THE FIRST ANNUAL SOLF-WARREN LECTURE IN INTERNATIONAL AND OPERATIONAL LAW[†]

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[†] The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, U.S. Army (TJAGSA) on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. On 16 August 2007, the Chair was renamed the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law.

Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate (SJA) of both the Eighth U.S. Army/U.S. Forces Korea/United Nations Command and the U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the ICRC Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

[*] This lecture is an edited transcript of a lecture delivered on 5 March 2008 by COL (Retired) Marc L. Warren to members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia.

Colonel Marc Warren was appointed as the FAA's Deputy Chief Counsel for Operations in November 2007. He assists the Chief Counsel in overseeing all aspects of the FAA's legal activities with special focus on nationwide enforcement, airports and environmental, personnel and labor law, and Regional and Center Counsel office activities.

A native of Florida, COL Warren received both a B.A. (1978) and a J.D. (1981, with honors) from the University of Florida; LL.M., 1993, TJAGSA, Charlottesville, Va.; and Master of Strategic Studies, 2002, U.S. Army War College, Carlisle Barracks, Pa. He is a member of the bars of Florida and the U.S. Supreme Court.

Prior to his FAA appointment, COL Warren served in the U.S. Army. Commissioned as an ROTC Distinguished Military Graduate in 1979, his military

General Black and Mr. Cohen, general officers, distinguished guests, fellow members of the Regiment, ladies and gentlemen, it is a great pleasure to be with you today. I appreciate the kind invitation to speak with you, and I appreciate the hospitality of the students, faculty, and staff of the Legal Center and School. General Black, thank you so much for this honor.

It is always a pleasure to come home to Charlottesville. I am honored to be here and I am particularly honored to be associated with Colonel Wally Solf, an officer, gentleman, and scholar of the first order who envisioned and championed the Department of Defense (DOD) Law of War Program. If Dave Graham is the father of operational law, Wally Solf is one of its grandfathers.

I hope to deliver a memorable lecture and the "best ever" Solf-Warren lecture. I know it can never compare to the one given by William H. Taft IV, former Legal Adviser of the Department of State, who was interrupted while at the podium by the sudden onset of a violent stomach flu. I don't want it to be that memorable.

Today, I will talk about the work of Judge Advocates in the first year or so of Operation Iraqi Freedom. During my tenure in Iraq with V Corps and Combined Joint Task Force-7 (CJTF-7), we were prematurely congratulated for a mission accomplished and excoriated for Abu Ghraib. For CJTF-7, the latter largely eclipsed the former. And the great and historic work done by Judge Advocates that first year has not gotten the positive attention it merits.

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schooling includes the Infantry Officer Basic Course; Judge Advocate Officer Basic, Advanced and Graduate Courses; Command and General Staff College; U.S. Army War College; and Airborne, Air Assault, Jumpmaster, Pathfinder, and High Risk Survival, Evasion, Resistance and Escape (SERE) Schools.

In the JAG Corps, he served as the Special Assistant to The Judge Advocate General and as the Staff Judge Advocate (SJA) for Combined Joint Task Force 7/Multi-National Forces in Iraq, V Corps in Iraq and Germany, and the 101st Airborne Division (Air Assault). He was the Legal Advisor for the worldwide activities of the Joint Special Operations Command, and Regimental Judge Advocate for the 11th Armored Cavalry Regiment. He served in numerous other assignments in the United States, Germany, Grenada, Bosnia, Kuwait, and Iraq, including Instructor in the International and Operational Law Department of TJAGSA.

His awards and decorations include the Distinguished Service Medal, Defense Superior Service Medal, Legion of Merit, Bronze Star Medal, Defense Meritorious Medal, and Meritorious Service Medal.

I've organized this presentation into five areas that I call the myths concerning the first year in Iraq, after which I will offer some conclusions. These are only my personal perspectives, based on my experiences and perceptions as a Soldier and nothing more. I've intentionally refrained from using slides or photos, because I do not want this to be a military style briefing or travelogue. Much has been written about some of the events I've been involved in and some of what has been reported is accurate. Much of it is not. If some of what I say may differ from what you've read or heard, and if you have questions about that, please ask me.

I will address, and attempt to refute, each of the five myths in turn, but I think it is fair to ask how they became widespread at the least and commonly accepted as fact at the most.

First, it is obvious that the war in Iraq did not go as planned. Of course, this can and often does happen in a war. Once the hounds of war are unleashed, they go where they want to go, despite our assumptions and efforts to the contrary. Speaking of assumptions, it seems that we assumed the worst about Iraq's capabilities and intentions in deciding whether to go to war, and assumed the best case as to what would happen once we crossed the LD.[1]

In fairness, the Vietnam and Somalia experiences notwithstanding, our recent operations in Grenada, Panama, the first Gulf War, and Kosovo achieved relatively rapid success at modest cost. We got accustomed to winning. The failure to win quickly in Iraq caused many observers to look more for scapegoats than root causes. These myths became convenient to those who wanted to distance themselves from that first year, who wanted to criticize the decision to go to war in the first place, or who wanted to propose a fresh start or a new strategy, but without looking too deeply at what really happened in the first year and why.

As almost always happens, the commanders and Soldiers on the ground became the easy and convenient objects of mythology—but not

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[1] Line of Departure: "1. In land warfare, a line designated to coordinate the departure of attack elements. 2. In amphibious warfare, a suitably marked offshore coordinating line to assist assault craft to land on designated beaches at scheduled times." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 314 (12 Apr. 2001, as amended through 8 May 2008).

in a positive way in this instance. CJTF-7 became a particular target of some special interest groups, politicians, and the media. It was an organization with no patron or constituency, a temporary and short term amalgam of a headquarters. Unlike an Army corps or division, it had no alumni base, no history, no future, and no defenders. It never even got a patch. It has not had the benefit of study, only scrutiny and investigation. There has, to my knowledge, been no meaningful after-action review or lessons learned conference on CJTF-7. Even the Army's official history of the first year in Iraq, *On Point II*, was delayed in publication because of the possibility of affecting courts-martial arising from the Abu Ghraib debacle.

CJTF-7 was critically under-resourced, never at more than fifty percent strength. It was built on a Corps headquarters (minus) and by itself did the work now done by MNF-I, MNC-I, MNSTC-I, and TF-134,[2] all the while in direct support of the Coalition Provisional Authority (the CPA). CJTF-7 envisioned, justified, and built its successor organizations and the command, control, and administrative architecture and processes now in Iraq; and, by the way, fought a war as the senior joint and combined headquarters. By analogy, building an airplane in flight would have been easy. While building the plane, CJTF-7 was also writing the pilot and instruction manuals while up in the air, and taking a lot of flak at the same time. It was placed in an impossible relation with the CPA that fractured unity of command and made unity of effort impossible. It was the odd man in the middle between the Army and Marine divisions beneath it and Central Command above it. Worse, as a joint command, it could expect no defense from the services. It was the Task Force Smith of the new millennium—out-manned, out-gunned, and left to die in the field.

The Abu Ghraib scandal engulfed the headquarters in the late spring of 2004, diluting its focus and sapping its strength. This happened at the same time that Sadr's Shiite militia attacked Coalition forces, the Sunni insurgency exploded, Al Qaeda in Iraq emerged, Iranian adventurism increased, and key actions had to be taken to end the occupation, disestablish the CPA, and enable the Interim Iraqi Government.

CJTF-7 went out of existence in May 2004. There was nothing to be gained by any remaining headquarters or the services attempting to

[2] Multi-National Forces Iraq, Multi-National Corps Iraq, Multi-National Security Transition Command Iraq, and Task Force 134.

clarify CJTF-7's positions, policies, or responsibilities; correct inaccuracies made in the media about CJTF-7; or simply tell the CJTF-7 story. Contrast the situation with what occurs when there are unfavorable allegations made about the Marine Corps, for example—the effort to at least correct, if not shape, the public record is enormous. CJTF-7's leaders could not defend it, or themselves for that matter, for a couple of years after its disestablishment. They were the object of investigations and congressional hearings, and actual or potential witnesses in courts-martial, and thus constrained from public statements to clarify or explain their actions. Certainly, their situation and active duty status made writing self-serving books, participating in speaking tours, and interacting with many special interest groups an impossibility.

