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Lore of the Corps

Special Edition

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Introduction

Accounts of military history are filled with Soldiers committing inconceivable acts of heroism. This same history is tainted, by a few, who during a time of war decided to act outside the bounds of human decency. In acknowledgment of the 50th anniversary of the My Lai Massacre, *The Army Lawyer* presents this Special War Crimes edition.

The articles in this edition mainly focus on the tragic events that occurred in Vietnam on 16 March 1968. We will learn how those events transpired, how the judge advocates detailed to represent both the government and the accused worked through the aftermath, and how we evolved as an Army from this tragedy. We will also look at a case of eight saboteurs and receive a better understanding of war crimes prosecutions before an international tribunal after World War II. Finally, we will recap our Corps participation in two recent events commemorating the lessons learned from My Lai and receive parting words from The Judge Advocate General, LTG Charles N. Pede. Please enjoy this special edition of *The Army Lawyer*.

John Cody Barnes
Editor, *The Army Lawyer*

Lore of the Corps

What Really Happened at My Lai on March 16, 1968? The War Crime and Legal Aftermath

By Fred L. Borch
Regimental Historian & Archivist

Early in the morning on March 16, 1968, then Second Lieutenant (2LT) Calley and his platoon were airlifted by helicopter to My Lai 4,¹ a sub-hamlet of the village of Song My in Quang Ngai Province. They believed that their platoon—and the other two platoons in Company C, 1st Battalion, 20th Infantry Regiment, 11th Light Infantry Brigade, 23d “Americal” Division—were about to take offensive action against the 48th Viet Cong (VC) battalion. The Americans also believed that since the VC battalion had a base camp near Song My and enemy guerillas had controlled the area for twenty years, Company C could expect heavy resistance and would be outnumbered more than two to one.²

Calley’s unit had not experienced much combat prior to this time, but it had suffered some casualties. In late February 1968, two Soldiers were killed and thirteen wounded when the company had become ensnared in a mine field. On March 14, just two days before the company’s arrival at My Lai 4, a popular sergeant in the company’s second platoon had been killed and three other men wounded by a booby trap. Consequently, the Soldiers faced this upcoming operation against the 48th VC battalion with both anticipation and fear, mindful of the recent injuries to their fellow Soldiers.

Even though 2LT Calley and his men expected heavy resistance, they entered My Lai 4 without receiving any fire. There were no mines or booby traps. There was no need to call for mortar fire from the weapons platoon or fire from artillery units in direct support. There were no VC. The only people that Calley’s platoon encountered were unarmed, unresisting and frightened old men, women, children, and infants. The villagers were found in their homes eating breakfast and beginning their daily chores. There were no military-age males among them.

Lieutenant Calley and his Soldiers had been expecting to fight the 48th VC battalion. They were not sure what to do in the absence of any enemy, much less any resistance to their

entry into My Lai 4. Yet when they first entered the sub-hamlet, some platoon members shot a few of the villagers, while other Soldiers stopped to kill livestock such as cows, pigs, chickens, and ducks. Still others searched huts and buildings for evidence of an enemy presence. The troops yelled into the small dwellings (called “hootches”) for their inhabitants to come out. If they got no answer from the hootches, the Americans threw hand grenades into them.

Ultimately, the American Soldiers herded the civilian villagers in several locations. Between 30 and 40 people were collected in a clearing in the center of the sub-hamlet. More were assembled near some rice paddies on the south side of My Lai 4. Still others were gathered together near a ditch on the east side of the sub-hamlet.

Some hours after having gathered the villagers together, Calley approached Private First Class (PFC) Paul D. Meadlo, who was watching the Vietnamese. Calley asked Meadlo “if he could take care of that group.” Calley then walked away but returned a few minutes later to ask Meadlo why he had not taken care of the villagers. “We are,” Meadlo said. “We are watching them.” Calley replied: “No, I mean kill them.”³ Calley and Meadlo then opened fire with their M-16 rifles on the unresisting, unarmed villagers. All were killed. But this was only the beginning. Ultimately, 2LT Calley, PFC Meadlo, and other Soldiers in Company C would kill at least 300 civilians between 7 a.m and 11 a.m. that day.⁴ Some witnesses later told of “huge holes being blown into bodies, limbs being shot off, and heads exploding.”⁵ Apart from Calley and Meadlo, those Soldiers who were identified as having murdered the villagers included Sergeants (SGTs) Charles E. Hutto⁶ and David Mitchell.⁷

Captain (CPT) Ernest L. Medina, the Company C commander, had not accompanied Calley’s platoon into My Lai 4 but he and his First Sergeant were in a field adjacent to the sub-hamlet at the time. Medina apparently was frustrated

¹ The Arabic numeral “4” in My Lai 4 distinguishes it from five other sub-hamlets in the larger hamlet of My Lai, which itself was part of the larger village of Son My. My Lai 4 was quite small; only about 400 meters wide and 250 meters long and with a population of about 400 men, women and children. While “My Lai” is commonly used to refer to My Lai 4, this Lore of the Corps essay uses My Lai 4 because it is a more accurate description of the sub-hamlet where Calley and his men committed their war crimes. My Lai 4 is also is sometimes called “Pinkville,” after the pink color used to indicate a populated area on U.S. Army maps of South Vietnam. WILLIAM R. PEERS, THE MY LAI INQUIRY 40-41 (1979).

² The facts set out in this summary are largely taken from the official inquiry conducted by Lieutenant General William F. Peers, discussed

below, and the opinion of the Army Court of Military Review in *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973).

³ RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 77 (1971).

⁴ *Id.* at 152-63.

⁵ PEERS, *supra* note 1, at 175.

⁶ HOWARD JONES, MY LAI 266-67 (2017). Note that Hutto’s surname is incorrectly spelled as “Hutton” in Peers’ book. PEERS, *supra* note 1, at 227.

⁷ PEERS, *supra* note 1, at 173, 227.

with Calley's slow progress. According to Calley, when Medina learned that a large group of Vietnamese civilians were responsible for the platoon's slow movement, Medina told him to "get rid of them." Calley later insisted that Medina's directive to him was the impetus for the slaughter of most of the villagers at My Lai 4. Medina, however, always denied giving Calley any order to harm civilians. Yet, when he arrived at My Lai 4 about 11 a.m., after much of the massacre was over, Medina himself was involved in an unlawful killing when he shot a woman carrying a basket of medical supplies twice in the head.⁸

While the massacre was occurring, an OH-23 observation helicopter piloted by Warrant Officer One (WO1) (later First Lieutenant (1LT)) Hugh C. Thompson was flying around the My Lai 4 area, at treetop level. Thompson was part of an aero scout unit and his mission was to locate enemy forces and relay this information to friendly ground forces. Thompson and his crew saw that a lot of people had been killed, with as many as 150 dead in a ditch near the sub-hamlet. Thompson also could see that a large part of My Lai 4 was on fire and was being systematically destroyed.⁹

Upset about what he and his crew were witnessing, Thompson landed his helicopter between fleeing Vietnamese and pursuing U.S. Soldiers. He then ordered his door gunner, Specialist Four Larry M. Colburn, to fire on the Americans if they refused his direction to break off the chase. After a tense confrontation with the officer leading the Soldiers, later identified as 2LT Stephen Brooks,¹⁰ the Americans ceased their pursuit. Shortly thereafter, Thompson and his crew also were able to evacuate a few living Vietnamese civilians, very likely saving them from serious bodily harm, if not death.

When WO1 Thompson finally returned to his base, he was angry and upset and reported what he had seen to his aviation unit's commanding officer, Major (MAJ) Frederic W. Watke. Watke listened to Thompson and later claimed to have passed on Thompson's report to Lieutenant Colonel (LTC) Barker, Calley's battalion commander, but Watke took no further action to report the war crime to higher headquarters, much less investigate it. Watke also later explained that he thought Thompson had been "over-dramatizing" the situation.¹¹

A distraught Thompson also went to the division artillery chaplain, CPT Carl E. Creswell. After he told Creswell what he had seen, the chaplain said he would make a report through

chaplains' channels. But Chaplain Creswell only relayed what Thompson had told him to his superior chaplain, LTC Francis Lewis, and neither Creswell nor Lewis ever reported the war crime to higher headquarters, as they were required to do.¹²

Besides the killings witnessed by Thompson and his helicopter crew, Calley and his platoon also committed other crimes, including rapes and other sexual assaults. These are only sometimes mentioned in literature written about the murders at My Lai 4, and no Soldier was ever charged, much less prosecuted for these sex offenses.¹³

Although Major General (MG) Samuel Koster, the Americal Division commander, and Colonel (COL) Oran Henderson, the 11th Brigade commander, received reports that more than 125 civilians had been killed at My Lai 4, the two commanders failed to properly investigate the event. On April 24, 1968, a little more than a week after the incident, COL Henderson falsely reported to MG Koster that "no civilians were gathered together and shot by US Soldiers" and that the claim of a massacre at My Lai 4 was "obviously a Viet Cong propaganda move to discredit the United States in the eyes of the Vietnamese people."¹⁴

As a result of Henderson's false report, and MG Koster's failure to make adequate additional inquiries into what had occurred at My Lai 4, the war crime remained hidden until April 1969, when a former Soldier named Ronald L. Ridenhour wrote letters to the White House, the State Department, the Pentagon, and 23 congressmen, describing the murders. Ridenhour had not been present at the incident, but he had learned about it from other Soldiers. When General William C. Westmoreland, then serving as Army Chief of Staff, saw Ridenhour's letter, he forwarded it to the Army Inspector General, with orders to investigate Ridenhour's claims.¹⁵

An investigation conducted by the Army's Criminal Investigation Command and an official inquiry headed by Lieutenant General William F. Peers resulted in charges not only against those officers and enlisted men who had been present in and around My Lai 4, but also against officers who participated in the cover-up of the war crimes by failing to investigate reports of misdeeds at My Lai 4, failing to report the occurrence as required, or both.¹⁶

⁸ *Id.* at 79-80. TRENT AGERS, THE FORGOTTEN HERO OF MY LAI: THE HUGH THOMPSON STORY 114 (1999).

⁹ PEERS, *supra* note 1, at 176-77. AGERS, *supra* note 8, at 102, 107, 113

¹⁰ Brooks was subsequently killed in action.

¹¹ PEERS, *supra* note 1, at 72.

¹² *Id.* at 73.

¹³ My Lai 4 was not the only scene of war crimes. There were some killings of unarmed civilians at other hamlets in the larger village of Son My. At My Khe, a hamlet adjacent to My Lai, Second Lieutenant Thomas K. Willingham and his platoon (who were not part of Calley's company but

were members of Company B) murdered between 38 to 90 women and children. But only the murders that occurred at My Lai 4 were the subject of courts-martial prosecutions. *Id.* at 222.

¹⁴ *Id.* at 272-73.

¹⁵ JAMES OLSON & RANDY ROBERTS, MY LAI: A BRIEF HISTORY WITH DOCUMENTS 147. (1998).

¹⁶ William Wilson, *Massacre at My Lai*, VIETNAM, Aug. 1991, 42-48; PEERS, *supra* note 1, at 221-22.

Thirteen officers and enlisted men were charged with “war crimes or crimes against humanity.” Another twelve officers were charged with having actively covered up the My Lai 4 incident. Yet only four officers and two enlisted Soldiers were tried, while charges against twelve officers and seven enlisted men were dismissed on grounds of lack of evidence. In four cases, charges against officers were dismissed without even an Article 32 investigation.¹⁷

Ultimately, the Army court-martialed four officers and two non-commissioned officers. Those court-martialed were now First Lieutenant (1LT) Calley, CPT Medina,¹⁸ COL Henderson,¹⁹ CPT Eugene M. Kotouc,²⁰ SGTs Mitchell and Hutto.²¹

All those court-martialed were found not guilty, except for Calley. He was tried by a general court-martial at Fort Benning, Georgia. Two relatively new judge advocate captains, Aubrey Daniel and John Partin, were the prosecutors. The Army lawyer with overall responsibility for the government’s case was COL Robert “Bob” Lathrop, the staff judge advocate. Calley was defended by George Latimer, a prominent civilian attorney and former judge on the Court of Military Appeals.²² He also had a military defense lawyer, MAJ Kenneth “Al” Raby. Colonel Reid W. Kennedy presided over the proceedings as the military judge.²³

The court-martial began on November 17, 1970, and the panel returned with its verdict on March 29, 1971, when it convicted Calley of the premeditated murder of 22 infants, children, women and old men, and assault with intent to murder a child of about two years. The panel, consisting of officers who had experienced combat in Vietnam, sentenced Calley to be dismissed from the Army and to be confined at hard labor for life.²⁴

Three days later, the White House involved itself in the judicial process by announcing that President Richard M. Nixon would personally review Calley’s case before the sentence took effect and that, in the interim, Calley would be under house arrest. On August 20, 1971, the commanding

general, Third U.S. Army, took action as the general court-martial convening authority. He approved the findings of premeditated murder and assault with intent but reduced Calley’s sentence to 20 years confinement. In April 1974, after both the Army Court of Military Review and the U.S. Court of Military Appeals had rejected Calley’s appeals, the new Secretary of the Army, Howard H. Callaway, further reduced Calley’s sentence to ten years confinement.²⁵

Calley had been moved from his on-post quarters at Fort Benning to the Disciplinary Barracks at Fort Leavenworth in June 1974. His unprecedented reduction in sentence made Calley eligible for parole in less than six months, and he was released on parole in November 1974.²⁶

One of the most prevalent myths, often heard in media commentary on the Calley case, is that President Nixon “pardoned” Calley or “reduced” his sentence. This is incorrect; other than directing that Calley be released from the stockade and placed under house arrest, Nixon took no further action to affect 1LT Calley’s conviction.²⁷

A few comments on the trial of Calley’s company commander, CPT Ernest Medina. He was found not guilty at trial by general courts-martial at Fort McPherson, Georgia, in September 1971. The most serious charge against Medina was that he committed premeditated murder of “not less than 100” unidentified Vietnamese persons. The government’s theory was not that Medina was a trigger-puller but that he was guilty on a theory of command responsibility, because he failed to intervene to stop the indiscriminate killing of villagers at My Lai 4. At trial, however, Medina denied knowing that Calley and his men were murdering civilians in the sub-hamlet; he insisted that he could not be held responsible as a commander because he had not been in My Lai 4 during the time period and so had no knowledge of the atrocity.²⁸

The lead prosecutor in *Medina* was trying his third My Lai 4 related court-martial. (He had lost the first two, *Hutto* and *Kotouc*). Yet despite having knowledge of the facts and circumstances surrounding the events of March 16, 1968, this

¹⁷ *Id.* at 221-28.

