawyer in the mold of 1st Lt Neil or CPT Andrews. His case bears no international significance, but "Doc" Harris was one of a kind.

In 1969, Stephen P. Harris was a twenty-three-year old Marine Lance Corporal (LCpl) in San Diego's active Reserves. He was called "Doc" because he had the distinction of holding a doctorate from The University of London. The Vietnam War's conclusion was not in sight and, given the constant need for officers and his prestigious degree, LCpl Harris was pressed to apply for a commission. "Give us your college transcript and that Ph.D. certificate and you're on your way to Quantico," his C.O. [commanding officer] must have told him. No problem! In truth, Doc was very intelligent and—years ahead of his time—had real skills in desktop publishing. Within days, Doc produced both a transcript and doctorate. Doc was ordered to OCS [Officer Candidate School] and, in January 1973, was commissioned a second lieutenant of Marines. They weren't fools at Headquarters Marine Corps. At The Basic School, Doc let slip that, while at San Diego, he had completed law school at night. The 1968 Military Justice Act's requirement for military lawyers

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[21] *Id.* at 83.
[22] COLONEL FREDERIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA, 1959-1975 60 (2003).
[23] *Id.* at 101-02.

for both parties at all levels of court-martial was straining JA recruiting efforts. Doc's Basic School platoon commander told Doc that he *would* go to Naval Justice School. "Just show us that J.D. and a bar certificate and you're on your way to Newport." No problem! Within days, Doc produced both a law degree and a New York state law license. Doc was ordered to Newport following his May Basic School graduation. They weren't fools at Headquarters Marine Corps.

He was in a class of fifty-five, including some notable Marines: Capt Jim Terry, later a colonel (Col), became Legal Advisor to General Colin Powell and, after retirement, is Chairman of the Veteran Administration's Board of Veterans' Appeals. Captain Jim Cathcart was later the SJA, 1st Marine Division, and then the Marine Corps' senior defense counsel. Captain Tom Meeker was later President of Churchill Downs, until retiring after last year's Kentucky Derby. Colonel Walter Donovan would soon make flag rank and become Staff Judge Advocate (SJA) to the Commandant—the Marine Corps' senior lawyer. Justice School graduation was in December 1973. Navy Lieutenant Rick Block was class honor man. Marine Lieutenant Colonel (LtCol) Jack Fretwell was number two. Colonel Walter Donovan was number four. The number three graduate: 2nd LT "Doc" Harris—whose commissioning date was back-dated three years for his time in law school, making him a captain nine months later.[24] They weren't fools at Headquarters Marine Corps.

Assigned to the 2d Marine Division, Doc was a notably successful trial counsel. The SJA said Doc was one of his best. Doc's wife, with whom he took occasional long-weekend trips to Geneva, was in Chicago at Northwestern University's medical school. (Doc usually made their plane reservations from the SJA's office.) Her medical school explained why no one had met her—and why Doc was entitled to BAQ at the "with-dependents" rate. Doc was a generous player in the Band of Brothers, giving the SJA a luxuriously expensive leather office chair. Every JA in the office received a leather briefcase and Montblanc fountain pen—bounty from the company that Doc's father owned, and in which Doc was still on retainer.

In late 1975, suspicious sorts opined that, at age twenty-nine, Doc was young to have accomplished so much. Colonel, later Brigadier

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[24] U.S. MARINE CORPS, COMBINED LINEAL LIST OF OFFICERS ON ACTIVE DUTY IN THE MARINE CORPS, 1 JANUARY 1973, at 109 (1973).

General (BGen), Jim King initiated an investigation. They weren't fools at Headquarters Marine Corps. The Naval Investigative Service questioned Doc, checked his documentation, and concluded that all was well. Stephen P. Harris had indeed been admitted to the New York bar—but wait! In 1953? Doc calmly assured Col Spence[25] that it was just a scrivener's error and, given a few days' leave, he would square it away. Granted. Doc drove a classic vintage Bentley automobile, recently purchased with funds borrowed from the credit union—on the strength of the Bentley's title, which Doc produced for them. Doc fired up the Bentley and drove to California. With his wife.

A month later, well beyond his leave period, at the Tijuana border crossing Mexican police handed over Doc to Camp Pendleton authorities. He had been found walking in the Baja California desert, naked and badly sunburned, reportedly with a rope around his neck. Doc related that hitchhiking Mexican bandits had stolen his clothes, money, Bentley, and wife. But, attractive as his story was, the jig was up. They weren't fools at Headquarters Marine Corps. Doc Harris was transported to the Quantico brig. In fact, Doc had but two years of junior college, no college degree, no law degree, no doctorate, no title to the never-located Bentley, and no wife.