The myths were gleefully perpetuated by some special interest groups that had an actual economic or perceived moral agenda to assume the worst about the U.S. military. They were aided by some people, some of whom who had served in uniform, who should have known better. In some cases, the ulterior motives of these special interest groups should have been clear as they announced conferences on their websites that were to be held in places like Havana, Cuba, or trumpeted "war crimes" indictments against U.S. leaders for everything from global warming to Hurricane Katrina, and from the AIDS epidemic to systematic detainee abuse in Iraq, Afghanistan, and Guantanamo. In extreme cases, some of them are party to "lawfare" waged against the United States, twisting legal principles, making outrageous assertions, and abusing legal process to bring lawsuits or make requests for prosecution of U.S. civilian leaders and military personnel for alleged crimes.

However, our own government is not without blame. For example, there was a failure to adequately plan, execute, and resource the occupation of Iraq; a failure to stick to a condition-based rather than an essentially arbitrary end to occupation; a failure to defer to the advice and experience of the military, including senior Judge Advocates; a failure to follow the letter and spirit of the law of war by not setting universal interrogation and detainee treatment standards for U.S. forces on the battlefield, whether special operations, conventional, or non-DOD forces; and a failure to categorically prohibit detainee abuse, even if committed by non-DOD forces in urgent circumstances and arguably not rising to the level of torture. In some cases, our government deserved to be criticized and sued, whether by special interests or others.

With regard to detainee abuse and interrogation practices in Iraq, there were a series of flawed and very public investigations, from Taguba to Fay-Jones, Schlesinger to Church, that have been at best diffused and incomplete. The very nature of multiple investigations means that they create enough gaps, seams, and inconsistencies to fuel a veritable cottage industry of conspiracy theorists. At least one of the investigations is simply a compilation of the others and repeats some of their incorrect information. Another kept no record of interviews.

The investigations failed to address some of the real root causes of the problem, such as the lack of relevant doctrine and training afforded to military intelligence interrogators; the absence of sufficient capable Military Police Corps detention and correction expertise during the first year in Iraq; the failure of Central Command to plan for, resource, and execute detention and interrogation operations in Iraq, even after previous experience in Afghanistan portended many of the same problems that were later repeated in Iraq; and the broad interrogation authorities granted to some special operations and non-DOD forces, neither of which were under the command and control of CJTF-7. The most thorough investigation on the topic has not been publicly released, even in a redacted form, because it deals with professional responsibility. Notably and sadly, the one common conclusion of the investigations—that there was no systematic practice or command policy of abuse by the military in Iraq—has been lost in the noise.

Instead, investigative reports were frequently prematurely released and briefed to Congress and the media, where they were dissected for sound bites and political advantage, and triggered a demand for more hearings, more information, and media opportunities. Leaders were hauled before cameras, editorial boards, and circus-style congressional hearings, and often forced to answer questions before facts were fully known. To some degree, this may have been inevitable as Abu Ghraib created what some have described as the perfect storm, and earnest military officers were unarmed opponents in battles with Capitol Hill and the media.

Regardless of the origin, the myths were born. The first myth is that there was uncertainty or confusion as to whether the Geneva Conventions applied in Iraq. From my perspective, there was never any uncertainty or confusion, at least on the part of senior commanders and their staffs. The war in Iraq was an international armed conflict between two High Contracting Parties, followed by a state of belligerent

occupation. The Geneva Conventions applied as a matter of law. Notwithstanding the legal positions taken by some Executive Branch lawyers on issues pertaining to interrogations, detentions, and renditions, Judge Advocates in Iraq were clear on the point that the Geneva Conventions applied and had to be adhered to. There were individual failures to apply them, but none were a matter of command policy. The Geneva Conventions were referenced in numerous operations plans, orders, policies, and standard operating procedures (SOPs) issued by CENTCOM,[3] CFLCC,[4] V Corps, and CJTF-7. In his 6 September 2003 letter to the International Committee of the Red Cross (ICRC), the CJTF-7 commander wrote, "Coalition Forces remain committed to adherence to the spirit and letter of the Geneva Conventions."

The principles of the Geneva Conventions are the bedrock of mandatory training for all Soldiers and Marines, and they are the basis of the "Soldiers' Rules" that are taught in basic training. Law of war refresher training was required as part of pre-combat training. In several exercises conducted before the war, considerable effort was put into training to apply the law of war in targeting decisions and in the rules of engagement, the ROE. Starting with the ROE development conference in London in November 2002, much attention was paid to methodologies and modeling tools to try to estimate and minimize collateral damage. The control of fires was a major focus of exercises in Poland in October 2002 and in Kuwait in November and December 2002. Judge Advocates were placed in all corps and division level (and many brigade-level) fire centers to assist in the clearance of fires by ensuring compliance with the collateral damage methodologies, ROE, and law of war. Within V Corps, Judge Advocates were placed down to the Military Police (MP) battalion level to help resolve prisoner of war and detainee issues.

Although the assumption that Iraqi forces would capitulate *en masse* never became a reality, the considerable effort that went into the detailed planning for capitulated forces was not wasted. A key point in the planning was that these forces enjoyed the legal status of prisoners of war and the Third Geneva Convention was a well-briefed and well-understood topic in the headquarters. At the start of the war, one of the first fragmentary orders (FRAGOs) issued by V Corps, Order Number 007, dealt with prisoners and detainees. It cited the Third and Fourth Geneva Conventions and established a review and release mechanism for

[3] United States Central Command.
[4] Coalition Forces Land Component Command.

detainees that exceeded the requirements of the Fourth Convention and adopted best practices from Haiti and Kosovo, including a review of all detentions by a Judge Advocate. Of course, this was the first large-scale implementation of the Fourth Convention, new in 1949, and the sheer number of detainees would overwhelm our process. Regardless, in our frequent interaction with the ICRC, there was never any dispute over the legal applicability of the Conventions, only in our ability to implement them completely.

This myth of ambiguity was advanced by Soldiers who, facing court-martial for detainee abuse, asserted that they were confused over the rules (or, for that matter, who raised the defense of superior orders or command policy to justify their actions). Their assertions have been extensively covered and amplified in the media, and are the stuff of books and movies. The fact that the assertions have been spectacularly unsuccessful, despite the opportunity of extensive pre-trial discovery to uncover any supporting evidence, has been much less reported. But in fairness there is a point to be made concerning the possibility of confusion at the Soldiers' level. There were Soldiers who served in Afghanistan where rules and principles were relaxed, and then redeployed to Iraq where the Geneva Conventions fully applied. There were also Soldiers who interacted with non-DOD forces who were apparently operating under relaxed rules and principles, even in Iraq. So, I think it is possible that some at the junior level might have been confused about the applicability of the Geneva Conventions, at least until they received the refresher training on the law of war that was mandated by CJTF-7. But none of those Soldiers should have reasonably believed that detainee abuse was ever authorized, and any who had questions should have sought clarification from a responsible leader.

More broadly, our government should have never deviated from the long-standing policy—championed by Wally Solf—that our Forces will apply the law of war, regardless of how a conflict is characterized, and our Army has since taken strong steps to reestablish this position and inculcate it into our training, doctrine, and culture. Over objections from some within our government, the Army—even before the *Hamdan* decision[5]—rightly insisted that the principles of Common Article 3 of the Geneva Conventions remain as the minimum standards for the treatment

[5] Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that Common Article 3 of the Geneva Conventions applies to Al Qaeda detainees during the Global War on Terror).

of all prisoners, regardless of the context of their captivity, unless higher standards apply.

The second myth is that the occupation of Iraq was not anticipated. The occupation was certainly anticipated at the level of the operating forces. However, higher-level planning was inadequate or did not occur, strategic policy decisions were not timely made, and the requirements for occupation were not adequately resourced. The problem was not in failing to forecast the occupation as governed by the Fourth Convention; it was in failing to set the conditions for its meaningful execution. The situation was analogous to the dog chasing the car. The real difficulty comes when he catches it.