¹⁸ The lead trial counsel in *United States v. Medina* was then MAJ (later COL) William “Bill” Eckhardt; his assistant trial counsel was CPT Franklin R. Wurtzel. The defense counsel was the well-known civilian defense attorney, F. Lee Bailey.

¹⁹ The trial counsel in *United States v. Henderson* was then MAJ (later COL) Carroll S. “Cal” Tichenor. The defense team was headed by civilian counsel Henry R. Rosenblatt, who was assisted by LTC Frank Dorsey.

²⁰ Kotouc, the battalion intelligence officer, was not prosecuted for any direct involvement at My Lai 4. Rather, he was court-martialed for allegedly mistreating a Viet Cong prisoner while interrogating him at the Company C bivouac area during the afternoon of March 16. The claim was that Kotouc had cut off the man’s little finger when the prisoner failed to satisfactorily answer Kotouc’s questions. The defense counsel in *United States v. Kotouc* was then CPT (later COL) Norman “Norm” Cooper.

²¹ Mitchell and Hutto were both charged with murdering villagers at My Lai. Note that Calley’s battalion commander, LTC Frank A. Barker,

probably was the most culpable officer in the subsequent cover-up of the war crime, but he escaped a court-martial because he was killed in a helicopter crash in June 1968.

²² On May 22, 1951, President Harry S. Truman nominated Utah resident George W. Latimer to serve a ten year term on the newly created Court of Military Appeals. The U.S. Senate confirmed him on June 19, 1951 and Latimer served until May 1, 1961, when he returned to private practice.

²³ HAMMER, *supra* note 3, 71-75.

²⁴ *United States v. Calley*, 22 C.M.R. 19 (A.C.M.R. 1973).

²⁵ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* (2D ED.) 399 (2016).

²⁶ *Id.*

²⁷ HOWARD JONES, *MY LAI: VIETNAM 1968 AND THE DESCENT INTO DARKNESS* 399 (2017).

²⁸ MARY MCCARTHY, *THE SEVENTH DEGREE* 345-48 (1974).

prosecutor and his co-counsel “appeared poorly prepared and were repeatedly taken surprise by their own witnesses.”²⁹

Additionally, the prosecution had failed to charge CPT Medina with two offenses that should have been on the charge sheet since there was evidence that Medina was guilty of both: dereliction of duty and misprision of a felony. After all, he had failed to report the atrocities in My Lai 4 (as required by Military Assistance Command, Vietnam directives)³⁰ and there was every reason to believe Medina had covered up the war crime. Later, in fact, Medina would testify under oath at COL Henderson’s court-martial that he had lied to Henderson in March 1968.³¹

The key prosecution error in *United States v. Medina*, however, was not that the government failed to charge CPT Medina with other violations of the Uniform Code of Military Justice. Rather, it was that the lead prosecutor failed to request the correct jury instruction at trial. This prosecutor requested that the judge instruct the jury that, if it were to find Medina guilty, it must find that he had actual knowledge of the killings at My Lai 4. But this was an incorrect statement of the law regarding command responsibility; the court members should have been instructed that they could find Medina guilty if he either knew or *should have known* that Calley and his men were committing war crimes.³² While it is true that the *Medina* court martial panel still might have found Medina *not* guilty with the correct instruction, that jury was very unlikely to find him guilty—beyond a reasonable doubt—of having *actual* knowledge of the war crimes committed at My Lai 4.³³

A final point about the war crimes committed at My Lai 4 and the subsequent cover-up. While much has been written about those officers and enlisted men who were prosecuted for their My Lai-related crimes, there is a significant gap in one important area of military legal history: no military authority or civilian scholar has examined the Army’s failure to court-martial the officers who were charged by Lieutenant General Peers with having covered-up the multiple war

crimes committed there, much less investigated why there was no trial of other officers actually identified in the killings.

Charges against twelve officers and seven enlisted Soldiers were dismissed on grounds of lack of evidence. In four cases, charges against officers were dismissed without even an Article 32 investigation being done. On what basis, then, were the convening authorities able to determine there was insufficient evidence? They never explained their decisions. Lieutenant General Peers was greatly troubled by this dismissal of charges without formal pre-trial investigation. As he observed, the decisions of the convening authorities were “most difficult to understand.” After all, “had these men undergone trial by courts-martial and been acquitted, there would have been no remaining doubts” as to their culpability.³⁴

The obvious conclusion is that the convening authorities wanted My Lai 4 to fade from public scrutiny, which is shameful given the horrific conduct of U.S. troops on March 16, 1968. How these individuals were able to walk away without a legal scratch is worthy of additional research, but only one scholar seems to have taken any interest in the topic.³⁵

A postscript on some of the participants in this tragedy. Today, Calley lives in Florida. As recently as 2009, he insisted that he was “only following [Medina’s] orders” at My Lai.³⁶ Former PFC Meadlo, who had joined Calley in shooting unarmed civilians, lives in Terre Haute, Indiana. The day after the massacre, Meadlo’s right foot was blown off when he stepped on a mine. He believes today that this injury “must have been part of God’s plan” for him.³⁷ Meadlo could not be tried by the Army for his war crimes because he had been honorably discharged and there was no longer any criminal jurisdiction over him.³⁸ Ernest Medina is also still alive; after his acquittal, his “career was ruined,” so he

²⁹ *Id.*, at 329.

³⁰ Military Assistance Command, Vietnam Directive 20-4, Inspections and Investigations, War Crimes, 25 Mar 1966, required the reporting of all war crimes committed by or against U.S. forces. The directive was punitive, in that disobeying it was a violation of the UCMJ. GEORGE S. PRUGH, LAW AT WAR: VIETNAM, 1964-1973 72-74 (1974).

³¹ *Id.* at 380.

³² “Knew or *must have known*” was the standard for command responsibility first announced in the military commission that tried Japanese General Tomoyuki Yamashita in December 1945. Yamashita was convicted on the basis of being responsible for the war crimes committed by this troops. He was guilty not because he ordered his soldiers to commit these war crimes but because he failed to control their actions or stop their criminal behavior, and he either had actual knowledge of what his troops were doing or else he must have known what they were doing. COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA 76-77 (1949). After the 1948 Nuremberg “High Command” case, however, the “must have known” *Yamashita* language was replaced with a “should have known” test for command responsibility. The U.S. Army officially adopted this “should have known” standard in 1956. U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 501 (15 JULY 1956).

³³ More than a few scholars have criticized the prosecution failures in *Medina*, especially the incorrect instruction to the court-martial panel. SOLIS, *supra* note 25, at 423-26. See also Michael L. Schmidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 199 (2000).

³⁴ PEERS, *supra* note 1, at 222-23.

³⁵ Gary D. Solis, *My Lai and the International Criminal Court*, Georgetown University Law Center lecture (2006), on file with author.

³⁶ *Calley apologizes for role in My Lai My Lai*, NBC NEWS (Aug. 21, 2008), <http://www.nbcnews.com/id/32514139/ns/usnews-military/t/calley-apologizes-role-my-lai-massacre/>.

³⁷ George Esper, *It’s Something You’ve Got to Live With*, LOS ANGELES TIMES (Mar. 13, 1988), http://articles.latimes.com/1988-03-13/news/mn-1573_1_front-lines.

³⁸ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) held that *in personam* jurisdiction for trial by courts-martial ended over a soldier when he was discharged.

resigned his commission (Medina had 16 years active duty so was ineligible for retirement).³⁹

Hugh Thompson died of cancer in 2006. Larry Colburn died a decade later of the same disease.⁴⁰ Before they passed away, however, the Army recognized their heroism with the Soldier's Medal, the Army's highest military decoration for non-combat valor.⁴¹ Ron Ridenhour, whose letters triggered the investigation, died from a heart attack in 1998.⁴² As for then Major General Koster, he was never court-martialed; charges against him were dismissed after a pre-trial investigation. But the Secretary of the Army revoked Koster's Distinguished Service Medal and vacated his temporary rank of major general, reducing him to his permanent rank of brigadier general. Koster retired in 1973 and died in 2006 at the age of 86.⁴³

³⁹ Esper, *supra* note 37. See also *My Lai: Meet the Participants*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/my-lai-selected-men-involved-my-lai/> (last visited Feb. 14, 2018).

⁴⁰ *My Lai: Meet the Participants*, *supra* note 39.

⁴¹ The citation for Thompson's Soldier's Medal is reprinted in AGERS, *supra* note 8, at 230.

⁴² *My Lai: Meet the Participants*, *supra* note 39.

⁴³ David Stout, *Gen. S.W. Koster, 86, Who Was Demoted After My Lai, Dies*, NEW YORK TIMES (Feb. 11, 2006), <http://www.nytimes.com/2006/02/11/us/gen-sw-koster-86-who-was-demoted-after-my-lai-dies.html>. See also, Fred L. Borch, *Samuel W. Koster v. The United States: A Forgotten Legal Episode from the Massacre at My Lai*, THE ARMY LAW., Nov. 2015, at 3.

Memories of a Trial Counsel:

My Observations and Thoughts on Trying *United States v. Calley*¹

By Aubrey M. Daniel III²

I. Background



On August 16, 1969, while working as a trial counsel at Fort Benning, Georgia, I heard for the first time that an ex-Soldier named Ron Ridenhour had written a letter to various government officials in Washington, D.C. In that letter, Ridenhour claimed that American Soldiers had committed war crimes at a Vietnamese village called “Pinkville.” I soon learned in conversations with Colonel (COL) Robert “Bob” Lathrop, the Staff Judge Advocate at Fort Benning, that an investigation conducted as a result of this letter revealed that Soldiers under the command of then Second Lieutenant (2LT) William L. Calley had murdered at least 350 unarmed and unresisting women, children, and old men at a hamlet called My Lai. Since First Lieutenant (1LT) Calley (he had been promoted since the events at My Lai) was now assigned to Fort Benning, it seemed that the initiation of criminal proceedings against him would be our responsibility.

On August 20, I saw the evidence against Calley for the first time. It was certainly an eye-opener, and any skepticism that I may have had about the accusations changed dramatically. In my opinion, there was a lot of smoke but not a lot of fire. It was clear from the investigation that a wanton killing of villagers had occurred and that Calley was probably responsible for much of it. Whether a case could be developed depended upon corroborating testimony of at least two witnesses in addition to Private First Class Paul Meadlo, and securing any photographic evidence. After discussing the matter with COL Lathrop and others involved in the case, it was agreed that if the facts warranted it, it would appear that Calley would be subject to charges for premeditated murder under Article 118 of the Uniform Code of Military Justice (UCMJ). Alternatively, Calley could be prosecuted under Article 134 for violations of the law of war.

I was directed to research the possibility of drafting premeditated murder charges in such a unique situation. I could find no direct precedent in our limited library for charged misconduct involving multiple victims whose names and ages were unknown; this was a very real issue because we did not know how many civilians had been killed at My Lai, much less their identities. I went to the local law library in Columbus, to look further. There, I was able to find some precedent in state court decisions for charging premeditated murder where the victims’ names were unknown.

I prepared a proposed draft of the specifications for COL Lathrop’s review. Given the highly unusual nature of the case, and wanting to be certain that we were legally correct, COL Lathrop took the proposed specifications to Washington D.C.. They were reviewed by the Office of the Judge Advocate General and approved.

Given the evidence, we concluded, as had Ron Ridenhour, that this was a grave moral issue which could not be swept under the rug. Under the UCMJ, any one of us or any other member of the military having knowledge of the evidence had the legal right if not the duty to prefer the charges. Given the circumstances, in the event an order came down not to prefer the charges, any officer who decided to prefer the charges would be at risk. It could ruin his career. We all agreed that the charges had to be brought and we discussed flipping a coin to decide who would sign and take that responsibility. It never came to that, because Captain (CPT) Ralph Hill, a judge advocate in our office, volunteered to prefer the charges based on his moral conviction that Calley should be prosecuted.

On September 4, 1969, COL Lathrop got a telephone call from the Office of the Judge Advocate General. The bottom line was that he had the “green light” to proceed; the case was his do with as he wished. COL Lathrop then informed me that I would prosecute the case and it would be treated like any other case.

One thing was for sure: this was not going to be like any other case. I was relieved, but also felt the weight of the awesome responsibility this was going to be. It was going to

¹ Most of this article is taken from my memoirs, which I am writing and which has the tentative title: AND THE VERDICT IS . . .

² Aubrey M. Daniel III was born in Virginia and grew up in Orange County. After graduating from the University of Virginia in 1963, he went to law school at the University of Richmond, from which he graduated in 1966. Daniel then practiced law for a year in Richmond. In 1967, he enlisted in the Army after receiving a draft notice. After completing basic

training at Fort Dix, New Jersey, he accepted a direct commission in The Judge Advocate General's Corps. He served at Fort Benning, Georgia, from 1967 to 1971. After leaving active duty, he practiced law in Washington, D.C. with the firm of Connolly and Williams. Now retired, he lives most of the year in Italy. The author thanks Fred L. Borch, Regimental Historian and Archivist for The Judge Advocate General's Corps, for his excellent assistance in preparing this article.

have huge implications for the Army, for the country, and for how the war in Vietnam was being conducted.