On 20 January 1976, pursuant to pleas of guilty, Doc was convicted by general court-martial of a one-month unauthorized absence, two specifications of false official statement, two specs of larceny, one spec of wrongful appropriation, one spec of uttering a false check, and a false claim. He was sentenced to dismissal, loss of all pay and allowances, and three years confinement. On appeal, Doc argued the court's lack of jurisdiction in that the Marine Corps had been grossly negligent in failing to uncover his frauds. Sentence unanimously affirmed.[26] The moral of Doc's story? A Marine Lance Corporal can do anything he sets his mind to.[27]

No court-martial is a laughing matter, particularly to the accused. But to those who have participated in many trials, a few inevitably stand out as less tragic than others. Doc Harris's case, juxtaposed to that of

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[25] Colonel Spence was Doc's SJA at the time.
[26] United States v. Harris, 3. M.J. 627 (N.C.M.R. 1977).
[27] I am indebted to my friend, LtCol (Ret.) Ben Cero, USMC, for this moral of the Harris affair.

Marine JA Capt Jeffrey C. Zander, illustrates the difference between lighter cases and darker.

Jeffrey Zander was born on the fourth of July, 1955. His younger brother was a 1982 graduate of West Point.[28] Jeffrey Zander enlisted in the Marine Corps, rose to the grade of staff sergeant, and earned a college degree. He shifted to the Reserves and enrolled at Brigham Young Law, from which he graduated in 1987. Law school on the GI bill with two kids was tough—and the bar review course tougher. So Zander skipped the bar review—and the bar exam, as well. But he did want to be a JA. Following law school and before returning to active duty, he was temporarily assigned to the Marine Corps' Twentynine Palms law center. He found a California lawyer named James Zander in Martindale-Hubbell. Jeffrey pulled a name change decree from legal assistance files and doctored it to indicate that James had changed his name to Jeffrey. The Los Angeles bar office was pleased to give "James" a new bar card in his new name, Jeffrey.

While he was at it, Jeffrey doctored a DD-214 discharge certificate, awarding himself Marine Corps jump wings, a Humanitarian Service Medal, Combat Action ribbon, Purple Heart, Bronze Star (with V device), and the Antarctica Service Medal (with the coveted "Wintered Over" device). With an imaginative flourish, he added a French *Croix de Guerre*—the first American Marine given that award since 1917.[29] Like Doc Harris, Capt Zander was an outstanding student. He did well at The Basic School, and was first in his Naval Justice School class.[30] He went on to serve in Japan and Hawaii, garnering excellent fitness reports—OERs [officer evaluation reports] in Army parlance—and he was selected for the government-funded LL.M. program. They weren't fools at Headquarters Marine Corps. Asked about his *Croix de Guerre*, that recognized his heroism in the 1975 evacuation of Saigon, Capt Zander modestly explained that it was "only a third degree" *Croix de Guerre*.[31] But at Kaneohe Bay, a Marine client he defended alleged that Capt Zander had mishandled his court-martial. A *pro forma* inquiry into the allegation discovered a doctored record of trial and missing trial tapes,

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[28] BICENTENNIAL REGISTER OF GRADUATES, UNITED STATES MILITARY ACADEMY 4-711 (2002).
[29] Lincoln Caplan, *The Jagged Edge*, ABA J. 52 (Mar. 1995).
[30] Telephone Interview, Brigadier General James Walker, USMC (Mar. 18, 2007). As a captain, BGen Walker, who was first in his own Justice School class, recognized Capt Zander's wall-mounted certificate, and briefly discussed it with him.
[31] Telephone Interview with Col (Ret.) Kevin Winters, USMC (Mar. 15, 2007).

strongly implicating Zander.[32] The NCIS called the California bar where, several years previously, a puzzled James Zander had changed his bar membership back to his own name, erasing Jeffrey's. Captain Zander's LL.M. orders were cancelled and a general court-martial convened.