In the Victory Scrimmage exercise and its follow-on before the war, V Corps war-gamed what we termed "transitional occupation" issues. By this I mean problems such as rioters, criminal conduct, looting, humanitarian relief requirements, and civilian population movement that would impede offensive operations as our forces moved through Iraqi territory. These issues so concerned the Corps commander, General Scott Wallace, that he directed an immediate follow-on exercise in Grafenwoehr to try to develop responses to the problems.

The result was stunning in several respects. First, it was clear that transitional occupation issues could appreciably slow offensive forces and potentially require substantial additional forces to deal with them. Unfortunately, it was also clear that these additional forces did not exist. The Corps had developed a Time Phased Force Deployment List, called a TPFDL, over the past year of exercises and mission analyses. The TPFDL identifies the amount and flow of forces necessary to accomplish the mission. In Grafenwoehr, we learned that the Corps TPFDL had been scrapped by DOD and replaced by a much smaller force. The Corps commander was deeply concerned about the reduction in combat power. The reduction meant that the Corps commander had to do a "rolling start" of the ground offensive with forces available and with the expectation that additional divisions would arrive over time, instead of being able to mass all of his forces at once. The Corps commander was also concerned, and I was deeply concerned, about the cuts in combat support and combat service support forces, particularly MP units.

Second, Victory Scrimmage and its follow-on demonstrated a potentially huge planning and capability deficit if the assumptions concerning what we called Phase 4, the phase of the operation after

decisive combat operations, proved to be invalid. These assumptions were premised on the belief that many Iraqi military forces would capitulate, that is surrender *en masse* without a fight, and would be available to serve as a constabulary or security force; that Iraq's physical and social infrastructure would remain intact; and that a capable interim Iraqi government, probably under Ahmed Chalabi, would quickly emerge. If these assumptions were invalid (and, of course, every one of them proved to be invalid), and if our forces encountered problems like those identified in Victory Scrimmage (as, of course, we did), it was clear that we needed to plan for and resource a sustained occupation.

Accordingly, V Corps dutifully identified numerous issues and requirements, and sent them up to higher headquarters. Some of our subordinate divisions, particularly 3d Infantry Division, did the same. In the legal arena, these included requests for decisions on what law was to be applied in Iraq, what parts of the Iraqi Penal Code could be suspended in accordance with the terms of the Fourth Convention, whether we should remove Iraqi judges from the bench and establish occupation courts convened by commanders with military judges, and what the occupation proclamation and ordinances should say. On a basic level, we asked for an Iraq Country Law Study and a translated copy of the Iraqi Penal Code. These questions and requests were received sympathetically by our higher headquarters, CFLCC in Kuwait, and the CFLCC Staff Judge Advocate (SJA), COL Dick Gordon, vigorously raised similar issues and questions, and joined us in our requests until we actually entered Iraq. Unfortunately, the answer we received was that there was a dedicated Phase 4 planning cell at CFLCC, CENTCOM, and in Washington, and that all of these matters were being addressed at "the National and Coalition level."

The Corps commander became so concerned about what was—or wasn't—being done at the Washington level, that he sent our civilian political advisor to D.C. to sit in on the meetings. Her report was that interagency planning for Phase 4 was underway, but that it would not be called an "occupation." We would not be occupiers, but "liberators" and "the O word" was not to be used at all. Of course, this was ludicrous, as occupation is a fact and the Fourth Geneva Convention and the older Hague Regulations establish the rights and obligations of an occupier as a matter of law. This fact cannot be wished away or dismissed by using the euphemism of liberator. On the topic of the Iraqi Penal Code, we did not obtain an official version until we were in Iraq, and then thanks to

CLAMO.[6] In the interim, one of our V Corps Judge Advocates, who happened to have been an Arabic linguist, checked out a copy from the Kuwait City public library and began the tedious task of translating the Code into English.

To make matters worse, the Corps's G-5, the Civil Affairs officer, had a heart attack in Grafenwoehr and could neither continue in the exercise nor deploy to Kuwait, then on to Iraq. He was never replaced by a civil affairs officer and the position of G-5 was instead filled by our G-1, a very competent officer, but a personnel specialist unschooled and inexperienced in Civil Affairs. Another deficiency existed in the Provost Marshal section. Until several months into the occupation, the senior Military Police officer on the Corps and CJTF-7 staff was a Major.

In January 2003, V Corps held a legal conference in Heidelberg to examine the ROE, targeting, detainees, and occupation and law of war issues generally. The Corps commander spoke to the assembly of Judge Advocates, including the SJAs of the Corps' subordinate wartime divisions. Also in January in Heidelberg, we hosted a conference with an Israeli Judge Advocate who had real-world experience in the administration of occupied territory. These conferences augmented research on occupation law, including the study of materials from the Army War College and the Center for Military History, on U.S. experiences after World War II.

Upon our return to Kuwait in February 2003, planning for the occupation continued, albeit in a vacuum. The SJA section gave the Corps commander a lengthy briefing on the rights and responsibilities of an occupier. At the end, we identified numerous issues concerning which we required information and decisions. The Corps commander directed the staff to coordinate with the Office of Reconstruction and Humanitarian Assistance, ORHA, which had recently established an element in Kuwait City. The ORHA was the predecessor to the CPA. We did so and were beyond sorely disappointed, we were simply stunned. They had done little analysis, had devoted few resources to the effort, and were way behind us in their thought process. In fairness, ORHA was designed for consequence management, not for the administration of occupied territory. Instead, it was their belief—really a hope—that "the interagency" (an agency, by the way that I've looked for

[6] The Center for Law and Military Operations at The Judge Advocate General's Legal Center & School, Charlottesville, Va.

in Washington, but been unable to find) would issue the clear policy decisions, *deus ex machina*-style, that we so desperately needed.

The third myth is that looting and lawlessness had not been anticipated. This probability had been addressed in the Victory Scrimmage and follow-on exercises. I had seen looting by civilians in prior military operations, even in Grenada in 1983 and in Kuwait in the first Gulf War. As an instructor at the Army JAG School, I had studied what happened in Panama, where looting by civilians took place even during military operations. It is a consequence of an authority vacuum and occurs when the lights go out and the police are off the street.

But in Iraq we did not know that Saddam had emptied the prisons and jails, except for political prisoners, and every thug in the country would be back on the block. This caused untold problems as our troops not only captured prisoners of war and what we later called insurgents, but also caught thousands of common criminals. Some were detained in the act of committing violent crimes. Some were turned in after the acts by locals, some were convicted criminals who had been granted amnesty, some were probably innocent of any wrongdoing and unjustly accused by a citizen holding a grudge, but the result was a huge influx of common law prisoners, what we would term criminal detainees, with precious few places to hold them, Soldiers to guard them, or courts to try them. The problem was compounded by Soldiers using Prisoner of War capture cards to document the capture of these persons; there were cards with "murderer" or "rapist" written on them and no more information.

In the march to Baghdad, V Corps *had* issued orders regarding procedures and warnings at checkpoints (after a terrible incident early on in which an entire family was killed as their van approached a checkpoint without slowing down, despite warning shots); cordon and search operations; curfews; weapons, explosives, and fuel possession controls; and the use of force against looters. The problem was that these were all issued as necessary at the tactical level and not as part of any cohesive plan. Efforts to try to address the problem in a comprehensive way were thwarted by a lack of fundamental policy decisions at a higher level. For example, an Occupation Proclamation and orders to civilians had been staffed, drafted, printed, and pre-positioned, but no order was ever given to release them.

Instead, actions were taken in accordance with the commander's intent using the Fourth Geneva Convention as a guide. I went on the

radio in Baghdad to order judges and court personnel to return to work. Denied the ability to convene occupation courts by CPA, Army and Marine Judge Advocates and Civil Affairs Soldiers went all over the country to meet with judges, coax them to the bench, and reestablish regular court sessions. This effort, a rudimentary rule of law program, was enthusiastically supported by commanders, who saw the reopening of the courts as an essential aspect of restoring stability, security, and public confidence. Judge Advocates routinely went to Iraqi courts, and even arranged for and executed payroll payments for judges and other Ministry of Justice personnel, and were under fire on a number of occasions as they did it. Later, Judge Advocates at the corps, division, and brigade levels created and staffed Judicial Reconstruction Assistance Teams (called JRATs) and Ministry of Justice Offices (called MOJOs) and for almost a year managed the Baghdad and Mosul court dockets.