Some people would speculate that because I was so young and inexperienced, I was chosen to lose to avoid embarrassment to the Army and to the country. Such speculation had no basis in fact. I never believed or saw any indication that the Army wanted me to lose. I believe then and now that COL Lathrop picked me because he had confidence that I would neither lose nor embarrass the Army.

II. Drafting the Charges and Preparing for Trial

In drafting the charges, and in thinking about how the case should be prosecuted, I was guided by certain fundamental principles. If 1LT Calley were convicted it would have to be after a trial of which no one could say, "He wasn't tried fairly." My duty as a prosecutor was to seek justice and to prosecute the charges in accordance with the law and my ethical responsibilities as a prosecutor.

When I drafted the charges, I drafted them conservatively. Some prosecutors make the mistake of overcharging and over-prosecuting a case. I wanted to make sure the charges were the ones which had the strongest proof and not charge any crime in which the quantity and quality of the evidence could be challenged. Like every United States citizen, 1LT Calley was entitled to the presumption of innocence. The charges would have to be proven beyond a reasonable doubt.

Ultimately, the Army charged 1LT Calley with violating Article 118, UCMJ. There were a total of four specifications, alleging that Calley had murdered "an unknown number" but more than 100 "Oriental human beings, males and females of various ages, whose names are unknown, occupants of the village of My Lai 4." Calley also was charged with the premeditated murder of a two-year old child, "name and sex unknown," by shooting him with a rifle.

It was clear from the offset that his defense would be, "I was trained to go to Vietnam and kill the enemy and that is what I did. I followed the orders that were given to me." On the surface, that defense would have much appeal and invoke a lot of sympathy in the cruel, uncertain, guerilla warfare of Vietnam where a high priority had been placed on getting "high body counts" of the "gooks." Lieutenant Calley also seemed like a sympathetic figure; in fact, he had very childlike qualities in how he looked as a young Soldier. He also had a cute, boyish nickname: "Rusty." At first glance, one would find it hard to believe that a young officer who looked like he did was capable of the atrocities he committed.

When I heard the name of the lawyer Calley had chosen—George W. Latimer—I was impressed. He was a living legend in the field of military law. Originally from

Utah, he had served as a justice of the Utah Supreme Court and was one of the three original members of the U.S. Court of Military Appeals from 1951 to 1961. In studying military law, I had read many of the opinions he had written.

Latimer had written a letter to Calley soon after the charges were filed expressing his support and sympathy. He had established a reputation not only on the bench as a judge but also as a brilliant trial lawyer. Calley had called Latimer in Salt Lake City and retained him. He was 69 at the time and he had an impressive history of military service.

Judge Latimer also retained Richard B. Kay of Cleveland, Ohio, as his assistant civilian defense council. He agreed to serve as an unpaid volunteer. Kay was an unknown quantity to me. The Army provided Major Kenneth A. "Al" Raby to be Calley's chief military council. He was a career military lawyer and had recently served as Deputy Staff Judge Advocate of the Americal Division in Vietnam. Curious about who he was, I did some research and found that he was an outstanding lawyer and a scholar, but I was not able to learn anything about his capabilities as a trial lawyer. The Army also provided Calley with another lawyer, the youngest and least experience of the team, Captain Brooks S. Doyle, Jr. It was clear that not only in numbers but in experience, I was outmatched. At the time, I was a team of one.

After I met Judge Latimer, it was clear that he was not the one on the defense team that I was going to be working with. He was cordial; but it was clear—given our age difference and experience difference—that he had little respect for me and underestimated me as an adversary.

I believed that the evidence would require a higher standard than the law required, namely proof beyond a reasonable doubt. I believed that a military jury of Vietnam veterans would require more than proof beyond reasonable doubt. They would need proof beyond any possibility of doubt.

Knowing that I had to try this case as if my life depended on it, if I made a misstep, it could ruin my career. Everything I did would be viewed through the lens of skepticism. I could not do anything that would in compromise my own integrity or the integrity of the proceedings. I said to myself, *I must be like Caesar's wife*. I had to make sure that there were no actual or apparent conflicts of interest. Fundamental to this was my relationship with Judge Kennedy. We had always remained professional in our demeanor, while at the same time enjoying a social life of golf and bridge outside the courtroom. Those days were over. I went to Judge Kennedy and told him so. He understood and obviously agreed.

The Army also provided Judge Kennedy with an outstanding lawyer to help him with the legal research that

would be necessary to insure that the judge had the best information upon which to rule on the many unique legal issues that would be presented.

Although it took a while for the publicity surrounding the case to explode, I knew that there would be a public trial in the press apart from the trial in the courtroom. I would not participate in the public trial and would maintain a position of communicating nothing to the media. No interviews. "No comment."

While the media coverage of the Calley case was not what it is today, it was still intense. After the publication of Seymour Hersh's book, *My Lai 4*, reporters were scouring the country to interview witnesses. Calley himself made several appearances on television. F. Lee Bailey had been retained by Captain Medina (Calley's company commander) and was giving lengthy television interviews. Photographs of some of the gruesome scenes from the massacre taken by a reporter with the unit were publicized.

I wanted to ensure that Lieutenant Calley would receive a fair trial and would not be able to use the publicity as an argument that he could not get one. I spoke with Al Raby, and we decided to jointly file a motion to enjoin any further publicity. We eventually argued the motion before U.S. Court of Military Appeals in Washington D.C. It was denied.

Shortly before Christmas, I got a much-needed present. Captain John P. Partin was assigned to be my assistant, having just graduated from the University of Virginia Law School. *What a great way for him to begin his military career*, I thought.

III. The Trial

I do not want to devote too much space in this short article to the trial itself, except to say that my summation best explains what CPT John Partin and I did as trial counsel in *United States v. Calley*. I gave this closing argument on August 27, 1971, and it subsequently was published in the book *Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law*.²

If it please the court, counsel of the accused, president, and gentlemen of the jury: First of all, I'd like to take this opportunity to thank you on behalf of the United States government, Captain Partin, myself, and I'm sure for the court, and counsel for the defense for the patience which you've shown us throughout this long trial.

You have a job, gentlemen, a job which you took an oath to do, to take all this evidence and judge the credibility of each one of those witnesses, and then make a determination in your own mind as to what happened in the village of My Lai on 16 March, 1968.

At the beginning of this case, I outlined for you what we expected to prove, to give you the government's theory under which we expected and intended and have in fact established that the accused is guilty of the offenses with which he was charged. At that time, I related to you that we would show that with respect to specification one of the charges that on 16 March 1968, when Charlie Company landed in My Lai on the western side of the village, they didn't receive any fire; they only found unresisting, unarmed men, women, children and babies. And I told you at that time with respect to specification one that Paul Meadlo and Dennis Conti and other members of the accused's platoon gathered up a group of not less than thirty individuals on the south side of the village, and that the accused came to Paul Meadlo and Dennis Conti and said, "Take care of them." And he left and he returned a few minutes later and he said, "Why haven't you taken care of them?" In the meantime, Dennis Conti and Paul Meadlo had that group of people, unarmed, unresisting men, women, children and babies, squatting there on that trail, and when Calley came back, they hadn't taken care of them, and he ordered Paul Meadlo to kill those people on that trail, and he in fact participated in the murder of those people. This was the first offense.

We told you that they then moved to an irrigation ditch on the eastern side of the village of My Lai, and there, the accused, along with members of his platoon did as the accused directed, gathered up more people, this time unarmed men, women, children, and babies, and put them in that irrigation ditch and shot them, and that he (*indicating defendant*) participated; and he caused their death and that they died.

After the accused, along with other members of his platoon, had killed the people in the ditch, he moved north and he came to a man that was dressed in white, a man that was described as a monk. The accused began to question this individual, and then the accused butt-stroked this man in the mouth, and then he blew half of his head off.

Shortly thereafter, the accused heard someone yell, "A child is getting away!" He ran back to that

² MICHAEL S. LIEF, H. MITCHELL CALDWELL & BENJAMIN BYCEL, *LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING*

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area, picked the child up, approximately two years old, threw the child in the ditch, shot, and killed him.

Those were the time sequences which I told you we would prove, those are the facts upon which these charges and specifications are based, and now you must resolve whether or not we have in fact established what we told you that we would prove to you when this trial began.

First of all, I would like to give you in summary form what the government submits that we have proved happened in the village of My Lai on 16 March 1968. Keep in mind that it is not your function to resolve the guilt or innocence of any other person who may have committed any other offense in the village of My Lai on 16 March 1968. Your function is solely to judge the guilt or innocence of the accused with respect to specific charges and specifications for which he is being tried.

Now, we have shown that when C Company landed on 16 March 1968, they did in fact land on the western side of the village of My Lai. All of the testimony is in agreement on that fact. We have also shown that the accused was in the platoon, a headquarters group, and a mortar platoon. We showed that when they landed, the accused's platoon assumed the position on the south side of the village. He had two squads and a platoon and a headquarters element for this operation. One squad was commanded by Sergeant Bacon. The first lift arrived at 0730 hours and it carried, as you will recall, after the first lift landed, elements of the First Platoon then secured portions of the LZ [landing zone] for the second lift to come in. Before the second lift landed, the First Platoon moved into the village. They received no fire from that village. None.

The witnesses are in agreement on that fact.

Now the accused's platoon had Sergeant Mitchell's squad on the south side of the village, and it had Sergeant Bacon's squad on the north side of the village. And when they entered the village, the platoon, as you will recall, found no armed VC [Vietcong]. All they found were old men, women, children, and babies. They began to gather up these thirty to forty unarmed, unresisting men, women, children, and babies, because they weren't receiving any fire. Meadlo and Conti moved them out on the trail, and they made them squat down on the north-south trail.

Lieutenant Calley returned fifteen minutes later and said to Meadlo, "Why haven't you taken care of this group?" "Waste them." "I want them dead." "Kill them." The versions differ here slightly between the testimony of Sledge, Conti, and Meadlo regarding the actual words that Lieutenant Calley spoke. But, nonetheless, Lieutenant Calley then issued an order to Meadlo, and in fact Calley and Meadlo shot those people on the north-south trail.

Jim Dursi had gathered another group of people and he moved this other group of civilians along the southern edge of the village until he came to an irrigation ditch. And when he arrived at the irrigation ditch with his people, he was joined by Lieutenant Calley. And what happened there? Lieutenant Calley directed that those individuals, those groups of people, be placed into that irrigation ditch, and that they all would be shot by Meadlo and Dursi.

You recall the testimony of Paul Meadlo to Jim Dursi, "Why don't you shoot?" "Why don't you fire?" "I can't." "I won't." Dennis Conti approached from the south and came up and observed Calley and Meadlo and Mitchell firing into that ditch and killing those people. And Conti moved north and set up a position. Robert Maples was in the area. He observed ten to fifteen people being put in that irrigation ditch by Lieutenant Calley. He observed Lieutenant Calley and Meadlo place the people in the irrigation ditch and fire into the people, but he didn't see the people come out.

Thomas Turner, you recall, testified that he, while he assumed the position to the north of the ditch, observed over a hundred people placed in that ditch during an hour to an hour-and-a-half period. These people were screaming and crying and that he passed Meadlo and Calley firing into that ditch as he moved forward.

And then you recall the testimony of Charles Sledge, that after that they moved north of the ditch where there was a man dressed in white, a fact which the accused admits, that Calley interrogated this individual; when the man refused to speak, Calley butt-stroked him with his rifle and then shot him. And then Charles Sledge testified that when he returned someone yelled out, "There's a child getting away, a child getting away!" Lieutenant Calley returned to that area, picked up the child, threw the child in the ditch, and shot him.

Many of the facts which we have related to you as having been proved by this evidence beyond any

reasonable doubt have not in fact been disputed by the defense and were in many cases supported by the defense's own evidence, including the testimony of the accused. . . .

We must prove that each of the victims died as a result of the act of the accused on 16 March 1968, and that they died pursuant to him actually having shot and killed them, or someone else at his direction actually having shot and killed these individuals.

We must prove that with respect to each of the specifications that the killings were in fact unlawful and committed without justification or excuse. We must prove that he not only had the specific intent to kill these individuals, but that he had a premeditated design to kill the individuals prior to the time he in fact killed them. This means under the law that he formulated the idea in his mind to take the life before he in fact killed the human being.

First of all, let's take specification one of the charge. Let's look at the specific evidence with respect to that specification.

Judge Kennedy will explain to you that the government has two methods by which it can establish any fact. We can prove a fact beyond a reasonable doubt by presenting to you direct evidence of the fact, or we can prove it by circumstantial evidence. Direct evidence, of course, with respect to a killing would be where an individual actually sees one person shooting another, such as the testimony of Dennis Conti and Paul Meadlo; both testified that they saw the accused shoot the people. We can also prove it by circumstantial evidence, the circumstances involved. For example, in this case, the location of the bodies in relationship to where the accused was seen to those bodies, the fact that they were in his area of operation. We could prove the fact of death of a human being by circumstantial evidence from the nature of the wounds themselves without having a doctor perform an autopsy. So we had available to us both types of evidence, and we have presented both types of evidence to you.

First of all, let's review the direct evidence which we have presented to support specification one of the charge. You will recall the testimony of Dennis Conti—Dennis Conti, truck driver from Rhode Island, was a PFC [Private First Class] at the time of this operation. He was a member of the platoon. Dennis Conti testified that when he got off the helicopter he got separated from the command group, Lieutenant Calley and Charles Sledge, and that he entered the

village and ran into Sergeant Bacon who told him that he'd better catch up and get with the command group and get with Lieutenant Calley. That he reached the intersection of the north-south trail and located the command group. He began gathering up people from the hooches in that area at the direction of Lieutenant Calley. They gathered up at least thirty to forty unarmed men, women, and children at the north-south trail intersection. Conti testified that Lieutenant Calley came up and he told Meadlo, "Push the people out in the paddies," and so he and Paul Meadlo pushed the people out in the paddies and put them on the north-south trail and they guarded them like they thought they were supposed to do.