Tried judge-alone from July to September 1994, Capt Zander pleaded guilty to a false official statement, twenty specs of conduct unbecoming, and two of wearing unauthorized awards. His sentence of seven years, all pay and allowances, and dismissal, was reduced by a pretrial agreement to dismissal, lesser forfeitures, and 120 days [confinement].[33]

Say what you will about Doc Harris, he consistently resisted assignment as a defense counsel. He only prosecuted. Captain Zander's three-year courtroom backtrail was littered with defense cases that the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) had to clean up. He had defended twenty Marines, winning acquittals in two cases. Eventually, two still-imprisoned clients were released, and thirteen bad conduct discharges were set aside with re-trials ordered.[34]

The Harris and Zander cases remain embarrassments to the Marine Corps and to the JA community. I've never met Doc Harris, but he strikes me as an interesting guy to have at the poker table, felony conviction and all. Jeffrey Zander, on the other hand, lied to the detriment of (literally) defenseless young Marines. Zander's clients might have been convicted even if defended by Mr. Charles Gittins—who was Zander's court-martial defender. But maybe they would not have been. Moreover, Capt Zander, who had eight years enlisted service in which to absorb the military ethos, lied about core aspects of what we all share and value as Soldiers and Marines: combat, and selflessness, and valor.

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[32] Rowan Scarborough, *Marine Captain Accused of Impersonating Lawyer*, WASH. TIMES, June 8, 1994, at A1.
[33] U.S. v. Zander, 46 M.J. 558 (N-M. Ct. Crim. App. 1997).
[34] Rowan Scarborough, *Great Pretender, Marines Plea Bargaining*, WASH. TIMES, Aug. 17, 1994, at A4. This article indicates that Zander served as defense counsel in twenty-three cases but the record of trial indicates twenty. The lesser number is used here.

VII. Trials and Non-Trials

What can one say about the U.S. Air Force in its hour of JA troubles? Major General Thomas Fiscus, JAG of the Air Force, NJP'd, demoted to colonel, and forced to retire after revelations of fraternization, conduct unbecoming, and obstruction of justice involving sexual affairs with more than two dozen enlisted women, officers, and civilian employees.[35] And Col. Michael Murphy, Commanding Officer of the Air Force Legal Operations Agency, former general counsel for the White House Military Office and former Commandant of the Air Force JAG School, recently discovered to have been permanently disbarred in both Texas and Louisiana in 1984.[36] Resolution of his case is pending.

But neither Col Fiscus nor Col Murphy have been court-martialed. For the most prosaic of crimes another Air Force JA was. For $25,000, a Lackland-based captain and his enlisted paralegal paramour hired a police informant to murder the captain's wife. At his September 2005 general court-martial, not yet reported, the Air Force JA pleaded guilty to attempted premeditated murder and fraternization and was sentenced to dismissal and eighteen years.[37]

VIII. Lest We Forget

The American cases mentioned here represent a small, an almost invisibly small, proportion of the Armed Service JA communities. It will be for another article, or for COL Borch's next book, to detail examples of the dedicated, even heroic, work performed every day by 1,300 Air Force JAs, 1,683 Army, 455 Marine Corps, and 750 Navy JAs.[38] Nor have we mentioned the sixteen military lawyers (eleven Army and five Marines) who have been wounded in combat in Iraq and Afghanistan. In Iraq, in October 2006, for example, Marine Maj Justin Constantine took an enemy sniper's round just under the rim of his helmet, behind his ear,

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[35] Thomas E. Ricks & William Branigin, *Air Force Reprimands Its Former Top Lawyer*, WASHINGTONPOST.COM (Dec. 22, 2004), *available at* www.washingtonpost.com/ac2/wp-dyn/A19083-2004Dec22 (last visited Aug. 9, 2007).

[36] Thomas E. Ricks, *Top Air Force Lawyer Had Been Disbarred*, WASH. POST, Dec. 10, 2006, at A22.

[37] *See* Air Force Link, *Military Lawyer Sentenced to 18 Years in Prison*, http://www.af.mil/news/story.asp?storyID=123011811 (last visited Aug. 8, 2007).

[38] Figures as of March 2007. Coast Guard numbers were unobtainable.

exiting his jaw. Through yet another miracle of battlefield medical care by amazingly capable military doctors, he survives and will recover, eventually. He has undergone nine surgeries with more to come. Major Constantine reminds us that, along with other U.S. and allied forces, JAs are in the line of fire every day, subject to wounding, maiming, and death. Army MAJ Michael R. Martinez, a former enlisted paralegal, died in a Blackhawk crash near Tal Afar, Iraq, in January 2006—a month before he was to return to his wife and five children. Major Martinez was the first JA to die in a combat zone since the Vietnam War.