There were few local police, no prisons, and almost no operating jails. During the intelligence preparation of the battlefield (IPB) process, our intelligence assets had an almost total focus on two things: enemy order of battle and WMD.[7] Early in the war, I became involved in the analysis of an order directing us to seize a prison in order to safeguard some political prisoners who were believed to have information about WMD. Despite the intelligence focus on the prisoners and their information, it turned out that the prison no longer existed; it had been looted and razed down to the foundation, like virtually every other prison in the country, after Saddam had issued his general amnesty in November 2002. The result was that all the criminals in a country of twenty-six million people were on the street and, until after we entered Iraq, we neither knew that nor did we know that there were almost no facilities available to hold anyone we caught.

In Baghdad, in addition to the large numbers of detainees, there was inadequate troop strength to effectively control the city. The 3d Infantry Division had reached its culminating point. It had fought all the way to Baghdad and was exhausted; it just had little energy left to detain looters or guard key infrastructure. Orders were issued to protect museums, courthouses, police stations, power and water plants, and public records holding areas, but there were simply not enough troops to go around. Even when troops were available, they frankly did not always follow through. I would often go out to key facilities to check on them, particularly courthouses and police stations. In the early days, we would

[7] Weapon of mass destruction.

go wherever we wanted to go in Baghdad, usually with just two Humvees and a small detail, almost all Judge Advocates and paralegal Noncommissioned Officers (NCOs) and Soldiers. Despite orders having been issued to secure the buildings, there were often no Soldiers there.

In the case of courthouses, we unilaterally deputized court personnel as armed court police to guard the buildings and records. In the main public records repository building in Baghdad, where property and other records were stored, we walked right in through unlocked unguarded doors and discovered that fires had been set in the document storage stacks. Courthouses, public records repositories, and police stations were prime targets for arsonists.

We were spread thin in the legal area. Our Corps SJA section was the foundation of the CJTF-7 legal section and had continuing responsibilities for legal support and services for the former V Corps area in Germany. My Deputy SJA had to remain in Heidelberg with the V Corps Rear command structure. Our request for Reserve augmentation in Germany had been denied, and the decision was not revisited until 2004. (When V Corps deployed from Germany, its higher headquarters were focused on, preoccupied by, and husbanding resources for their potential role in the "Northern Option," the invasion of Iraq from Turkey that never transpired.)

In the summer of 2003, as legal issues skyrocketed due to demands of occupation, our Reserve augmentation in Iraq actually shrank. The personnel planning assumptions that the war would be over in the summer resulted in the draw-down of legal support. It was like the stories of mobilization before World War I, only in reverse. We could see what needed to be done and the need for more people, but the system was on automatic, sending mobilized reservists home. Concurrently, the Joint Manning Document (JMD) for CJTF-7 was being developed. I was surprised that V Corps was the base, but shocked at the personnel estimate for the size of the legal section: four attorneys and two NCOs—six total personnel for the entire headquarters! The V Corps leadership, including the Corps commander, became involved to correct this and the JMD grew, but we still had to augment the JMD with V Corps assets, the V Corps Augmentation Package, in order to have minimum capability.

At the same time, the demand for Judge Advocates was going through the roof. Early on, Judge Advocates essentially did the intellectual heavy lifting for the J-5 section and did almost all the early

work on reconciliation. When a rash of kidnappings and major crimes hit Baghdad, V Corps formed Task Force Vigilant Justice with the SJA and 18th MP Brigade commander as co-leads to target organized crime in Baghdad. The Task Force ran some raids of modest success and was then given a nation-wide charter and renamed the Special Prosecutions Task Force, with a concentration on counter-smuggling efforts off the coast of Basra. It was eventually turned over to CPA as a combined and interagency Task Force. Based on cases built by the Task Force, Iraqi Judges issued orders to seize oil tankers carrying smuggled oil and Judge Advocates fast-roped from hovering helicopters to serve the orders and impound the ships. Less exciting, but important, was the fact that Judge Advocates ran the rewards program in Iraq, which paid out a great deal of money for wanted persons and information, and for specified weapons, such as MANPADS.[8]

There was much debate about whether U.S. Forces should have shot and killed civilian looters. Aside from the fact that most U.S. troopers simply would not shoot an unarmed civilian who was not threatening them, our ROE would not allow it. The ROE allowed Soldiers and Marines to use deadly force to accomplish the mission against lawful targets (combatants), to protect themselves and others, and to protect designated property—but not to shoot a fellow walking down the street with a TV set.

In fact, Judge Advocates worked hard to find innovative ways to compensate civilians who had been inadvertently injured by our troops. The Foreign Claims Act would not allow the payment of claims arising from broadly construed combat activities, such as most checkpoint shootings. Judge Advocates convinced Central Command to reverse its position prohibiting *solatia* or gratuitous payments, and helped draft the enabling language for the newly created Commanders' Emergency Response Program so as to allow payments for unintended combat damage. Judge Advocates also established a meaningful foreign claims program after advocating that the Army, not the Air Force with its limited resources in country, should have single-service claims responsibility for Iraq.

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[8] MANPADS: Man-Portable Air Defense System. *See generally* Fed'n of Am. Scientists, *Man-Portable Air Defense System (MANPADS) Proliferation*, http://www.fas.org/programs/ssp/asmp/MANPADS.html (last visited July 15, 2008).

The fourth myth is that there should have been greater interagency involvement in Iraq. This myth is perhaps the most commonly accepted as true. In fact, it is false, in my view. There should have been less non-military presence in Iraq in the first year. There should have been more interagency planning before the war and a more responsive and cohesive interagency decision-making process before and during the war. But, in Iraq, the situation would have been drastically better if the military had simply established a military government in order to stabilize the country, restore security, reestablish infrastructure and institutions, and allow for the insertion of civilian experts and the reemergence of an Iraqi government as conditions permitted. We would have to endure the propaganda that we were occupiers, but did we really sidestep that with the CPA?

Besides, we have the obligations of an occupier regardless of what we call the situation or what instrument we use to administer the territory. By establishing the CPA, and placing CJTF-7 in direct support of the CPA, we violated the military maxims of unity of command and unity of effort. It was never clear who was in charge in Iraq, nor was it clear as to the relative roles and responsibilities of the CPA and CJTF-7. I was there, and saw General Sanchez daily and Ambassador Bremer several times per week, and never could figure it out. What was obvious was that there was a diffusion of effort and the squandering of several golden months after a decisive military victory within which time most of the Iraqi population craved firm direction and before any insurgency could meaningfully develop.

Instead, CPA concentrated on a wide range of activity, such as developing the Iraqi stock market, reestablishing symphony orchestras and arts programs, implementing Miranda-style rights warnings and building a defense bar, and promoting women's rights. All of these were nice things to do, but none of them contributed to stability and security. At best, many of the CPA's activities, even if successes, were irrelevant. Many were set-backs. CPA's efforts to rebuild the Iraqi police force and Army were total failures; CJTF-7 had to take over the programs. At worst, some of the CPA's directives were a blatant interference with the military's war-fighting mission. These included orders to release dangerous detainees because of political considerations, and extensive involvement in events in Fallujah in April 2004, including mandating peace talks and culminating in Ambassador Bremer directing General Sanchez and General Abizaid, who was then present in Baghdad, to call off the attack on the city.

Contributing to the CPA's disfunctionality was the near constant turn-over of personnel, including principals. For example, there were four senior advisors to the Iraqi Ministry of Justice during my tenure, not counting acting advisors who filled the gaps. This meant new philosophies, new approaches, and of course redevelopment of personal bonds among all involved parties, including Iraqi ministers and judges.

Also contributing was the secure video-teleconference, or SVTC. This technology allowed for personal communication between Iraq and Washington. The unfortunate reality was that it did not contribute much to common situational awareness or informed decision-making. Rather, it led to confusion as it sometimes trumped the military orders process and led to decisions that were not analyzed or thought through, and not coordinated with the military units that would have to implement them. The SVTC enabled policy from within the Beltway to be instantaneously injected into a theater of war . . . and that is normally not a good thing.