You recall that Dennis Conti said that he assumed a position on the south side of those people, and that Paul Meadlo was on the north side, and he put the people in a squatting position and that while they were waiting, he heard something in the hooches, to the south of where he was, and that he left and went down there and found an old woman and child. He gathered these people up, came back and put them in with the group of people on the trail who were still waiting there—who weren't resisting, and who weren't armed. He then testified that Calley returned a few minutes later, and said, "Take care of these people," and Calley left. Calley returned shortly and said, "I thought I told you to take care of them." Calley said, "'I meant kill them.'" Then you recall Conti testified that he assumed the position to the rear of Meadlo and Calley, and watched as Calley and Meadlo fired into the group of people as he covered the tree line with his M-79 grenade launcher, not wanting to participate. You recall he testified that Paul Meadlo during the midst of this broke down and started crying, that Meadlo in fact attempted to push his weapon into Conti's hand, but Conti refused to take it, and that Calley and Meadlo shot and killed all of the people on the north-south trail.

Then we have the testimony of Paul Meadlo who also supports the charge, specification one. And what did Paul Meadlo say? He corroborates Dennis Conti, although not identically, sufficiently to show what actually transpired. He also testified that he gathered up thirty to forty people in the same location, at the same spot, and he was told to take these people to a designated area in a clearing. He said substantially the same thing that Dennis Conti said, "Calley came up to me and he said, 'You know what to do with them.'" So the two of them corroborate each other's testimony. Meadlo also assumed, as did Conti, that Calley just meant for him and Conti to guard those people, but then Paul Meadlo says that about ten to fifteen minutes

later, Calley returned and said, "How come they're not dead yet?" Meadlo said, "I didn't know we were supposed to kill them." Calley said, "I want them dead." And Calley, according to Meadlo, backed off twenty to thirty feet and fired into this group of people on full automatic, and that he directed Paul Meadlo to join him and Meadlo joined him. You recall that Meadlo said he was very emotionally upset at this time. He became hysterical. He started crying. But Conti didn't fire. . . .

Now, we have alleged in the specification that the accused killed not less than thirty human beings on the north-south trail. We went to great lengths at the early part of this trial to establish [that] the people shown in prosecution exhibit 12A [photograph of bodies] were in fact the people that Calley and Meadlo shot on the north-south trail. And we presented to you members from all sections of the company, from the mortar platoon and the headquarters element, from the Third platoon, who came to this area by various routes, and they all were able to identify that photograph and place it at that location.

The defense raised the question. "Why can't Dennis Conti identify prosecution exhibit 12 as in fact being the group?" Dennis Conti would not say that it was not the group. Why can't Paul Meadlo say that it is in fact the group? What about Paul Meadlo's emotional state at the time he killed those people? Do you think that he was going to look at that photograph and tell you, "That's the people that I killed?" Do you think that he could look at that photograph and admit to himself that that's the people that he killed? How about Dennis Conti? That's not pleasant for those men, gentlemen, and perhaps they have blocked that out of their minds, as you heard one psychiatrist say that an individual could do. And so we wanted to prove it to you by circumstantial evidence, that that is in fact the group of people that were shot there by people who were detached from this event, that Dennis Conti's verification of the location is well substantiated because Dennis Conti, as you will recall, testified that he has since returned to the village of My Lai, went into the village of My Lai on the ground, and in fact located the spot where these people we're killed on the north-south trail.

Do you think that Lieutenant Calley would tell you that was the group of people? Do you think that he would tell you that that was the enemy that he shot? Do you think that he could justify that to you? Do you expect him to admit that was the enemy he killed?

A lot of people testified concerning their estimates of how many people died and the bodies. Some would say five, some would say ten, some would say fifteen to twenty. But what's the best evidence that you have as to how many people died? The best evidence you have, gentlemen, is prosecution exhibit 12A of the numbers. Look at that photograph when you go back into your deliberation. How many people are shown in that photograph? If you count the number of people in that photograph, you will find not less than twenty-five actually shown in the photograph, nine of which are clearly identified as children, and three of which are clearly identified as infants. Can there be any question about the fact that photograph has been well identified? You've heard twenty people testify, before you that they saw that group of bodies on the north-south trail. Twenty out of that company. There can be no doubt about the fact that those people were on the north-south trail and they were in fact dead. Would they be there that long and observed by that many people over that period of time with the wounds that they had and be alive? There is no doubt at all gentlemen, about the fact that Lieutenant Calley shot the people in prosecution exhibit 12A and that they are in fact dead and died as a result of his acts on 16 March 1968.

Let's turn to specification two, the shooting at the ditch. This occurred after the shooting on the north-south trail. Again, we have established this beyond any shadow of a doubt by both the direct and circumstantial evidence. . . .

What is the evidence relating to specification two of the additional charge? Charles Sledge testified that as they were leaving the ditch area, someone yelled out. "A child is getting away!" Sledge testified the accused went back, picked up the child, threw it in the ditch, and without hesitation, gentlemen, without hesitation, he raised his weapon and he looked down, and he fired. Sledge couldn't see where the baby was, but he threw it out in front of him, out in front of him in the ditch by the arm. Do you think he missed? Do you think he wanted to miss? He didn't hesitate. He just pulled that weapon up and squeezed that trigger, and that baby was at the end of that barrel.

We submit that with respect to all of the specifications, we have clearly established the fact of death of the victims, and that the accused either killed them or he directed that they be killed. We have established those elements beyond any doubt.

Now, we have an additional element that we must satisfy as to all of the specifications: did the accused

have the required criminal state of mind at the time he killed these individuals. To be guilty of premeditated murder, gentlemen, you have to intend to kill the victim. You have to intend that he die, and you have to form this intent just prior to the time that you accomplish that act. That's what the law requires. A split second, just so long as it's before you pull the trigger. If you make up your mind before you fire that the people that you are going to fire into are going to die, that is premeditation. You're going to be given an instruction on what constitutes premeditation, what constitutes premeditated design to kill, and you must find in this case that the accused did in fact premeditate with respect to each of the offenses with which he is charged.

How does the government perceive what a man is thinking? What Lieutenant Calley was thinking on the day in question? How do we show you that? First of all, we rely upon your own common sense and understanding and recognition of the way the human mind functions, recognition of the way people think and act. We rely upon the fact that you can take these facts, you can take his acts, his conduct, the observations of others, and find what he was thinking. We can prove it to you. We have proved it to you, because what is the evidence of a man's intent, what he intends to do? A man's actions [are] the mirror of a man's mind. You can prove intent two ways, just as you can any other element of an offense, or any other fact. You can prove it by direct evidence, and what is that? When a man tells you what he is thinking, that is direct evidence of what he's thinking. You can prove it by circumstantial evidence; even though he doesn't tell you, you know by what he does what he intended.

Now, the defense in this case raised an issue regarding the accused's mental capacity to entertain the required criminal state of mind for these offenses. And you recall how they raised that issue. They raised it with the introduction of psychiatric testimony. They gave you the testimony of Dr. Crane and Dr. Hamman in an attempt to show that the accused's mind, his mental ability, was such that on the date in question and while he was in the village of My Lai he did not have the mental capacity to be able to premeditate, that is, to be able to get an idea in his mind he was going to kill somebody and then kill them after he got the idea. They presented the testimony of these two doctors. The military judge is going to instruct you that under the law, a man can be sane and yet still be suffering from a mental condition which would deprive him of the mental ability to premeditate, and that if you were to find that if there was a mental condition and then if it did in fact deprive the accused totally of his ability to

premeditate, then he could not be found guilty of the offense of premeditated murder.

Dr. Crane [qualified as an expert in the field of psychiatry], as you will recall, testified on the basis of a hypothetical question, which was read to him by Mr. Latimer and at the conclusion of that hypothetical question, he was asked to render an opinion regarding the accused's mental condition on the date of 16 March 1968. Dr. Crane was willing to give you a medical opinion on the basis of a hypothetical question without ever having interviewed the accused, without having the benefit that you've had of observing him, listening to his testimony, without the benefit you've had of listening to what the witnesses who were actually there had to say about what transpired. I point this out to you in this regard as we go through this discussion of the testimony of the experts who testified medical opinions to assist you, gentlemen, in arriving at a medical diagnosis; in effect, a diagnosis of the accused's mental condition on the date in question. The law permits them, because they have expertise, to give you the benefit of their knowledge, but it does not relieve you of the ultimate responsibility of making the ultimate diagnosis, and you're not bound to accept the opinion of any doctor. You must make your diagnosis on the basis of all the facts.

Now, Dr. Crane stated under cross-examination that the accused did in fact have the mental ability to premeditate at the time of the offenses. He said Lieutenant Calley couldn't make a complex decision. We asked him for an example of a complex decision. He said, "Like going to the moon." You don't have to be a genius, gentlemen, to commit the offense of premeditated murder. You don't have to have above-average intelligence to be able to commit the offense of premeditated murder. You don't have to have a college degree. You've just got to have the ability to think and form that intent to kill somebody and form that intent in your mind before you kill them. And Dr. Crane said, "Well, if you're going to give me that literal definition"—and that literal definition, gentlemen, is the legal definition you must make your findings on—Calley had the mental ability to do it on the date in question. Dr. Crane in fact admitted that the accused could form the intent to kill before he pulled the trigger. Then Dr. Crane said that he didn't have the ability to form the specific intent to kill. Does that appear to be inconsistent to you? What is "specific intent to kill"? It's no more than specific intent to kill as opposed to, say, specific intent to wound, as opposed to specific intent to just scaring, as opposed to specific intent just to take away someone's property. That's all it is. It means to take a human being's life.

Specific intent to kill as opposed to specific intent to do something else.

They would die, and that he intended their death. He knew when he fired into that ditch that those people were going to die, that he was in fact killing them. Dr. Crane's opinion supports the government's position that he had the mental capacity. He had the mental capacity. He found that the accused was mentally healthy.

Then Dr. Hamman testified. I tell you, gentlemen that the opinion that is given to you by any man is only as good as the facts upon which it is based, and the facts don't support the opinion of Dr. Hamman. Dr. Hamman, you will also recall, was not a combat psychiatrist. In fact, he said he hadn't read anything about combat psychiatry in two years. He didn't keep up in the field, he hadn't studied in the area. Doesn't Dr. Hamman's testimony indicate that Calley could think? Doesn't it indicate that he was thinking all sorts of things? Just consider all the factors in the accused's own testimony which demonstrate clearly that he not only had the mental ability to think, but that he was thinking on the date in question.

He was thinking more complex things than just getting the idea to kill somebody and killing them. Look at the accused's testimony. No evidence that he was in a delusional state at the time. No evidence that he was not aware of what was transpiring around him. He knew where he was that day. He was able to tell you that. He was able to recognize his own men. He was able to give you their names. He was able to recognize what they were doing. He was able to give you an estimate that the helicopter was fifteen feet off the ground, and that he jumped out at five feet. He was able to recognize the subordinate relationships and the relationships of his men to himself, and himself to Captain Medina.

He could receive and transmit telephone calls, he could relay information to his men. He was oriented that day as to his direction of travel. He knew where he was going. He was able to communicate, to carry on conversations with others. He positioned his men.

You recall him testifying he was positioning the machine guns, directing Sergeant Mitchell to position the machine guns. It was a tactical operation. He recognized there were helicopters in the area. He was able to recognize that there was a man brought to him for interrogation. He was able to rely upon his training in Vietnamese language. He was relying on his

training. Anything wrong there with his mental processes?

As the psychiatric testimony of the government's witnesses shows, in some situations stress can make a man react more efficiently. Did that happen here? Lieutenant Calley testified that while he was there that day, he was thinking about "the logistics of my men, throwing down the volume of fire or picking it up, breaking out into the open, keeping my men down, checking out the bunkers, keeping moving, keeping pre planned artillery plots at hand. I had two radios that I was working with, the air-to-ground push." He was thinking about all those things, gentlemen. They're complex. Is there any question about the fact that his mind was functioning as a normal human being on the date in question? Do those facts demonstrate someone who was befuddled? They show that he was thinking. If he could think about all those things, he had the mental ability to formulate the attitude that when he pulled the trigger on his weapon, he intended to kill who he shot at, or when he gave the order to Meadlo that he intended for the people to die.

Now, on the issue of mental capacity, you heard from expert witnesses, Dr. Edwards, Dr. Jones, and Dr. Johnson. All of these men were members of the military, all of them were doctors from Walter Reed Army Hospital. You recall what their qualifications were. They were familiar with combat psychiatry. Dr. Johnson had been charged with the responsibility for the mental health program in Vietnam. They were aware of the studies in the area. Dr. Jones had served in Vietnam. He had written in the qualifications of those men with the qualifications of Dr. Hamman and Dr. Crane. I ask you to consider the circumstances under which they were brought here to testify. They didn't volunteer their services, gentlemen; they were directed to conduct an examination, an evaluation of the accused for this court, pursuant to its directive, and operated accordingly.

In fact, you recall Dr. Johnson testifying, he wanted to be sure that this was done fairly and impartially, so much so that he disqualified one of his few board-certified psychiatrists from testifying, from sitting on this board, because he in fact had communication with me as trial counsel. You also recall that he testified that I concurred in that man not sitting. They gave you three good medical opinions regarding this man's mental condition, locally and reasonably arrived at. They conducted extensive evaluations of the accused in which the defense participated at Walter Reed. They had available to them the testimony that you heard, and before they

rendered their opinions in court, they had available to them the observations of the accused as he testified from the witness stand, which is something which you also saw. And those three doctors' qualifications cannot be contested.