IX. Captain Randy Stone

That brings us back to Marine Capt Randy Stone. On 19 November 2005 he was in Iraq, attached to the 3d Battalion, 1st Marines, at Forward Operating Base Sparta. In nearby Haditha, a Marine patrol from Kilo-3/1 is alleged to have murdered twenty-four Iraqi noncombatants. Over the next few months their courts-martial will take place at Camp Pendleton, California, prosecuted by JAs of the 1st Marine Division's SJA Office, where I was a trial counsel for six years. Along with four enlisted Marines who were in Haditha, their platoon commander, company commander, battalion commander, and Capt Stone are charged. Captain Stone is also represented by Mr. Charles Gittins. The significant fact that a JA is charged in relation to offenses against noncombatants—grave breaches of the law of armed conflict—has escaped the media's attention almost entirely.

The path to operational law advisors serving in infantry battalions is a lengthy one. In the Marine Corps, Capt Stone's branch, "there were no billets for attorneys in the fleet or at any post or station until 1942, when a billet for a capt-lawyer was included in each Fleet Marine Force division headquarters."[39] In 1950, the newly-enacted UCMJ mandated "law officers," and defense counsel who were required to be lawyers, at general courts-martial, but they were not required elsewhere. The Military Justice Act of 1968, a major re-ordering of the *Manual for Courts-Martial*, mandated lawyer-judges and lawyer representation for all accused at special and general courts.[40] The day was past when, during World War I, the Navy's JAG's office could boast that there was

[39] SOLIS, *supra* note 20, at 283.
[40] Pub. L. No. 90-632, 82 Stat. 1335 (1968).

not a single lawyer on its staff.[41] In fact, the JAG of the Navy was not required to be a lawyer until 1950.[42]

The 1977 Protocol I Additional to the 1949 Geneva Conventions,[43] for the first time, called for legal advisors to be available to counsel combat commanders. Article 82 reads: "The High Contracting Parties . . . shall ensure that legal advisors are available, when necessary, to advise military commanders . . . on the application of the conventions and this Protocol . . . ."[44] The mandate of Additional Protocol I is taken up in a Department of Defense directive and a Joint Chiefs of Staff instruction.[45] In the Marine Corps, it is further disseminated in *Marine Corps Order 3300.4*, directing senior commanders to "ensure qualified legal advisors are immediately available to operational commanders at all levels of command . . . to provide advice concerning law of war compliance."[46] The order refers to JAs as "operational law advisors."[47] The same order repeats the requirement, long in place, that alleged law of war violations

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[41] Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 172 (1953).

[42] 10 U.S.C. § 5148 (1950).

[43] Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3.

[44] *Id*. at art. 82. The United States has signed but not ratified the two 1977 Additional Protocols. Nevertheless, the United States considers fifty-eight of Protocol I's 102 articles to be customary law to which there is no United States objection. Mike Matheson, *Additional Protocol I as Expressions of Customary International Law*, 2 AM. U. J. INT'L L. & POLICY 428 (1988).

[45] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.8.3 (9 Dec. 1998) (addressing briefly the "command legal advisor"); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4.b (25 Mar. 2002). Joint Chiefs of Staff Instr. 5810.01B is more specific:

> At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.

Id. In 1972, it was then-Colonel George S. Prugh who first urged adoption of DOD Directive 5100.77, after having earlier written MACV Directive 20-4, *Inspections and Investigations of War Crimes*, in early 1965. BORCH, *supra*, note 22, at 20-21, 34-35, and 54.

[46] U.S. MARINE CORPS, ORDER 3300.4, MARINE CORPS LAW OF WAR PROGRAM para. 4.c(4) (20 Oct. 2003). The Marine Corps order is the most comprehensive of the Armed Services' current law of war compliance orders.

[47] *Id*.

be reported and investigated.[48] The law of war orders of the other Armed Services lay down the same requirements.

It took thirteen months to prefer Haditha charges.[49] The lengthy gestation is mitigated by the fact that no one beyond the battalion knew of possible crimes in Haditha until they were bought to light by *Time* magazine, four months after the event.[50] Whether suspicions *should* have been raised will be an issue at the trial of 3/1's battalion commander. Whether higher command should have suspected is a question beyond our scope. We do know that as soon as the possibility of a war crime was realized, investigations were immediately undertaken. Having learned a lesson from the Army's multiple and sometimes mistaken or contradictory investigations into the death of Corporal (CPL) Pat Tillman, the Marine Corps proceeded methodically and carefully. Before bringing charges, they considered formal Haditha investigations conducted by Army COL Gregory Watt, Army MG Eldon Bargewell, the Marine Corps itself, and by the Naval Criminal Investigative Service.[51] The NCIS investigation alone was 3,500 pages in length. Delay was a by-product.