The decision to disband the Iraqi Army is one example, made without consultation with the military commanders on the ground in Iraq. The de-Ba'athification policy is another. Based on our study of de-Nazification, we concluded that there should be a conduct, not status-based, policy that addressed former Ba'ath Party members. The goal was to quickly get the cop back on the beat, the teacher back in the classroom, and the municipal worker on the street. Judge Advocates developed a conduct-based policy, implemented through a Renunciation Agreement. General Wallace discussed it with retired General Jay Garner at ORHA, and the conduct-based approach and Renunciation Agreement were approved. We printed and distributed thousands of agreements, and implemented the policy. The policy told people to sign an agreement renouncing the Ba'ath Party, and promise to obey the law and get back to work. Essentially, get to work, but we're watching you and will remove bad actors over time. Less than ten days later, CPA announced its de-Ba'athification policy that took exactly the opposite tack; it was a pure status-based policy that took thousands of people out of the work force and disenfranchised them, and was done with absolutely no coordination with the commanders on the ground and no consideration of what was being done by the military—despite the fact that this decision would have a huge impact on law and order, security and stability, and reconciliation.

On the day Ambassador Bremer arrived in country, he announced that U.S. Forces would shoot to kill all looters. This announcement was

made without any coordination with the military in Iraq and no consideration of our ROE. Of course, our ROE rightly would not allow this and we had to expend considerable time and effort to issue clarifying orders and guidance to put this genie back in the bottle.

Another example of the chaffing between CJTF-7 and the CPA was the inability to agree that CENTCOM General Order Number 1, which among other things banned alcohol use and possession in Iraq, applied to CPA. This seems like a small issue, but it is a symptom of the lack of unity of, and confusion over, the chain of command. The CPA took the consistent position that the Order was not applicable, not only to its civilian employees, but to its military personnel.

A more significant difference involved private security contractors. CJTF-7 took a conservative, if not dim, view of armed security contractors. Our concern was that the use of armed security contractors potentially blurred the distinction between combatants and noncombatants; created command, control, and communications issues; and could cause law of war violations if the contractors were to use force offensively or otherwise directly contribute to the war effort by, for example, guarding lawful military objectives. The CPA, perhaps in a position born of necessity, took a much more expansive view, although sharing some of our concerns and suffering from the absence of a coherent national policy on the use and arming of security contractors.

There were bright spots in the CPA (its legal staff was brilliant). In general, however, it was a policy- and politics-laden bureaucracy that was a drain and distraction to the war effort. In sum, the CPA was more hurtful than helpful.

Myth number five is that U.S. Forces were ill-disciplined and that the abuse of detainees was systematic or the norm. This is perhaps the most widespread myth of the war. The truth is that U.S. Forces were disciplined and detainee abuse cases were few. Abu Ghraib was an awful and aberrant exception. It demonstrated the power of pictures and the impact of the Strategic Corporal. Most detainee abuse cases occurred at point of capture, where tempers run high, frequently after an IED[9] detonation or a firefight. The thresholds for classifying and reporting cases of detainee abuse were for a significant time very low in Iraq. After the Abu Ghraib photographs were turned over to the command, and

[9] Improvised explosive device.

before they were publicly known, I went to the ICRC delegates in Baghdad and informed them of the existence of the photographs, that the circumstances would be investigated and those responsible would be prosecuted, and that the command would tell the media about the abuse and about the existence of the photographs. By the way, CJTF-7 informed the media about the abuse and the photographs in January, some three months before the media frenzy ignited by their airing on *60 Minutes*. Although ashamed by the photographs, I was proud when the ICRC delegate told me, "You must be the only Army in the world that would do that."

Detainee abuse in Iraq, including the abuse at Abu Ghraib, occurred despite, and certainly not because of, military command policies and orders. In Iraq, General Sanchez repeatedly and consistently emphasized disciplined operations and compliance with the law of war, including the humane treatment of prisoners and detainees, in numerous policy memoranda and orders. There was no lack of guidance to Soldiers and Marines. There were, however, huge problems caused by the sheer numbers of detainees and the unexpected crush of common law criminals. Judge Advocates did everything in their power to ensure that detainees were treated humanely and in accordance with the law. In many cases, Judge Advocates personally intervened to ensure that military authorities provided detainees adequate food, water, hygiene, and shelter.

Early on, one of the first organizational tasks was to separate common law criminals, prisoners of war, and persons who were attacking Coalition Forces. In May 2003, we implemented CPA Apprehension Forms that required sworn statements from Soldiers and witnesses on the circumstances of capture. This was met with some pushback from commanders and Soldiers, but it was the right thing to do and helped ameliorate the situation. Using the model of the Fourth Geneva Convention, we classified detainees into two categories: security internee and criminal detainee. The former were those who had engaged in hostilities and who would be held until the conclusion of hostilities or otherwise earlier released, perhaps through a parole or release guarantor agreement; the latter were criminals who were held for trial or other disposition by the emerging Iraqi criminal justice system. The ICRC modified its capture cards to recognize the two categories of prisoner.

For those whose status was in doubt, we conducted Article 5 tribunals. When V Corps closed on Baghdad, we soon began tribunals

under Article 5 of the Third Geneva Convention for all of the High Value Detainees (HVDs), people like Tariq Aziz. The tribunals consisted of three Judge Advocates and concluded whether the prisoners were prisoners of war, security internees, or innocent civilians. None of the HVDs were deemed innocent civilians. There were some decisions that raised eye-brows, but nobody questioned the fact that we were obligated to hold the tribunals. It was understood that we did so because the Geneva Conventions required it.

During the summer of 2003, Judge Advocates organized Operation Clean Sweep, in which we brought in attorneys from commands all over the country and, joined by a former Iraqi judge, reviewed every single detainee's file to see if they could be released outright or turned over to the emerging Iraqi court system for a hearing. Also in the summer of 2003, CJTF-7 issued an order, nicknamed "The Mother of all FRAGOs," which established review and appeal boards as required by Article 78 of the Fourth Geneva Convention. Again, the process exceeded the requirements of the Fourth Convention.

Concurrently, CJTF-7 was struggling to characterize the MeK (the Mujahadeen-e-Khalq), several thousand Iranians who had operated from Iraq as a military force against Iran. The MeK were our only large scale capitulation—and they weren't even Iraqis! Unfortunately, they were on the U.S. list of terrorist organizations and we had to determine their status. Again, the Geneva Conventions were used as the standard and, after a year of interagency wrangling and debate, it was decided that they were simply "protected persons" under the Fourth Convention.

There was also debate over the legal status of Saddam Hussein. Although there were strong arguments to the contrary, CJTF-7 believed him to be a prisoner of war, which meant, among other things, that we were obligated to report his capture to the ICRC and allow the ICRC to visit him. Ultimately, CJTF-7 prevailed in this position and Saddam's status as a prisoner of war was publicly acknowledged and the ICRC visited him on numerous occasions. Of course, his status as a prisoner of war accorded him no immunity from prosecution for his pre-capture criminal offenses.

Judge Advocates envisioned, established, and chaired the Detention Working Group in July 2003, which brought together legal, MP, military intelligence (MI), medical, engineer, and CPA assets in order to try to bring fusion and order to the chaotic situation. The first "Detainee

Summit," held in August 2003 and chaired by a Judge Advocate, identified serious shortfalls in detention operations expertise and recommended requesting additional subject matter experts and the establishment of a Detention and Interrogations Task Force, commanded by a brigadier general. This requirement was not met until the creation of TF-134 in the spring of 2004. Recognizing that the command was about to be overwhelmed by detainee operations, CJTF-7 requested additional legal support for the detention and interrogation mission in the summer of 2003, as well as changes to the headquarters structure to provide attorneys to the Joint Interrogation and Debriefing Center at Abu Ghraib. These requests were not addressed until the formation of MNF-I and MNC-I in May 2004. In the interim, we created an additional legal support cell at Abu Ghraib, using attorneys and paralegals cobbled together from various sources.

Concerned about extra-judicial indefinite detention, Judge Advocates envisioned and championed Operation Wolverine, which proposed the trial of Iraqi insurgents engaging in unlawful combat. This led to the historic trials held before the Central Criminal Court of Iraq, ongoing today, that have helped reinvigorate the rule of law in Iraq. The genesis was an incident in which two 4th Infantry Division Soldiers had been captured at a checkpoint and then executed, their bodies dumped by the side of the road.