They are of the unanimous opinion that the accused did in fact have the mental capacity to premeditate on 16 March 1968, and was not suffering from any mental disease or defects. And you, gentlemen, yourself posed questions to these doctors regarding what factors they had taken into consideration in arriving at their opinion; did they consider the situation in which Lieutenant Calley was in possible stresses of combat upon him. They did. They considered all those facts. They relied upon their experience as Soldiers and their knowledge of the military, their knowledge of commanders, their knowledge of the situation, and they gave you three opinions, all of which were the same. But you're not bound by any of that expert testimony, gentlemen. You reject it, as you can the testimony of any witness who has testified in this case. It's offered to help you in making your judgment as to the man's mental ability.

And perhaps the strongest testimony of all is what other people had to say about his actions on 16 March 1968, and what their opinions were of his mental condition at that time in relationship to days that they had observed him before this operation. That perhaps is the strongest evidence, because they were there and they had seen the accused before this operation. The law permits a lay person to give his opinion to you regarding a mental condition. You don't have to be a doctor to know that something is wrong with somebody. You, as a human being, can look around and determine what a man's mental state is, and the law recognizes that a lay witness can make such an observation, permits him to give you his testimony and his opinion regarding the man's mental condition.

It's interesting to note that when Paul Meadlo testified in this case, he was asked by Mr. Latimer, "Lieutenant Calley wasn't raving around that day, was he? ... He wasn't acting crazy?" Meadlo said, "No." Dennis Conti also had been serving under the accused, (and] had seen him on a daily basis for four to five months prior to this operation, testified that Calley seemed pretty calm, didn't appear to be upset, just like it was an everyday thing.

In addition to this evidence, the court has also permitted us to present to you evidence which showed that several weeks prior to this operation, a man was

captured and interrogated by the accused for over twenty minutes. The accused beat the man during this interrogation, and at the end of the interrogation, shot him. You can also consider that in determining whether or not the accused had the mental ability to form the intent to kill before he killed.

Now, gentlemen, we have proved beyond any shadow of a doubt that the accused had the mental ability to think, to premeditate, and that he did in fact premeditate, and at the time he killed.

With respect to specification one, when you stand up to a group of people with an M-16 and pull that trigger, can you have any other intent? Let's analyze the evidence which demonstrates that the accused not only had the ability but he was in fact premeditating.

First of all, let's take Dennis Conti's version of what transpired. Dennis Conti said that Calley said to Meadlo, "Take care of them," and that when he returned he said that he meant to kill them. This was before any of them were ever killed. He formed the intent to kill them the first time he told Meadlo. He had that same intent fifteen minutes later when he returned. There can't be any clearer case than that. He only had to have the intent a split second. We've got the accused's own statement. We've got direct evidence of what he intended when he made that statement.

Jim Dursi also heard him make the same statement, "Why haven't you wasted them yet?" Paul Meadlo, same statements. Charles Sledge said Calley ordered them to "Waste them." When he gave that order he intended for them to die, and that idea was in his mind before they died, before he pulled the trigger, or before Meadlo pulled the trigger. And that's all the law requires with respect to premeditation.

How about specification two? Don't the facts again clearly show what he intended? He ordered them shot. That means he had to get the idea before the shooting started.

And what about Thomas Turner's testimony that this took place over an hour and a half and they were separate groups?

There's testimony through Paul Meadlo and Jim Dursi, "We've got another job to do." What does that show? And he made that statement before the people were ever placed in the ditch. Fifteen seconds before? One second is enough. How about the fact that he was observed changing magazines?

Gentlemen, the evidence that he in fact premeditated with respect to the people on the north-south trail and at the ditch is just overwhelming. There can be no doubt under those circumstances of what he intended when he started firing, and when he gave those orders. He intended for those people to die, and he formed that intent before he ever killed them, or ordered his men to kill them.

How about specification two of the additional charge? The man in white at the end of the ditch. You don't put that weapon up to somebody's head and pull the trigger. While he was putting it up to that man's head, he had to know that he was going to pull that trigger. He premeditated.

And when he threw that child in the ditch and he raised that rifle, he was premeditating again, and he was premeditating to kill.

And that's what the law requires that we prove. That's what we have proved beyond any doubt. . . .

Now, the military judge is going to instruct you that in addition to the major offenses with which the accused is charged, that is, the offenses of premeditated murder, that if the government had failed in some way to establish one of the elements of those offenses, the accused could be found guilty of some lesser included offenses.

However, we have clearly shown in this case, and all the facts show that with respect to all of the specifications, that the accused acted with premeditation. And so I say to you that, having established this fact of premeditation with respect to all of these offenses, which the lesser included offenses are not in issue.

The judge instructed you regarding the offense of unpremeditated murder, which contains the same elements as the offense of premeditated murder with the exception that when the act of killing is committed, the intent to kill is simultaneous with the act of killing. There was no premeditation. He didn't think about it before he did it. It was a spontaneous thing on his part. He formulated the idea of killing simultaneously with the act of killing, a sudden act.

I submit to you that the facts in this case, which establish clearly that the accused premeditated, would show that he in fact intended for these people to die before they were killed, negate any finding on your part of unpremeditated murder. We have established beyond a reasonable doubt that there was premeditation. How can a man give an order to

someone to kill someone and not premeditate? The mere fact that he makes the statement before the deaths result show the premeditation. He had to think about it. He had to come up with the idea of killing when he made the statement, which is the direct evidence of the intent, and we don't have to rely upon circumstantial evidence, even though that is abundant.

The judge will also instruct you that another possible, lesser included offense is the offense of voluntary manslaughter. The government submits again that we've shown premeditation. There is no need for you to consider the offense of voluntary manslaughter. If a person acts in a heat of sudden passion, caused by adequate provocation, the law recognizes that a man can be provoked to such an extent by the circumstances that he may kill before he has time to gain control of himself. Again, a spontaneous reaction on his part. The facts negate spontaneous action, the descriptions of those people who were with the accused that he was calm, that he acted like he did on every other day, the time period over which these killings took place. The provocation is not there. His own testimony does not reflect that he was in a rage, that his mind was befuddled by rage that he acted spontaneously. It shows that he was thinking. It shows that he was premeditating. And where we have shown premeditation beyond any reasonable doubt, there can be no justification for rendering a finding showing any other state of mind than what the facts show.

We also have to establish with respect to each of these offenses that they were committed unlawfully without justification or excuse. In this regard, the accused while denying that he in fact committed the acts which we have alleged in specification one at the trial, he in fact has attempted to justify all of his acts that day under the theory that he was doing his duty, that he was following orders, orders that he had received from his company commander, Captain Medina. This was a combat operation, gentlemen, and the military judge will instruct you that the conduct of warfare is not wholly unregulated by law, and that nations, including this nation, have agreed to treaties which attempt to maintain certain basic fundamental humanitarian principles applicable in the conduct of warfare. And over a period of time these practices have dealt with the circumstances and the law concerning when human life may be justifiably taken as an act of war. The killing of [an] armed enemy in combat is certainly a justifiable act of war. It's the mission of the soldier to meet and close with and destroy the enemy. However, the law attempts to protect those persons who are noncombatants. Even

those individuals who may have actually engaged in warfare, once they have surrendered. They are entitled to be treated humanely. They are entitled not to be summarily executed.

The military judge will instruct you that as a matter of law regardless of the loyalties, political views, or prior acts, people had the right to be treated as prisoners once captured until they are released, confined, or executed, but executed only in accordance with the law and the established procedures by competent authority sitting in judgment of the detained or captured individual. A trial, gentlemen, a trial, like the accused has had in this case, a trial at which the guilt or innocence of these individuals can be determined.

He will instruct you that as a matter of law, summary execution is forbidden. He will also tell you that as a matter of law that under the evidence which we have presented in this case, that any hostile acts, or any support which the inhabitants of the village of My Lai may have given to the Vietcong or to the [North Vietnamese Army] at some time prior to 16 March, would not justify their summary execution. Nor would hostile acts even that day committed by an armed enemy unit have justified their summary execution, as a matter of law, if those individuals laid down their weapons, held up their arms, and surrendered themselves to the American forces.

He will tell you that as a matter of law, that if unresisting human beings were killed at My Lai while within the effective custody and control of our military forces, their deaths cannot be considered justified, and that any order to kill such people would be, as a matter of law, an illegal order.

We presented in our case in chief no evidence regarding what the orders were for this operation. We wanted to present to you the facts surrounding these deaths. We wanted to present to you, and show to you, show you clearly that the people that were killed in My Lai were unarmed, were unresisting, and offered no resistance to the accused on the date in question, and that they were summarily executed by him.

There can be no justification for that. There is none under the law, the law which you have sworn to apply in this case, even despite what your own personal feelings may be regarding this law.

You will be told as a matter of law that the obedience of a Soldier is not the obedience of an automaton. When he puts on the American uniform, he still is under an obligation to think, to reason, and

he is obliged to respond not as a machine but as a person and as a reasonable human being with a proper regard for human life, with the obligation to make moral decisions, with the obligation to know what is right and what is wrong under the circumstances with which he is faced and to act accordingly.

We submit to you in this case that the accused received in fact no order to have done what he did in My Lai on 16 March 1968. He cannot rely upon an order in the first instance, because there was no order to round up all those men, women, and children and summarily execute them. There was an order, yes, to meet and engage the Forty-eighth VC Battalion in My Lai. We submitted to you all the evidence regarding the pre operational planning for this operation. You heard what the mission of this operation was to meet and engage the armed enemy unit that they expected to be there. Is there anything unlawful about that order? On the night of 15 March, do you think that they anticipated or intended when they got to the village the next day there would be no one there with weapons, and all they would find would be old men, women, children, and babies, and that the mission was to go in and gather those people up and take them out on that trail and that ditch and shoot them? Do, you think that those were the orders on the night of 15 March? Do you think that that was the order that emanated in those task force briefings? There is no evidence to show that any order was given to summarily execute.

There is no evidence to show that there was an order given not to take prisoners. There was an order given to meet and engage an armed enemy unit, and this is the order that Captain Medina relayed to his men, to meet and engage the forty-eighth VC Battalion, and the defense's own witnesses testified to this, as have the government's. The accused testified that he thought they would come in on a high speed combat assault, clear My Lai, and make a primary assault on Pinkville and go in there and neutralize Pinkville once and for all. Does that indicate summary execution of men, women, and children? Do you think that was the order issued on the fifteenth of March? Calley said after he received the platoon leaders' briefing that 'We were going to go in there and do sustained battle with the enemy and that we would stay with the enemy as long as we could maintain contact with him, and we would try to roll him up.' That's what he thought on the night of 15 March.

Was Captain Medina justified in trying to arouse his men to engage the enemy the next day? Shouldn't he have told them, shouldn't he have made them aware

of what they could expect? And they expected to meet an armed enemy unit.

And so I say to you that the evidence clearly shows that the accused cannot rely upon any order emanating out of any briefing on the fifteenth of March, 1968, to justify his acts, because no such order was given. Nor can the accused rely upon an order having been given to him the day of the operation. He has testified that he received an order from Captain Medina to “waste” the group of Vietnamese that was detained, and he, gentlemen, alone has testified to that fact.

We have produced both RTOs [Radio Telephone Operators] who were members of that command group; neither one of them heard such an order given. You had the RTO from the Third Platoon, Steven Glimpse, who was on his radio that day. He heard no such order given. You had Jeffrey LaCross, who was the Third Platoon leader, who had no knowledge of such an order being given. You had Charles Sledge who was Lieutenant Calley’s RTO; he had no such knowledge of an order being given. The accused and the accused alone said he received that order. You had Captain Medina testify before you under oath that he did not give that order. Do you think that the accused would have called Captain Medina and told him that “I have fifty, a hundred Vietnamese—men, women, and children—none of whom have any weapons?” And then would have received an order from his company commander to waste that many. Do you think that he called Captain Medina and told him what he had found in the village and how many people he had under his control, or what type of people they were, or what the circumstances were? He doesn’t tell you that. He doesn’t tell you, because he didn’t do it. He didn’t check, and perhaps his conduct is typified by his own statements to Charles Sledge after he talked to Lieutenant Thompson: “He don’t like the way I’m running the show here, but I’m the boss.” He was running that show, gentlemen, on his own initiative, why did the members of the First Platoon begin to round those people up? Even defense’s own witness, Elmer Hanwood, testified that he started gathering them up, because he wasn’t receiving any resistance from these people. “I wasn’t going to shoot them,” Hanwood said. “They weren’t doing anything to me.”

And so, gentlemen, the acts are unjustifiable as a matter of law, the accused did not receive any order of any kind which directed him to summarily execute the people on the north-south trail, the over seventy people in that irrigation ditch, the man in white out there at

that irrigation ditch, or that child. Let’s assume for the sake of argument that he had.

Let’s assume that he got an order to waste unarmed, unresisting people in the village of My Lai on the sixteenth of March. The military judge will instruct you that even that is not a justification for his acts, if the accused knew that that order was unlawful. For one to follow such an order, [one] has adopted the same criminal intent of the man who issued it. You’re not absolved of your responsibility by the order. There are just two men guilty as opposed to one. The responsibility is joint. He joins in the same criminal purpose when he accepts and follows an illegal order. He has the same criminal intent of the man who gave the order.

The accused testified that this was the second largest military operation he was ever on, that he did his duty that day, which he met and closed with the enemy. His testimony regarding the body count, the great emphasis that was placed on body count within the command, within his company. I ask you, gentlemen, if this was the great battle for the accused, if this was his great day in which he had an opportunity to meet and close with the enemy, wouldn’t he have wanted to give a big body count, actual body count of the armed enemy soldiers that he had killed? But he doesn’t. He can’t even give you an estimate. If they were the enemy, he engaged in honorable combat that day. Do you believe that? And even if you were to find subjectively that the accused believed the order to be lawful, it is still not a defense, if a reasonable man under the same or similar circumstances would have known and should have known that any such order would have been unlawful—a reasonable man, gentlemen, not Lieutenant Calley. A reasonable man is the average man, the average lieutenant, the average platoon leader, with average training knowledge. Would he know that that order was illegal?