Historically speaking, the specifics of Capt Stone's case are largely irrelevant. More important is what his being charged means to JAs in Iraq, in Afghanistan, and future combat zones. My research indicates that this is the first time an American JA has been charged with criminality in combat, albeit as a principal. Captain Stone didn't pass bad paper and misuse military funds, as did JAG Swaim. He certainly is no *Generaloberst* Lehmann, no LT Wako Yusei. But his case is not simply the court-martial of an operational law advisor, either. It is a trial involving a JA's advice, or its lack; its sufficiency or inadequacy; a trial for his taking or not taking a role. The charges suggest that Capt Stone's judgment was so poor that it rises to criminality; essentially, criminal professional negligence.

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[48] *Id.* para. 3.b.

[49] The homicides occurred on 19 November 2005, they were reported by *Time* magazine on 19 March 2006, and charges were preferred on 21 December 2006. *See* Thomas E. Ricks, *In Haditha Killings, Details Came Slowly*, WASH. POST, June 4, 2006, at A1.

[50] Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 19, 2006, *available at* www.time.com/time/printout/0,8816,1174649,00.html (last visited Aug. 8, 2007).

[51] The Marine Corps JAG Manual investigation, convened by Major General Richard C. Zilmer, was eventually combined with MG Bargewell's AR 15-6 investigation.

He is charged with three specifications of a violation of UCMJ Article 92, two of which appear multiplicious: wrongfully failing to ensure accurate reporting and investigation of a suspected law of war violation; negligently failing to ensure its accurate reporting; and negligently failing to ensure a thorough investigation of the incident. The facts adduced at trial—if his case goes that far—may modify our view of his performance of duty, or not, but today Capt Stone is guilty of nothing.

His charging is a positive event in two respects. On a grand canvas, it demonstrates that the United States takes seriously its obligations under the law of armed conflict. The fact that the United States has not ratified Protocol I is irrelevant to the demonstration of the sincerity of our commitment to the law of war. We have disregarded it often enough, lately.

Captain Stone's charges are a positive event because they send two significant messages—and when the Marine Corps is mentioned, if you are not a Marine substitute your own armed force. The first message: "Commanders, in the combat zone, you remain responsible for the actions of your men and women. You are provided JAs to give you specialized advice. Integrate them into your staff and use them as you would your other staff members. Provide a command climate that allows them to assist you and, should you ignore their advice, have a reason for doing so." The unspoken subtext: ". . . or we'll court-martial you."

The second, stronger message: "Judge advocate, as a battalion staff member in combat, know and remember who your client is, and what your duty to your client is." That message is clear: Your client is the United States and the Marine Corps, embodied by your battalion commander. (Or task force commander, or regimental commander, *et cetera*.) To clarify what their duty is, JAs need only read the specifics of their branch's law of war order.

Operational law advisors have a broad range of responsibilities in each phase of combat operations. In the planning stage, a working knowledge of treaty-based and customary law of war is required, as well as U.S. law of war policy. Judge advocates must instruct their Soldiers and Marines in the basics of that law, occasionally remind commanders of the concept of command responsibility, and instruct all hands in the rules of engagement. Are there potential international human rights law

concerns? Will information operations be involved? The operational law advisor's expertise must be extensive.

In the execution phase of operations, the JA's responsibilities continue on a lower plane, yet it is here that the command's law of war problems will surely arise. Judge advocates must be alert to the progress of the operation and to potential issues related to the instruction they have previously accomplished.

In the follow-up phase of combat operations, JAs are, of course, tasked with recognizing, investigating and reporting possible law of war violations.[52] It has been a long time since military lawyers could prosper merely with an expertise in the courtroom.

We won't know the specifics of Capt Stone's charges until his Article 32 investigation concludes, and perhaps not until he presents his defense at trial. Did he mislead or lie to investigators? Did he actively cover-up events in Haditha? Did he identify too closely with Marines he served with and, in his reporting, shade or unduly minimize their acts? The court-martial process will reveal the facts. Or has he been rashly charged? But, as already mentioned, the specifics of Capt Stone's case are largely irrelevant. The very charging of a JA is the significant fact. Whether or not Capt Stone is found guilty, whether his case ever goes to trial, a precedent is established for all the armed services: when law of war violations occur, the performance of duty of operational law advisors—their decision-making—will be examined and, if found wanting, charges may follow.