Lieutenant General Sanchez and I went out to the scene to view the bodies, and I recalled the number of times I had been involved in the investigation of law of war violations by the enemy, but without any process that would hold the perpetrators criminally accountable. We resolved that we should try violators of the law of war and proposed convening military commissions for that purpose. The proposal went all the way to DOD and it was decided instead to use the newly-established Central Criminal Court for that purpose. Judge Advocates and detailed Department of Justice attorneys invigorated the court and we canvassed all of the detainee files for cases amenable to prosecution. As you can imagine, we were faced with many files where there was enormous difficulty in turning classified intelligence information into evidence, and where there was a paucity of prosecutable information in the first place. However, we were able to start the process, get to trial, and eventually get convictions for the murder of Coalition Soldiers and Iraqi civilians.

This is a real point of pique for me because this great demonstration of the rule of law and the law of war in a combat zone has been

misrepresented by some as failing to follow the Geneva Conventions because, they claim, we characterized those prosecuted as "enemy combatants" in the manner of the Guantanamo prisoners. Nothing could be more wrong. The CJTF-7 never classified anyone as an "enemy combatant." What we did do was hold insurgents criminally accountable for their warlike acts committed without benefit of combatant immunity. They were still "protected persons" under the Fourth Geneva Convention, but they could be prosecuted because they were not lawful or privileged combatants; they did not meet the criteria of Article 4 of the Third Geneva Convention. In other words, we prosecuted unlawful combatants, a result not only clearly contemplated by Geneva, but a result reached only by strict adherence to the Third and Fourth Geneva Conventions.

Similarly, there has been much criticism of "many confusing" interrogation policies in CJTF-7. Here are the facts: there were two. The first was developed in September 2003 to regulate the interrogation approaches and techniques flowing in from Afghanistan and Guantanamo, many of which were based on techniques used to teach interrogation resistance in SERE[10] programs, and from non-DOD forces. Three weeks later, CJTF-7 implemented a second more restrictive interrogation policy that essentially mirrored the interrogation approaches in Army Field Manual 34-52 and added additional safeguards, approvals, and oversight mechanisms that made the CJTF-7 interrogation policy much more restrictive than the Field Manual. This fact has not prevented the media from asserting otherwise and essentially blurring Iraq, Afghanistan, and Guantanamo, and merging the actions of military and non-DoD forces.

On the topic of interrogations, CJTF-7 has become, in the words of the old Iraqi saying, the coat-hanger on which all the dirty laundry is hung. For example, a *Washington Post* editorial claimed that General Sanchez issued policies authorizing interrogation techniques "violating the Geneva Conventions, including painful shackling, sleep deprivation, and nudity." This is false. The CJTF-7 policies did not violate the Geneva Conventions, when used with the safeguards and oversight required by the policies. Moreover, the CJTF-7 interrogation policies never authorized, and would not allow, the use of shackling, sleep deprivation, or nudity (or the use of dogs for that matter) as interrogation

[10] SERE: Survival, Evasion, Resistance and Escape. Higher-level military SERE training involves instruction in resistance to interrogation techniques.

techniques. In fact, as was concluded by the Army's Chief Trial Judge in her exhaustive analysis of legal support to CJTF-7, had the CJTF-7 interrogation policies been followed, there would have been no abuses at Abu Ghraib. As an aside, while the entire Abu Ghraib incident is shameful and reprehensible, a point not commonly appreciated is that the individuals depicted being abused in the Abu Ghraib photographs were not security internees; they were criminal detainees, common criminals, who were not being (and would not be) interrogated in any event.

As I reflect back on what happened in Iraq, it is ironic that CJTF-7 has been blamed for so much. In so many respects, the media and many politicians went after the good guys. We certainly could have done some things better (for example, I wish that we had never issued the September 2003 interrogation policy), but by and large my experience was that good people were struggling to do the best they could under very difficult circumstances. Of course, there were individual lapses and those folks should be—and mostly have been—prosecuted or otherwise held to account.

So what does all of this mean for the future?

1. Disregard history at your peril. Decision-makers would have benefited from a thorough study of occupation history, particularly the history of occupation in Germany and the Far East after World War II. It would have informed them greatly and potentially avoided missteps about de-Ba'athification, restoration of law and order, and resources and decisions necessary to implement an effective occupation. They would have also benefited from an analysis of past counter-insurgency and "nation-building" operations, such as the U.S. occupation of the Philippines after the Spanish-American War, British counter-insurgency operations in Malaysia, U.S. military operations generally in Central America in the last century, and British operations in Northern Ireland. Among the things they would have discovered is that patience and adaptability are essential, and that missteps and mistakes are inevitable but recoverable.

2. Recognize that the box exists for a reason. Sometimes thinking outside the box is not helpful. This is particularly the case with the law of war, which has developed over time for reasons of humanity and necessity and is grounded in pragmatism. Old law can still be good law. For example, the Geneva Conventions are neither quaint nor anachronistic. At a minimum, they can serve as guiding principles even

when not applicable as a matter of law. When they do apply as a matter of law, like in Iraq, they have demonstrated their utility and ability to be meaningfully implemented in the new millennium. In the area of special operations, "no borders, no boundaries" cannot mean "no law, no rules."

3. All who went before us were not fools. The principles of war and command, military doctrine, force ratios, troop to task ratios, and the military decision-making and orders processes all exist for a reason. Put another way, ignoring these things, either by senior military or civilian officials, is asking for trouble. In the legal arena, the long developed concept of legal technical channels is important. Use them. Every SJA needs an SJA and nobody involved in operations should be a solo practitioner. But watch out for commanders and staffs who try to push non-legal matters into legal technical channels.

4. The military is an indispensable tool for nation-building and modest rule of law activities are essential to establish security and stability. This has been demonstrated so frequently that it is amazing that the contrary view is still advanced.

5. Timely strategic policy decisions are necessary to enable and empower Soldiers and Marines on the ground. Once these are made, politicians should stay out of the fight.

6. You play as you practice. For the military, this means that exercises must not end with the defeat of the enemy's military forces and intelligence preparation of the battlefield must include an analysis of the capability of the systems of government and public administration, as well as the enemy's order of battle. We must put as much intellectual effort into planning for activities after decisive combat operations as we do into planning for fires and maneuver. This would include updating our doctrine and examining our resources and capabilities for civil administration, military government, and civil affairs in general.

7. There is a random spotlight of accountability for mistakes and misjudgments—whether real, exaggerated, or even fabricated. The fog of war in battle is nothing compared to the fog of politics on Capitol Hill. This is unfair and capricious, particularly to those of us who are political agnostics as professional Soldiers. But it is what it is and it always has been so. In the legal arena, there has developed an unforeseen dark underbelly to operational law, and that is the notion that the SJA in the field is the "Guarantor General," the one person in the command who is

somehow expected to have total awareness and perfect knowledge, to be read on to all activities, and to have the duty to identify, resolve, and report all problems. These are, of course, preposterous burdens, but consider the blocked advancement of Judge Advocates who served in Iraq and Afghanistan, despite having been selected by promotion boards, or study the case of the only officer to be court-martialed in the Haditha incident—the battalion JAG—and I think you will recognize the phenomenon.[11] Shakespeare wrote about the slings and arrows of outrageous fortune, and Teddy Roosevelt spoke of the man in the arena. I guess the point is that we need to concentrate on doing our duty and not waste time worrying about whether we'll be promoted (or whether we'll be hauled before Congress or a court-martial).

8. We cannot have different legal standards for Soldiers and non-DOD forces, or even for Soldiers operating in different operations or campaigns. It is too easy for the standards to be blurred and, as was the case with interrogation policies between Afghanistan and Iraq, to migrate (perhaps a better term is to metastasize). Concerning non-DOD forces, they may be "great Americans," but just because someone is wearing a suit or Oakley sunglasses does not mean they are smarter than you or your commander. Trust but verify and don't get "out-lawyered." There is no such agency as "the interagency" or "OGA." Get full names, insist that relationships and requirements be established in written orders from your higher military headquarters, keep good notes, and keep your higher headquarters informed—and not just through legal technical channels. Remember and remind your commanders that nothing stays a secret forever; it simply lies in ambush, waiting to emerge and attack at the worst possible time.