The reasonable man, gentlemen, is an objective standard. You represent the reasonable men under the law. The reasonable man charged with knowledge of the law to apply in a given situation. The reasonable man would know and should know, without any doubt, that under the circumstances in which he found himself on the sixteenth of March, 1968, that any order to gather up over thirty people on that north-south trail, and to summarily execute those people is unlawful. It can’t be justified. A reasonable man would know that to put over seventy people in that irrigation ditch, like a bunch of cattle—men, women, children, and babies—that to do that is unlawful. A reasonable man not only would know it, he should know it, and he could not rely

upon any order to commit that, to absolve himself of criminal responsibility for that conduct.

There can be no justification, gentlemen, and there is none under the law, or under the facts of this case. We have established beyond reasonable doubt every element of every offense that we have charged, and the facts clearly demonstrate that those acts were unjustifiable and without excuse. We have carried our burden, and it now becomes your duty to render the only appropriate sentence, punishments, and adjudications you can make in this case, and that is to return findings of guilty of all of the charges and specifications. Thank you.

IV. Results and Concluding Thoughts

On Monday, March 29, 1971, at 3:30 in the afternoon, I received the call I had been awaiting for a long time. It was the longest jury deliberation in the history of my career. After thirteen days of suspense, it was almost a surprise when the phone rang.

“The jury has reached a verdict,” barked a brusque voice. “Get back to the courthouse ASAP [as soon as possible].”

Calley received word in his apartment. He was driven to the courthouse by one of his lawyers, Brooks Doyle. John Partin and I were already in the packed courtroom when Calley arrived flanked by the defense team.

Judge Kennedy took the bench at 4:29 P.M. and called the court to order. One by one, the jurors filed through the blue curtains behind the bench. Not meeting anyone’s eyes, they entered the jury box and sat down in the same seats they had occupied during the long trial. Judge Kennedy, anticipating that the verdict—whatever it was—would cause an emotional outburst, instructed the spectators and press that everyone was to keep their seats until the jury, the judge, and the parties had left the courtroom. Then he turned to the panel president, Colonel Clifford H. Ford.

“Have you reached a verdict, Colonel Ford?”

Colonel Ford solemnly replied, “We have, Your Honor.”

Judge Kennedy ordered Calley and his counsel to step forward and receive the verdict.

Calley rose slowly from his seat. With Mr. Latimer on his right and Major Raby on his left, Calley stepped forward to face Colonel Ford. I watched as Calley took a deep breath and saluted him. Colonel Ford returned the salute and then,

holding the findings in his right hand, he read the long-awaited verdict in a soft, gentle southern drawl.

“Lieutenant Calley, it is my duty as president of this Court to inform you that the Court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you: Of Specification 1 of the Charge [the killings on the trail]: Guilty of premeditated murder of an unknown number, not less than 1; Of Specification 2 of the Charge [the killings in the ditch]: Guilty of premeditated murder of an unknown number, not less than 20; Of Specification 1 of the Additional Charge [the killing of the monk]: Guilty; Of Specification 2 of the Additional Charges [the baby thrown in the ditch]: Guilty of assault with intent to commit murder.”

In finding Calley guilty of premeditated murder, the jury rejected his primary defense that he was only following orders. The jury reaffirmed the principle established a generation earlier at the Nuremberg war crimes trial, when Nazi leaders made the same plea in defense of their atrocities. But it had taken a marathon deliberation of thirteen days for the jury to decide that Calley had been lying about Medina’s orders or that even if Calley had been following orders, which was no excuse for his crimes.

As I listened to the verdict, I was flooded with an overwhelming sense of relief. At last the questions had been answered, and the skepticism I had felt for so long, about the courage of a military jury to render what I believed was the only just verdict, vanished. I was awed and proud, as well as somewhat surprised, that a military jury could convict one of its own.

As for Calley, his narrow eyes widened as he listened to Colonel Ford read the guilty verdicts one by one. When he heard the first “guilty of premeditated murder,” his short frame sagged. Then he braced himself and stared intently at Colonel Ford as he continued to read the verdicts of “guilty,” “guilty,” “guilty.” Calley’s normally florid face became even pinker.

When Colonel Ford finished, Calley saluted awkwardly, turned, and walked stiffly back to the defense table with his lawyers by his side. Visibly shaken, he sank back into his seat.

The silence in the courtroom was electric. The reporters were poised to run to the telephones to break the story the whole country was waiting for.

Judge Kennedy broke the silence. “Gentlemen, we will go into the sentencing phase tomorrow.”

Calley ultimately was sentenced by the court-martial panel to be confined at hard labor for life, to forfeit all pay and allowances and to be dismissed from the service.

Looking back almost fifty years later, I am proud of what John Partin and I did at Fort Benning in the *Calley* case. We showed that war crimes could be successfully prosecuted, and we showed that the military justice system could work—and work well despite the pressures put upon it by outside influences.



Defending Calley:
Recollections of the Military Defense Counsel in the Trial of the *United States v. Lieutenant William Calley*

By Lieutenant Colonel Bradford D. Bigler*

By the summer of 1969, then-Major Kenneth “Al” Raby had been in the Army for eight years. In his time as a judge advocate, he had tried scores of cases as both a trial and a defense counsel. He had practiced military justice in the United States, during a tour in Germany, and most recently in Vietnam.

Freshly re-deployed from Vietnam, Major Raby was assigned to an infantry training unit in Fort Benning, Georgia, where a recent initiative to train new Army officers on the laws of armed conflict was underway. By July of 1969, he had been to a six week long “shake and bake” course educating him on how to teach, and he was ready to get started.

But he did not anticipate that he would soon receive a new mission that would consume the next several years of his life, and which would indelibly leave its mark on Judge Advocate General (JAG) Corps history—indeed, on United States history. The mission was to defend the court-martial of the *United States v. Lieutenant William Calley*.

Raby recounts how his Brigade Commander called him in to tell him he had been requested as a defense counsel on a new case. Raby remembers his initial reluctance to take yet another case to trial. In his mind, he was at Fort Benning to be an instructor, not a trial attorney.

But then the Brigade Commander told him the accused was charged with over 100 murders. His attention now captured, he responded: “Well, I guess I’m available.”

Unbeknownst to then-Major Raby, his detail to the case had been in the making for some time. George Latimer, the civilian counsel on the case, had a very successful civilian practice in Utah, and had been looking for a crack Army litigator to help him in the defense of Calley. Latimer also had history with the military; in fact, he was one of the first

three judges appointed to serve on the Court of Military Appeals when it was established in 1951.¹

Latimer reached out to Major General Kenneth Hodson, the Army Judge Advocate General at the time, who referred him to Colonel Bob Comeau, the Chief of the Army’s Criminal Law Division. Fortuitously, Comeau had also recently returned from a tour as a staff judge advocate in Vietnam, and he had been very impressed by Raby’s performance—especially in supervising young counsel who were trying cases in a combat environment. Comeau recommended Raby, and the rest is history.

Raby recounts his first meeting with Calley in a way that may seem familiar to many military defense practitioners. Calley was “very young; he was scared, young, [and] didn’t understand why he was being charged because he was doing just what he’d been told to do in his mind.”²

Raby remembers having very little information about the case. Charges had been preferred in a hurry because Calley was due to be discharged from the Army. Raby recalls that the government had preferred charges the day before his service expired.

As a consequence, the only evidence available to Raby was few statements from Meadlo and a handful of other witnesses. The charge sheet was so basic that Raby didn’t even know who the victims were. Raby recalls that one of the first things he did was to file a motion for a More Definite and Certain Statement of the Charges.³ This motion was the first of many.

Modern military justice practitioners might be surprised to learn that pretrial litigation was rarely—if ever—done in courts-martial of the day. In fact, Raby recounts that the *Calley* case may have been one of the first military cases ever to have had written motions argued in a pretrial session outside the hearing of the court-martial members.

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¹ Fred L. Borch, *Lore of the Corps: The United States Court of Military Appeals: The First Year (1951-1952)*, THE ARMY LAWYER, March 2016.

² Interview by Major Andras Marton and Major Harper Cook with Kenneth Alan Raby, (January 14, 2004).

³ Modern practitioners might recognize this as a motion for a Bill of Particulars. Rule for Court-Martial 906(b)(5), MANUAL FOR COURTS-MARTIAL (2016). Such a motion seeks “to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification is too vague and indefinite for such purposes.” *Id.* discussion.

The reason for this was timing. The 1968 Military Justice Act (1968 MJA) had just made “the most sweeping changes in the Uniform Code of Military Justice since [the] code was enacted in 1951.”⁴ Less than six weeks before charges were preferred on Calley, the 1969 Manual for Courts-Martial implementing the changes went into effect. One major change was the statutory establishment of an independent trial judiciary that, among other things, now had power to decide pretrial issues in a motions session.⁵

Asked to describe motions practice in the Calley case, Raby said simply: “It was damn rough.” There were no online resources, and access to a physical law library was crucial. While Fort Benning had a fairly decent law library that was beefed up even more because of the trial, he recalls many late nights spent pouring over indices, and then calling former co-workers to see if they had a particular case in their library. If they did, they would make a photocopy and send it to him. Sometimes the case would be relevant; sometimes not.

By necessity, motions practice was a protracted ordeal. Raby recalls the military judge, Colonel Kennedy, eventually setting a “drop dead” date after which no new motions would be accepted. In accordance with the court order, Raby filed a “Drop Dead” motion—a motion to permit the defense to file any meritorious motion it needed to make after the drop dead date. The court granted the motion.

Raby knew from the beginning that his defense would be obedience to orders; given the facts, there was no other choice. So he was searching for anything that could support his theory. He had heard about how the command had authorized so-called free fire zones and about inconsistencies in the operations orders. But Raby needed the evidence.

In the lead up to trial, Raby recalls that the government provided him whatever he needed to prepare. He and the trial counsel took two trips to Vietnam. He visited My Lai and reviewed rules of engagement. During those trips, Raby learned more in a couple of hours than he had learned in days of research at his home station.

The case finally came to trial in late 1970 and lasted until March 1971. With the 1969 changes to the UCMJ being so new, the military judge, Colonel Reid Kennedy, knew the *Calley* case could be pivotal in defining the military justice system to the world. There had been some discussion amongst military judges about whether to wear robes in the court-room. Most judges were against it. Kennedy mentioned the idea to Raby and Daniel. Raby was immediately for it.

⁴ James A. Mounts Jr. and Myron G. Sugarman, *The Military Justice Act of 1968*, 55 AM. BAR ASSOC. J. (No 5) (May 1969), at 470.

⁵ Among other things, the law formally established the trial judiciary. It authorized military judges to arraign and decide pretrial and interlocutory issues without first assembling a court-martial panel. Most military justice practitioners will recognize the now common parlance of “taking a matter up at an Article 39(a)” as short hand for addressing a legal issue outside the

Reid also reorganized the physical layout of the court-room. Prior to 1969, courts-martial had a distinctive layout, with panel members facing the witnesses and the accused. The law officer (the military judge precursor) was off to the side. Reid mandated that the court-room in the *Calley* case be re-oriented to look exactly like a civilian court-room.

Raby recalls the trial progressing slowly but steadily. Rather than bring all the witnesses at once, the trial plan called for witnesses to be called in bunches. A group of witnesses would fly in and testify, and then fly out while the next group came in.

As the evidence mounted, Raby knew his only real hope was to have the panel decide whether Calley was acting under orders, and if so, decide whether it was reasonable to obey them. He hoped a panel would use their common experiences in Vietnam to evaluate the evidence and nullify a conviction.

He recalls the testimony of Chaplain Creswell as standing out from the others. At trial, Creswell testified that the night before the My Lai operation, he had visited the operations room. Creswell testified that the battalion commander was telling the group, “We are going to go in there tomorrow and scorch the whole damn place. Nothing’s going to be standing after we go through that place.” Creswell said, “Colonel, I didn’t think the American Army conducted that kind of warfare.” The commander’s alleged response: “You say your prayers for rain and leave the war to me.”⁶

Throughout the trial, the courtroom was packed with reporters. Raby recalls that before the *Calley* case, it was unheard of to talk to the press. But in the *Calley* case, there were so many legal issues and the system was so new that the press didn’t understand much of what was going on, let alone how fair the system was to the accused. They had to come up with a way to brief the press on the justice system without violating their ethical responsibilities.

He and the lead prosecutor, Aubrey Daniel, eventually came up with the idea of providing off-the-record “deep background” to the press to explain and impress on them the fairness of the system. Speaking of the success of that system, Raby recalls that not once was he quoted in the press for anything other than his statements during the actual court-martial hearings.

Throughout the trial, Raby recalls the government team doing a fantastic job. They pulled no punches, but they kept things professional. The trial was hard fought, but fair. Raby and Daniel developed excellent rapport and still talk to each other from time to time.

presence of the members. The 1968 MJA completely rewrote Article 39, U.C.M.J., to include this authority. See generally *Military Justice Act of 1968*, Pub. L. No. 90-632, § 2(a), 80 Stat. 1335, 1341 (1968).

⁶ Interview by Major Andras Marton and Major Harper Cook with Kenneth Alan Raby, (January 14, 2004).

Defending such a monumental case came at a high personal cost. Raby had served on the Division staff in Vietnam before the allegations came to light, and knew several of the officers implicated in the subsequent cover-up.⁷ He recalls friends of his coming up to him and telling him, “You don’t know what the hell war is all about.”⁸ In all of this, he tried to keep things in perspective. He says that his experience trying cases had taught him “to be thinking all the time . . . to give [Calley] one hundred percent of my ability to present his side of the case.”⁹

After the trial, Raby was approached about serving as appellate counsel on the case, but he declined. While the trial was hugely influential, he wanted to have a JAG Corps career that was defined by more than just the *Calley* case.