No one in military service can complain that his or her service is open to review, with remedial, even disciplinary, action taken, if found deficient. Administrative reductions in grade and career-ending fitness reports have always been common conversational fare at enlisted and officer club bars. But where legal judgments are involved, the very term "judgment" incorporates a host of decisional factors, some virtually inarticulable. In the future, who will make the decision to charge or not charge a JA for the quality of her reporting, or for the absence of a

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[52] CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED JUDGE ADVOCATE RESOURCE LIBRARY (The Judge Advocate General's Corps DVD, 8th ed. 2006). Army judge advocates are well-instructed in operational law responsibilities, for example in the subchapters *Coalition Operations/Military Justice* and *MJ in an Operational Setting*. *See id.*

report? Who will decide if the lawyer's judgment was deficient, and who will decide what the standard of adequacy is? The JA's reporting senior? Her staff judge advocate? The commanding general? An inspector general, perhaps? Will congressional interest and pressure—or its absence—be a factor? Will the media question decisions to charge or not charge, and will that matter?

"No change," you say? "The military justice process will continue to march as usual and the accustomed judgments will be made by the accustomed individuals," whoever they are. But Army Corporal Pat Tillman's case suggests otherwise. The statements of Congressman John Murtha remind us that political pressure from concerned politicians can initiate military action. Fallout from the Walter Reed Medical Center case illustrates the rightful power of the press. Ms. Cindy Sheehan is proof of the power of a single voice. No, the decision to charge the lawyer, and who makes the decision to do so, and what standards apply, are not as settled as we might wish.

X. Conclusion

In light of Capt Stone's charges, should Army OPLAW [operational law] advisors sit through combat engagements in the operations center, monitoring tactical radio traffic for possible problems? Shall Air Force JAs review gun camera footage for improper targeting choices? Must Marine lawyers review patrol reports and FDC logs? Does Capt Stone's case open the door to JAs peering over the shoulders of S-3s, air bosses, and battery execs? Should that targeting cell munitions assignment list undergo a second JA's scrub, just to be safe? Might the Stone case presage legal advisors becoming a hindrance to the command decision-making process they are supposed to facilitate? Might OPLAW advisors become fall guys for a commander's hesitancy to take aggressive combat action?[53]

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[53] An example of judge advocate scapegoating occurred during an early stage of the current war in Afghanistan. In October 2001, a Taliban convoy bearing Taliban leader Mullah Omar was allegedly sighted. Expedited permission for a loitering armed Predator to fire on the convoy was denied by Central Command Commanding General Tommy Franks. His widely reported feckless reply to the request: "My JAG doesn't like this, so we're not going to fire." Thereafter, General Frank's "JAG," Navy Captain Shelly Young, was pilloried in the unknowing media, sometimes by name. *See, e.g.*, Seymour M. Hersh, *King's Ransom: How Vulnerable Are the Saudi Royals*, NEW YORKER, Sept. 22, 2001, at 36; Thomas E. Ricks, *Target Approval Delays Cost Air Force Key Hits*,

Or will we merely continue to march, praying that another Haditha doesn't occur on our watch? What we can say with assurance is that Capt Stone's case raises the potential for a new range of problems for both JAs and for tactical commanders; legal problems that could result in incarceration, loss of career, and the stamp of criminality. Stone's case is a new phase of legal history. It may be the first of a new breed of court-martial charge, or it may pass without a further note. We can't know which, since history, including legal history, can only be viewed in retrospect.[54]

I suspect that General George Prugh would counsel operational law advisors to simply do their best, and not approach their duty with an eye to how they might defend their decisions at court-martial. Competence and diligence are always a JA's goals—and, if it comes to that, their best defense.

WASH. POST, Nov. 18, 2001, at A1 (providing a circumspect depiction of the event); Rebecca Grant, *An Air War Like No Other*, AIR FORCE, Nov. 2002, at 31-37, 34; and *Face the Nation* (CBS television broadcast Oct. 21, 2001) (dialogue between host Bob Shieffer and Secretary of State Colin Powell), *transcript available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cbstext_102101.html.

[54] Subsequent to this lecture, the convening authority dropped all charges against Capt Stone. *Charges Dropped for Two Marines in Haditha Case*, NPR.ORG, Aug. 9, 2007, http://www.npr.org/templates/story/story.php?storyId=12634743.