9. The difficult legal issues facing our operating forces, and the responsibilities placed on the shoulders of our uniformed legal advisors, merit an increase in the size and rank structure of our Judge Advocate General's Corps. Most unified command SJA offices should be substantially bigger and more capable. Despite some simply wrong assertions to the contrary, Judge Advocates are a respected and proper source for legal and policy advice at all levels, and their presence and role with the operating forces sends a powerful message about our

[11] Although charges were preferred against the battalion Judge Advocate, the convening authority dismissed the charges after an Article 32 investigation. *Charges Dropped for Two Marines in Haditha Case*, NPR.org, Aug. 9, 2007, http://www.npr.org/templates/story/story.php?storyId=12634743.

nation's commitment to the rule of law and to the law of war. At a minimum, some unified command SJAs and the Legal Advisor to the Chairman should be general or flag officers. The Judge Advocates General should be lieutenant generals at least, and it was heartening to see this recognized in recent legislation. Under no circumstances should The Judge Advocates General be subordinate to any department General Counsel.

10. Goldwater-Nichols[12] is a work in progress. There remains a significant lack of understanding of the relative roles and responsibilities of unified commands and task forces, and services and service components, particularly in the areas of discipline, investigations and reports, oversight, and responsibility for corrective action. This leads to inefficiencies, but also affords opportunities to obfuscate or shun responsibilities, with the typical result in this war being that the Army is left holding the bag for an act or omission over which it had no control and to which its only relation was that somebody involved in the matter at issue wore an Army uniform. With regard to investigations and oversight in general, I wish that we had devoted a small fraction of the resources we spent on investigating ourselves on addressing and resolving the problems in the first place.

Thank you very much for your attention and for your interest and scholarship. Thanks most of all to you and your families for your service.

[12] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (reworking the command structure of the U.S. military; among other changes, streamlined the chain of command between the President, Secretary of Defense, and combatant commanders).

SECOND GEORGE S. PRUGH LECTURE IN MILITARYLEGAL HISTORY[1]

HITLER'S COURTS: BETRAYAL OF THE RULE OF LAW IN NAZI GERMANY

JOSHUA M. GREENE[*]

Thank you for this honor of giving the second Major General George S. Prugh Lecture on Military Legal History. Given my lack of formal training in military legal history, it is an honor I do not deserve. But as George Burns once said, "I have arthritis and I don't deserve that either."

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[1] This is an edited transcript of a lecture delivered on 23 April 2008 by Mr. Joshua M. Greene to the members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Va. The chair is named in honor of Major General (MG) George S. Prugh (1920–2006). This lecture included a screening of the lecturer's film "Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany."

[*] After returning from thirteen years in Hindu monasteries, Mr. Joshua M. Greene became an author, filmmaker, and communications consultant specializing in religion and the peace process. Currently, he teaches in the Religion Department of Hofstra University and at the Jivamukti Yoga School in New York.

In 2000, his book *Witness: Voices from the Holocaust* (Simon & Schuster 2000) was made into a feature film for PBS and voted one of the best Holocaust films of all time by Facets Educational Media. His one-hour family special on cultural diversity "People" debuted at the United Nations, received an Emmy nomination, and has been incorporated into elementary and high school classes nationwide. He is a six-time recipient of TV Guide's Best Program of the Year award.

Mr. Greene's book *Justice at Dachau* (Random House 2003) traces the largest yet least known series of Nazi trials in history. The book was called "masterful" by *Publishers Weekly* and adapted to film by Discovery. His editorials on war crimes tribunals appear in newspapers and magazines internationally including the *Los Angeles Times,* the *International Herald Tribune*, and the London *Economist*. His biography *Here Comes the Sun: The Spiritual and Musical Journey of George Harrison* (John Wiley 2006) made the bestseller list. His most recent film for PBS was "Hitler's Courts," which explores the complicity of the German judiciary during the Nazi era.

Mr. Greene is a frequent lecturer. Keynotes have included the World Economic Forum, Microsoft, Harvard University Law School, the New York Public Library's Distinguished Authors series, and the Washington Holocaust Memorial Museum. He served as Director of Programming for Cablevision, the nation's sixth largest cable provider, and was Senior Vice President for Global Affairs at Ruder Finn, an international communications firm. In 2000 he was appointed Director of Strategic Planning for the United Nations World Peace Summit of Religious and Spiritual Leaders. He sits on the boards of the American Jewish Committee, the Holocaust Memorial and Educational Center of Nassau County, and the Coalition for Quality Children's Media. He lives with his family on Long Island.

The invitation to be here today prompted me to think about parallels between your career in the military and the calling I followed into Hindu monastic life. We're both up at 5:30 for PT—that's "prayer time" for me. Both paths involve interpreting laws which have far-reaching implications for others. And we both report to superior officers who think they are divinely inspired. There is an upside to our respective callings. We are, I believe, both motivated by selfless service—the term in the Sanskrit language of India is *bhakti*, literally, devotional service—and we derive a satisfaction, perhaps even a joy in that selfless service which is hard for people outside that experience to understand.

But we also share two downsides to our callings. One is a tendency to become so absorbed in our mission that we can sometimes forget to slow down and smell the roses. At the risk of sounding presumptuous, I'd like to encourage you to take the opportunity of being here at the JAG Legal Center and School not to overlook occasions to catch up with family and friends—and with yourselves as well. We humans seem to make our most meaningful contributions when we are stimulated by new experiences, and that means going outside the parameters of daily routines. My students at Hofstra, for example, are not allowed to quote Wikipedia as a source in their papers. I do that not only because it is poor scholarship but because I want them to get away from their computers and go to a place where serendipity can occur. When you peruse the shelves of a library, you come upon books and sources you never expected to find, and these can inspire very different ways of looking at a problem. That kind of serendipity doesn't happen as frequently online.

The other downside to our respective callings is that we can become tainted by the satisfaction of our mission, lured into believing that our way is the only right way. And that brings me to the subject of the film we are about to see.

Forty years ago this week, when I was seventeen and a freshman at the University of Wisconsin in Madison, I went to work as a reporter for the student paper. UW was a good school, but in those days students spent more time in the streets protesting the Vietnam War than they did in class studying. The Madison police force was using mace to disperse demonstrators, a chemical spray that had put a number of people in the hospital, and one of my first assignments was to write about it.

One day the editor-in-chief called me over and showed me the front page, and there was the lead article citing one Joshua Greene as writer. That was it for me, and apart from that thirteen-year detour through monastic life, I've been writing and making films about justice and injustice in one form or another ever since.

The Madison police were not bad people. They were church-goers, some had sons or daughters who were attending the university, and back then I could not understand their extreme reaction to student protestors. The reason became clear to me years later, and it was reinforced more recently by producing the film we are about to screen. The police, like many of the student protestors, simply were unwilling to see past their own priorities. They were fiercely loyal to their community, to their families and friends and those who saw things as they did—in other words, fiercely loyal to their own kind. They adhered to a narrow definition of the rule of law as anything which supported their sense of what is right, and anything different needed to be put down.

Let me be clear up front that I am no longer a romantic. My bellbottoms and love beads are safely stowed away in a closet, my wife keeps the only key, and she comes from a family of diehard Republicans. Her vigilance aside, I have done some writing and filmmaking about the Holocaust period and see now what I could not see as an idealistic college student: that there is nothing romantic about transgressing the law however convinced we are of possessing the Truth. Nor is there anything romantic about a government that suspends or subverts the rule of law under a pretext of emergency measures. Not only is it hypocritical to claim we compromise the law in order to defend the law, but it also doesn't work.

Why doesn't it work? We might look at the current recession as a parallel. To no small degree the current fiscal crisis owes its genesis to the corporate catastrophes of a few years ago. Those debacles led to a series of new laws called Sarbanes-Oxley[2] whose purpose, in theory, was tighter control of corporate behavior. In practice, however, the added laws did nothing to curtail malicious business habits. What they did was make white collar criminals more cunning in circumventing regulations. Laws by themselves do little to change people's hearts and a whole lot to make lawyers richer.