Raby spent his follow-on assignment as the Staff Judge Advocate at Fort Stewart.¹⁰ The 24th Infantry Division was just standing up, and when Raby arrived, there were only about 500 people on post. Raby rates this as the best assignment of his career because he had the opportunity to work with so many fantastic people, and had the opportunity to set the legal climate of an entire Army division.

Raby’s second favorite assignment came a few years later as the Chief of the Criminal Law Division in the Office of the Judge Advocate General. By then, it was the 1980s, and the military was headed for another major amendment to the Uniform Code of Military Justice. After the Military Justice Act of 1983, Raby, assisted by the outstanding research and drafting ability of then Major John Cooke, was instrumental in supervising major revisions to the Manual for Courts-Martial, conforming it more closely to the Federal Rules of Procedure and Evidence. The update formed the basis for rules still relied on today. Raby closed out his career as a Senior Judge on the US Army Court of Military Review.

When speaking of his military career, while Raby acknowledges the importance of the *Calley* case, he considers his true JAG Corps legacy to be the people whom he had the opportunity to mentor. Those notables who worked for Raby include Brigadier General John Cooke, who retired in 1998 as the Chief Judge, U.S. Army Court of Criminal Appeals and Commander of the U.S. Army Legal Services Agency; Major General John Altenburg, who retired in 2001 as the Deputy Judge Advocate General of the Army; and Brigadier General J. Robert Barnes, who retired in 2001 as the Assistant Judge Advocate General (Civil Law and Litigation).

After a successful second career in civilian practice, Mr. Raby is currently enjoying the retired life in Atlanta, Georgia.

⁷ *Id.*

⁹ *Id.*

⁸ *Id.*

¹⁰ *Id.*

From the Frying Pan into the Fire: The Story of Captain Jim Bowdish and his Defense of SSG David Mitchell, the First American Soldier Tried for Murder at My Lai

By Lieutenant Colonel John L. Kiel, Jr.*

Life was pretty sweet for Captain James Bowdish in the fall of 1969. Fresh out of the Basic Course, the Judge Advocate General (JAG) Corps had assigned him to the 1st Armored Division at Fort Hood, Texas. An avid hunter and outdoor enthusiast, Jim Bowdish loved the allure of Central Texas. Any free time he had was spent on his dirt bike in the woods exploring every inch of Fort Hood. MapQuest and Siri were not a thing. Just a compass and grid map was all Bowdish needed for his frequent jaunts through the training areas.

Bowdish loved roaring through the woods racing alongside untamed horses and wild pigs. There were plenty of deer, armadillos, and roadrunners out there too. He spent his fair share of time dodging rattlesnakes and cottonmouths as they slithered across the many trails that twisted and turned through the triangular shaped behemoth of a base that measured 30 miles by 30 miles.

When he wasn't blasting through the woods on his motorbike, Captain Bowdish could be found at home spending family time with his lovely wife Jenny whom he met in college, his daughter Michelle and son Michael, both born at Darnall Army Hospital on Fort Hood.

Prior to joining the JAG Corps, Jim Bowdish graduated from Wake Forest University in Winston-Salem, North Carolina, in 1966 where he earned an ROTC scholarship and attracted the attention of Jenny Campbell who would later become his wife of 52 years . . . and counting. Upon graduation from Wake Forest, Bowdish was commissioned a 2nd Lieutenant in the Army Reserve. He then received an education delay to attend law school at the Stetson University College of Law in Saint Petersburg, Florida. Upon graduating law school, he had a choice to make – he could spend two years on active duty in the Army as a tanker or apply to the JAG Corps, spend four years on active duty, and actually put his law degree to use.

In 1969, the JAG Corps was actively seeking to increase the number of company grade officers it accessed due to a change in the 1968 UCMJ that required the participation of Judge Advocates at special courts-martial. Bowdish passed his bar exam in the spring, found out he was accepted into the JAG Corps shortly after that, and entered active duty in July of 1969 where he proceeded directly to the JAG School to attend the Officer Basic Course (OBC) at the rank of Captain.

Captain Bowdish loved the OBC and felt that the training was first rate, especially in military justice, a topic he was the

most interested in. He received a lot of valuable training on the UCMJ and military justice practice. Much of it was spent on his feet delivering presentations or conducting mock trials. At some point during the OBC, every officer was asked which area of the law they would like to practice in. Bowdish requested an opportunity to get experience in the courtroom as a trial advocate. He got his wish and was assigned to the Office of the Staff Judge Advocate, First Armored Division (later the 1st Calvary Division).

As Captain Bowdish would quickly find out, life at Fort Hood wasn't all about riding dirt bikes and scoping out hunting spots in the woods. One brisk morning in late October of 1969, he was summoned by the Chief of Military Justice to come see him. Bowdish left the office annex he worked in, which was down the street from the main OSJA which was located across the street from the Division Headquarters. After Bowdish arrived in Captain Charlie Bliel's office, he was introduced to a very sharp looking African American Soldier named Staff Sergeant David Mitchell. Captain Bliel handed CPT Bowdish a CID file and told him to read it before he interviewed his new client.

As Bowdish reviewed the voluminous file, he was really disturbed by what he saw. The graphic images of dead Vietnamese women and children left no doubt. These same photographs Bowdish was staring down at would be revealed to the world a few weeks later in LIFE Magazine. They would also haunt viewers on the nightly news for months to come. Besides the photographs, there were statements in the file particularly relevant to the handsome Soldier still sitting in the waiting room outside the office where Bowdish was reviewing the file. Witness statements obtained by CID identified both 2LT William Calley and a number of other Soldiers as having fired into a ditch at the end of the hamlet into a group of unarmed women and children. Sergeant Mitchell had been a member of Lieutenant Calley's platoon and had been present at My Lai during the massacre.

After reviewing the entire CID file, Bowdish recalls saying to himself "This is going to be a huge, big deal. What an awful event! There will be a huge amount of publicity when all of this finally gets out."¹ Bowdish's premonitions would prove to be an understatement. It wasn't long after Bowdish's first meeting with SSG Mitchell that all of the major media outlets reported on the charges brought against SSG Mitchell and 2LT Calley for war crimes the two had allegedly committed at My Lai some 18 months prior.

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¹ Telephone interview with Michael K. Swan, Partner Emeritus, Akin, Gump, Strauss, Hauer & Feld, LLP, Houston, Texas (Feb. 12, 2018).

Bowdish wondered why the JAG Corps would assign a 25 year old, wet behind the ears, “greenhorn” with no trial experience to a case of that magnitude. For nearly 50 years, Bowdish had pondered this question. “Well that’s an easy answer, I know exactly why” recalls Mike Swan, the lead trial counsel assigned to prosecute the case of U.S. v. Mitchell.² “Jim Bowdish was one of six or seven lawyers assigned to the Division JAG office at the time. He also happened to be the newest, which is why he was selected.”³

Both Bowdish and Swan explained that while they knew that would never happen today, it was common practice back then. The United States was hotly engaged in an unpopular war and military lawyers were needed to handle a huge backlog of cases. New Judge Advocates with no trial experience would be initially assigned to defense work. Once they gained trial experience after a year or two, they would switch sides and become prosecutors. Normally that pattern worked fine, as most cases dealt with simple AWOLs and drug use. When Bowdish got his hands on the charge sheet prepared by Swan, he discovered the gravity of SSG Mitchell’s situation. Charges had been preferred against Mitchell for assault with intent to commit murder on more than twenty unarmed Vietnamese civilians.

By the time Mitchell’s charges had been preferred, the Army and Congress had both begun to investigate what became known as the My Lai Massacre. Bowdish had a three week reprieve after reading the CID report before the rest of the country began to find out the extent of what had happened at My Lai. In mid-November, 1969, the twenty-five year old “greenhorn” received a request to appear on the NBC Nightly News and was interviewed at Fort Hood by NBC reporter Don Oliver to discuss the government’s case against SSG Mitchell.

Unlike now, where counsel have to formally receive permission to talk to reporters or appear on camera to discuss a case, Bowdish informally received the green light from the Fort Hood information officer who requested that he proceed with the interview. Although Bowdish was hesitant to grant the interview, the Army’s public relations office also supported it. In fact, Bowdish explained that they all but ordered him to conduct the interview. Bowdish met with Don Oliver on a cold morning on November 18, 1969, and essentially spoke about some of the allegations facing his client and proclaimed that he hoped that the Article 32 investigating officer, would recommend to the Division

Commander against referring the case to a general court-martial. The interview was broadcast on the NBC Nightly News later that evening.

On December 5, 1969, LIFE Magazine published a comprehensive article on the My Lai massacre complete with color photographs taken by an Army photographer named Ron Haeberle. Haeberle’s photos depicted old men, women, and children who had been shot by U.S. Soldiers in their village and in a ditch at the end of the village. That same day, TIME Magazine ran a story about Lieutenant Calley’s role in the massacre. For the next 18 months, the horror stories coming out of My Lai consumed every major newspaper, magazine, and television station in the country.

Neither Swan nor Bowdish recall anything about the Article 32 investigation because neither attended. Another trial counsel not assigned to try the Mitchell case apparently presented a paper file of evidence to the investigating officer. Sergeant Mitchell called no witnesses nor did he testify. The investigating officer recommended against referring the case to a general court-martial (GCM) but despite the IO’s recommendation, Major General John K. Boles, the convening authority, referred the case to a GCM anyways.



SSG David Mitchell, center, sits in a news conference with his civilian attorney, Ossie Brown, left, and his Judge Advocate, CPT James Bowdish

Immediately after the NBC Nightly News interview, CPT Bowdish received a telephone call

from a judge in Louisiana informing him that a criminal defense attorney from Baton Rouge would be joining the defense “team” which at that point was comprised of Mitchell and Bowdish. Shortly after Ossie Brown arrived from Baton Rouge he insisted on calling a press conference to discuss the case. Bowdish was opposed to any pretrial publicity but Brown insisted and they conducted it. Ossie Brown was no doubt attuned to the fact that most of the American public were adamantly opposed to prosecuting U.S. Soldiers for anything that happened over in Vietnam.

Brown and Bowdish also received a request for SSG Mitchell to testify before a committee investigating the My Lai 4 massacre. Brown quickly declined the request and shortly thereafter SSG Mitchell received an order to show up and testify before the Peers Commission. Bowdish, Brown, and Mitchell all flew up to Washington, D.C., to appear before the Peers committee. Captain Bowdish recalls ambling out of the car and through the Pentagon’s corridors which were thronged with pushy reporters falling over themselves while trying to get pictures and a statement from Mitchell. Bowdish

² Telephone interview with James L.S. Bowdish, Partner, Cray Buchanan Law Firm, Stuart, Florida (Jan. 9, 2018).

³ *Id.*

had never seen so many flash bulbs go off in his entire life. The trio finally nudged their way into the committee room, sat at a table together and when called to testify, SSG Mitchell invoked his Fifth Amendment right against self-incrimination. That ended their participation in the famous Peers Commission Inquiry.

Back at Fort Hood, Bowdish and Brown had to prepare for trial. Captain Bowdish was assigned to argue an unlawful command influence (UCI) motion before the military judge. Bowdish essentially argued that pressure coming from big Army and Congress, both of whom were conducting separate investigations into My Lai, was too much for MG Boles to ignore while making a decision whether to refer Mitchell's case to general court-martial. The judge ruled against SSG Mitchell finding that there had been no actual or apparent UCI committed thus far in the case.

Mike Swan was hoping that the government would try 2LT Calley first in order to avoid the appearance that the Army was going after enlisted members first. Calley's defense team requested a continuance to travel to My Lai to interview witnesses and view the crime scene. The judge granted Calley's continuance. Much to Swan's chagrin, *United States v. Mitchell* would be the first of the My Lai massacre cases to see the inside of a courtroom. Swan was partially relieved though because, as he noted, everyone was just tired of having these cases hang around. They just wanted to try it and move on to the next one.

Swan's luck went from bad to worse when the trial judge made a ruling that all government witnesses who had previously testified under oath or who had made sworn statements had to provide those statements to Mitchell's defense team or they would be barred from testifying at trial under the Jencks Act.⁴

Unfortunately for Mike Swan, the government's two star witnesses were Hugh Thompson, the helicopter pilot who helped saved civilians at My Lai by putting an end to the shooting, and Ron Haerberle, the combat cameraman who took all of the photos of My Lai that had appeared in LIFE Magazine. Thompson and Haerberle testified before a congressional committee investigating My Lai chaired by F. Edward Hébert of Louisiana, Mitchell's home state. Congressman Hébert refused to provide transcripts of any of the committee's proceedings so Thompson and Haerberle would never be called as witnesses at Mitchell's court-martial.

The government decided to call instead, SPC4 Charles Sludge, a radio operator in Mitchell's company. Sludge was also a well-dressed, sharp Soldier who happened to be African American too. Swan was hoping that his testimony would counteract Mitchell's should Mitchell choose to testify. Specialist Sludge essentially testified that he saw 2LT Calley

and SSG Mitchell both at the ditch at the end of the hamlet firing their weapons at unarmed civilians.

On cross examination, Bowdish recalled, the defense impeached Sludge with a conviction he had received back in Louisiana prior to joining the Army. The conviction was for peeping on a white woman through her bedroom window. Sludge pled guilty and in order to avoid jail time, agreed to join the Army. What actually happened according to Bowdish and Swan, was that when Sludge was in high school, he developed a mutual crush on a white classmate. After walking her home from school one day, Sludge stood on the lawn as she spoke to him through her bedroom window. When the girl's father, who was the high school superintendent, found out he reported Sludge to the police which triggered a prompt arrest and subsequent prosecution.