[2] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

"Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany"[3] was produced at the behest of the good folk at Touro Law School on Long Island. Their purpose was to document the connection between the success of tyrants and the failure of lawyers and judges to defend the rule of law. The bottom line in this film is that our personal philosophies infiltrate and shape our professional behavior. Tell me who your heroes are, and I'll tell you something about how you practice law. Rule of law alone is insufficient. It must be coupled with men and women of impeccable character who can implement the law with integrity of purpose. Briefly, here is the story presented in the film.

In 1933, less than a month after being elected Chancellor, Adolf Hitler used the pretext of a fire in the Reichstag building to suspend constitutional law and place unlimited judicial authority in the hands of the government. The German legal system in the 1930s was quite sophisticated, but after the burning of the Reichstag—which was more than a symbolic destruction of Germany's Parliament—the vast majority of Germany's judiciary, more than 10,000 lawyers and judges, took an oath of personal loyalty to the Fuhrer. This set in motion the *Fuhrer prinzip*, the notion that Hitler now had absolute discretion to make any ruling whatsoever in the interests of the state, and that lesser fuhrers under him had similar discretion limited only by what the fuhrer above had told them to do.

Over the next twelve years, the Nazi party continued its subversion of constitutional safeguards until Germany's courts amounted to nothing more than tools for the implementation of National Socialism. Early in their subversion of law, Nazi officials established Special Courts to deal with anyone the party deemed an enemy of the Reich. In these courts there was no pretrial investigation, judges determined arbitrarily what evidence to consider, and there was no right of appeal. In retrospect, this would have been the time—while there was indeed still time—for men and women of good faith to stand up and say, "Wait a moment, we have a Constitution in this country, we have rules and laws that we will not see ignored." Why that did not happen may be a question more aptly addressed by psychologists than historians, but one explanation lies in the response Hitler offered to detractors. "This is," the Fuhrer promised, "only temporary. We are under attack by terrorists and need to suspend constitutional law." If any of this begins to sound familiar, it is.

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[3] HITLER'S COURTS: BETRAYAL OF THE RULE OF LAW IN NAZI GERMANY (Stories To Remember 2007).

"In this hour I am responsible for the fate of the German nation. Hence, I am the supreme Law Lord of the German people."
–Adolf Hitler, July 13, 1934

Once he succeeded in concentrating legal authority into his own hands, Hitler then had the tools for eliminating all those whom he deemed to be enemies of the Reich, most prominently Jews but also other minorities. On April 7, 1933, the German government enacted a law forbidding attorneys of non-Aryan descent from representing Aryan clients. If anyone dared to do so, their names were published in the press and their businesses boycotted. This decree was followed by others that incrementally deprived civil rights to these "enemies of the Reich."

In 1934, the government established the People's Court to try persons accused of political offenses. Eventually, the court came under the presidency of Roland Freisler, a Nazi of such extreme sentiments that he shocked even his fellow Nazi judges. Freisler was one of an echelon of senior German jurists who paved the way for the subversion of law in the 1930s. Others included Carl Schmitt, Hitler's legal theorist, a wealthy and ambitious conservative who described the Fuhrer as "Germany's Guardian of Justice," and Erwin Bumke, the man who drafted Hitler's emergency laws. These and other senior officials of Hitler's courts empowered police to disband organizations, seize assets, make arrests, and determine on their own initiative what constituted a threat to the State.

The Nuremberg Laws of 1935 allowed Hitler's courts the further liberty of condemning enemies of the State not for anything they had done but on the sole grounds of racial, ethnic, and religious type. These laws reflected Nazi preoccupation with "racial purity," an idea concocted from vague elements of religion, citizenship, and heredity. Since the laws defined Jews as racially impure, marriage between Jews and non-Jews would defile the race and was now prohibited. Resourceful judges found other applications for the Nuremberg Laws, by arguing for example that because Jews were no longer considered full human beings they did not qualify for legal rights. In effect, Jews and other minorities underwent a civil death long before millions met their physical death in the camps.

With the official declaration of war in 1939, Nazi lawmakers moved into high gear as thousands of so-called enemies of the Reich were arrested and tried. By 1939, roughly sixty percent of all law school

professors were Nazi appointees engaged in training a new generation of lawmakers: young zealots raised and educated under Nazi rule. And if some of this new generation harbored misgivings, hardly any ever dared question the Nazi distortion of the rule of law.

Among the few who dared was Dr. Lothar Kreyssig, a judge on the Court of Guardianship in Brandenberg. In 1934, Kreyssig objected to Hitler's euthanasia program and even attempted to prosecute Nazi officers for sending hospital patients to their death. Because he had been a respected citizen, the courts encouraged him to retire ahead of schedule. Kreyssig was left to live out the rest his life in peace. Such leniency was extremely rare. Dr. Johann von Dohnanyi, at thirty-six the youngest member of the German Supreme Court, also spoke out against the Nazi betrayal of justice. He was arrested and later executed at concentration camp Sachsenhausen. The overwhelming majority of Germany's legal community cooperated with the Nazi regime. Postwar statistics estimate that by 1940 the number of death sentences handed down by Germany's various courts had exceeded 50,000 annually, of which more than eighty percent were carried out.

Yet another blow to the rule of law took place in September 1942, when the Reich Ministry of Justice empowered the SS[4] to change any court decision it deemed overly lenient. Thousands of prisoners were delivered to the SS at that time for summary execution.

> *"For the enemy of the state, there is only one course in prosecution and sentencing—unflinching severity and, if necessary, total annihilation."*
>
> –Roland Freisler, President, The People's Court (1942)

On 20 January 1942 a meeting took place in Wannsee outside Berlin. Among those present were Reinhard Heydrich, Head of the Reich Security Main Office; Adolf Eichmann, Heydrich's expert for deportations; and thirteen other high-ranking representatives of the Nazi party. Minutes from the meeting, known as the Wannsee Protocol, spelled out in clear terms plans for the deportation and murder of all European Jews and the active participation of Germany's public

[4] *Schutzstaffel*, meaning "protective squadron"; a major Nazi military organization.

administration in the genocide. More than half the participants at Wannsee were legally trained. Heydrich made mention of the fact that he was particularly surprised at how easily the lawyers and judges sitting around the table went along with the others.

In March 1947, the Justice Trial took place at Nuremberg, one of eleven subsequent trials that followed the main Nuremberg trial of December 1945. The Justice Trial included sixteen defendants who had been members of the Reich Ministry of Justice or of the People's and Special Courts. The trial raised the issue of what responsibility judges have for enforcing grossly unjust but arguably binding laws. The charge was: "judicial murder and other atrocities committed by destroying law and justice in Germany, and by then utilizing the empty forms of legal process for persecution, enslavement, and extermination on a vast scale."

In their own defense, the accused claimed they had stayed to prevent the worst from happening. But after hearing 138 witnesses and introducing more than 2,000 pieces of evidence, the Nuremberg court concluded that the defendants had consciously participated in "a nationwide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity." The court ruled that during the Nazi era "the dagger of the assassin was concealed beneath the robe of the jurist." Nonetheless, only a handful were convicted and of these only a portion had their sentences carried out.

And therein lies the beauty of the Nuremberg trials: as painful as it may have been to see people who clearly supported "history's darkest hour" go free, due process won out over the desire for revenge. When we succumb to impulses to "get the bad guy" by any means, we betray the very value for which we go to war in the first place. In the final analysis, America's greatness is not superior military might but the ability to check that might when it threatens to interfere with due process of law. Arguing that we must compromise human rights in order to defend human rights is not only hypocritical, it also does not work. Whenever the government has crossed that line—whether it be through the Sedition Act of long ago, or the internment of Japanese Americans during World War II, or the detainment of accused terrorist without access to counsel—we have always lived to regret it.

Looking back on that dark time in Germany's history, we would do well to remember that when the rule of law is compromised in the name of democracy, it is democracy itself which suffers. To work effectively, the rule of law required implementation by men and women of impeccable character and noble motive. It strikes me that this is the image you carry forward as representatives of the Army's Judge Advocates, and it is an honor for me to have shared this time with you today.