The government's second witness was Private First Class Dennis Conti. Private Conti also testified that he could vividly remember seeing 2LT Calley shooting into the ditch and recalled hearing Calley order him to "take care" of a group of prisoners he was guarding. Conti also testified that he was pretty sure the African American noncommissioned officer he saw standing next to Calley firing into the ditch was SSG Mitchell. The government then called its last two corroborating witnesses to describe the general scene at the ditch before resting its case.

Ossie Brown's strategy was somewhat unique for the defense's case in chief. Brown asked Bowdish early on what he thought about calling SSG Mitchell to testify and only asking him one question — did he shoot anyone in that ditch? Bowdish told Brown that he believed that would be a great strategy because Mitchell had never given a statement to CID, maintained his innocence the entire time, and Swan, not having any statements to work with would have to cross-examine Mitchell asking questions he did not know the answers to. That's exactly what they did at trial. Brown called Mitchell to the stand and asked only one question of the defense's star witness. Mitchell acknowledged that he was at My Lai and that he had his weapon with him, but that he did not shoot anyone in the ditch.

Mike Swan dropped his pencil somewhat in shock at the brevity of the defense's case. Brown and Bowdish had thoroughly prepared Mitchell for the onslaught of questions that Swan was about to unleash. Swan had to walk Mitchell through everything that happened leading up to the shootings at the ditch. Mitchell calmly answered that while he was at the village that day, he was however, further up the ditch from Calley's location and hadn't fired a shot, or heard or seen a thing to indicate that civilian women and children were being shot by members of his platoon.

Both Swan and Bowdish agreed that SSG Mitchell presented well on the witness stand. "He looked like the model Soldier" Bowdish explained. "He looked good in his uniform and his testimony was clear, respectful of the cross-

⁴ *Id.*

examination questions, and he was unwavering in declaring his innocence.” Moreover, Mitchell’s testimony was corroborated by one other defense witness who had been at the ditch when the shooting occurred with Calley present. The witness went away from the ditch where Calley was shooting to another location where he saw SSG Mitchell. Essentially, Brown and Bowdish had effectively established an alibi for their client that countered testimony of the government’s witnesses.

Swan explained that without Thompson and Haeberle there to set the stage for the chaos they both witnessed in My Lai that day, he was left with Mitchell’s unrefuted testimony.

After Mitchell’s grilling on cross examination, the defense rested. The military judge then prepared and read instructions to the panel of nine officers, no enlisted. Neither Swan nor Bowdish sought to challenge any of the nine officers on the panel. With the exception of the most junior officer, whom they believed to be a First Lieutenant, every panel member had served at least one tour in Vietnam. The lawyers on both sides thought they would get a fair shake.

After a few agonizing hours of deliberation, the panel came back and acquitted SSG David Mitchell on all charges. With that, the first of the My Lai massacre cases came to an end. Jim Bowdish had just finished up the trial of a lifetime. He recalled that the commanding general, the public, and almost everyone else was happy with the result. Nobody really wanted to prosecute Soldiers who were ordered to fight in an extremely unpopular war thousands of miles from home where the enemy wore no uniforms, where the villages were under control of the Viet Cong, and where the South Vietnam government was corrupt.

Bowdish explained that the general consensus was that Lieutenant Calley was only convicted because the evidence against him was overwhelming. He also explained that the military judge in Calley’s court-martial did not exclude the testimony of Thompson and Haeberle under the Jencks Act even though their congressional testimony was unavailable to Calley’s defense team too. William Calley would be the only Soldier convicted of murdering Vietnamese civilians in the hamlet simply known to most Americans as My Lai 4.

Captain Bowdish went on to complete his four-year tour of duty at Fort Hood as the Chief of Military Justice in the 1st Cavalry Division OSJA (which succeeded the 1st Armored Division) before leaving the Army for private practice in Florida. Bowdish explained that while he loved every bit of his Army career at Fort Hood, he couldn’t wait to get back to the Sunshine State. Bowdish is currently the Chief of Litigation and a senior partner at the Crary Buchanan Law Firm in Stuart, Florida.

Jim Bowdish credits the JAG Corps for the litigation skills that he still uses in courtroom across South Florida. “I had a lot of opportunity to examine and cross-examine witnesses. I learned those very important skills in the JAG

Corps both in the Mitchell case and probably even more so as a defense counsel and prosecutor in other cases. I can tell you I loved my career in the First Armored Division and later the 1st Cavalry Division JAG offices. I will always be proud I served.”⁵

⁵ *Id.*

Fifty Years After My Lai: What Did We Learn?

Brigadier General Joseph Berger*

A young judge advocate—the commander and staff she supports—participating in home station training ahead of a Combat Training Center (CTC) rotation or operating in a forward deployed environment unknowingly enjoys the benefits of the My Lai Massacre. While it seems disingenuous, at best, to assert that the tragic killing of hundreds of innocent civilians somehow benefitted our Army, and specifically our judge advocates, it did. And for judge advocates in uniform today, the scope of that transformation is anything but apparent. Understanding where our Army was on that dark day in 1968 and where it is fifty years later is critical for every Soldier, but especially so for judge advocates, as it serves to reinforce the fundamental nature of our Army as a learning institution, while reminding us of the vigilance required at every level to guard against such an insidious breakdown of law and order.

At the time of My Lai, a judge advocate's role on the battlefield was largely limited to the practice of military justice.¹ The draftee Army of the Vietnam era provided plenty of work. But when LTG William F. Peers published his inquiry into what happened on that day in March and in the cover-up that followed,² his report provided the Army the momentum to fundamentally change the role judge advocates play in training, operational planning, and execution. Coupled with a clear definition and rigorous cradle-to-grave implementation of a core set of Army values,³ the Army and the Judge Advocate General's Corps (JAG Corps) set out to institutionally guard against a recurrence.

There is much to be gleaned from LTG Peers' report, even fifty years later. Rigorous, well-documented, and unrestrained in its recommendations, his team's work has stood the test of time. LTG Peers found "[m]any soldiers in the 11th Brigade were not adequately trained" when it came to obedience of "palpably illegal" orders, "responsibilities concerning the procedures for the reporting of war crimes," and the "provisions of the Geneva conventions."⁴ As the Judge Advocate General's Corps' Regimental Historian later noted:

[T]he Peers Report finding with the most significant legal ramification was the determination that inadequate training in the Law of War was a contributory cause of the killings. Particularly damning was the report's finding that Law of War training in Calley's unit was deficient with regard to the proper treatment of civilians and the responsibility for reporting war crimes.⁵

In short, the Army was not properly training its Soldiers and the putative subject matter experts—the Army's judge advocates—were not part of the process. Those findings and that disconnect led to the then-Division Chief of the Office of the Judge Advocate General's (OTJAG) International and Operational Law Division (IOLD), COL Waldemar Solf, to recommend to then-TJAG, MG George Prugh, that the Department of Defense (DoD) formally establish a law of war program. By 1974, at the Army's urging and with the Army as the Executive Agent, DoD had established a formalized law of war program.

Now in its fifth iteration,⁶ by requiring judge advocates be part of the operational planning and execution process, the DoD Law of War Program codified a ground-breaking change for DoD. The program's impact on today's JAs and the formations they support is best summarized in the directive's mandate that, "The Heads of DoD Components shall: . . . Make qualified legal advisers at all levels of command available to provide advice about law of war compliance during planning and execution of exercises and operations. . . ."⁷ This was the first step in fundamentally altering the historic mindset of the Army regarding the "appropriate" role to be played by judge advocates in operations. As an unintended consequence, it served as the precursor for the inevitable development of the body and practice of what became known as "operational law." But, like any mandate, the evolution of judge advocates to peer or near-peer status in the planning process with a commander's operations officer (G3/J3) or intelligence officer (G2/J2), let alone the requisite access to their staffs during the planning process, took time.

* Judge Advocate, U.S. Army. Presently assigned as Commander of the US Army Legal Services Agency.

¹ Judge Advocates *did* advise commanders and their staffs on personnel and foreign claims, administrative law, contract law, and international law issues, too. However, as this note hopes to illustrate, it was not until the 1974 DoD mandate that Judge Advocates be involved in the operational planning process that the Army's perception about the role of lawyers changed and JA staff integration began to evolve to its present state.

² U.S. DEP'T OF THE ARMY, REPORT OF THE DEP'T OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT, 1970, https://www.loc.gov/frd/Military_Law/pdf/RDAR-Vol-I.pdf [hereinafter Peers Inquiry].

³ The Army Values are Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage. *Army Values*, U.S. ARMY, <https://www.army.mil/values/>.

⁴ Peers Inquiry, *supra* note 2, Chapter 12, page 8.

⁵ FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA, 1959-1975 54 (2003).

⁶ U.S. DEP'T OF DEF., DIR. 5100.77, LAW OF WAR PROGRAM, (22 February 2011) [hereinafter DoDD 5100.77].

⁷ *Id.* para 5.7.3. (emphasis original).

The practice and the form of codification would, through future operations continue to evolve. Later guidance required:

Legal advisers should be *immediately* available at all appropriate levels of command *during all stages* of operational planning and execution to provide advice concerning law of war compliance during joint and combined operations. Advice on law of war compliance will be provided in the positive context of the broader relationships of international, US, and foreign domestic law to military operations and will address not only legal restraints on operations but also legal rights to employ force.”⁸

The evolution continues. When the Army restructured making the Brigade Combat Team (BCT) its center of gravity, the JAG Corps ensured an appropriate number of judge advocates were assigned to each. Originally two and now three judge advocates per BTC, the JAGC responded to commander-driven requests for integrated legal support at the tactical level. Today’s formations include paralegals at the battalion level. During conventional or special operations forces (SOF) operational deployments, it often means at least one judge advocate and paralegal no matter how small the task force. That level of commander-driven integration of legal support into their operations was simply incomprehensible fifty years ago.

But being present in the formation is only part of the solution. To address the training deficiencies LTG Peers identified, our Army has also fundamentally changed how we teach the Law of War. Soldiers in Vietnam were provided training cards, focused almost exclusively on enemy prisoner of war-related tasks like the “5 S’s”⁹, not on how to handle civilians on the battlefield, deal with unlawful orders, or report potential war crimes. A lack of integrated training on even the 5 S’s coupled with a jungle environment’s ability to turn a reference card to pulp in short order, made this largely a wasted effort.

Today’s Soldiers begin their understanding of the Law of War as early as basic combat training and advanced individual training (BCT/AIT)¹⁰ and in their pre-commissioning program and it carries through individual and collective training at every echelon, from home station to combat

training center (CTC). The integrated training also continues through every level of the Officer and Enlisted Education System, regardless of military occupational specialty. The active role of today’s judge advocates and paralegals in that training process reflects the reality that JAs and their supporting paralegals must be even better trained than the formations they support. Beginning in BCT/AIT and JAOBC (and for some, in law school) and continuing in specialized short courses, judge advocates and their paralegals, in close cooperation with unit commanders, routinely assist in this training.¹¹ Training must reflect the importance the command and institution put on the task. The old adage “Soldiers do what leaders check” rings true. Law of War training is and must remain a command responsibility with appropriate leader—and specifically commander—emphasis. Soldiers do best that which they train and rehearse regularly. Law of War training can never be “one and done,” and even with My Lai 50 years behind us, we must remain diligent.

Part of the tragedy of My Lai is found in the cover-up that reached the Division Commander. Training helps Soldiers understand what right (and wrong) looks like and their obligation and tools for reporting potential violations. Coupled with the power of legal technical chain reporting, the integration of judge advocate into the operational planning and executing process is critical in ensuring there is a check on the system outside command channels.

In light of subsequent war crimes in Afghanistan and Iraq, it is not only fair but necessary to ask ourselves if anything has truly changed. Yes, war crimes still happen, even in a trained, disciplined Army.¹² That is the human element and the unpredictable impact of the stresses of combat on our forces. But our Army today succeeds where we earlier failed because we have made these changes. Trained Soldiers know they can and in fact must, disobey unlawful orders. Trained Soldiers understand the basic principles of the Law of War and appreciate not only their obligation to report potential violations, but the multiple channels through which to do so. And the integrated JAs across the planning and execution continuum, absent from the process in 1968, help ensure plans are legally sound and appropriately aggressive in achieving the commander’s intent in light of the full body of the law of war.¹³

⁸ CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01D, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (30 April 2010) [hereinafter CJCSI 5810.01D] (emphasis added).

⁹ The 5 S’s are: Search, Silence, Segregate, Safeguard, Speed to the rear.

¹⁰ See generally U.S. DEP’T OF ARMY SOLDIER’S MANUAL OF COMMON TASKS WARRIOR SKILLS LEVEL 1, STP 21-15MCT (1 Sep. 2017).

¹¹ Driven by the events at My Lai, in 1970, prior to the implementation of the DoD Law of War Program, the regulation then governing law of war training was updated, directing increased training on the Law of War, specifically including the Hague and Geneva Conventions, and “requiring such training be presented by judge advocates together with officers with command experience preferably in combat.” BORCH, *supra* note 5, at 54.

¹² The CJCSI directs DoD components implement an “effective program to prevent violations of the law of war.” While not simply aspirational, in practice, any such program will only succeed with relentless reinforcement across the training spectrum, from classroom to complex, multi-echelon exercises. CJCSI 5810.01D, *supra* note 8, para. 4.c.

¹³ Although the DoD program uses the phrase “Law of War,” it mandates that “Members of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations,” often driving us of a broader term “law of armed conflict.” See CJCSI 5810.01D, *supra* note 8, para. 4.a.

My Lai at Fifty:

A History of Literature on the ‘My Lai Incident’ Fifty Years Later

By Fred L. Borch

Regimental Historian & Archivist

Over the last fifty years, hundreds of articles, monographs and books have been written about the killings at My Lai 4 in March 1968.¹ This article examines the most important, with a focus on those of interest to Army lawyers.

For background reading on the Vietnam war, John Prados’s *Vietnam: A History of an Unwinnable War, 1945-1975*, is a superb one-volume treatment of a complex conflict.² Another important book, albeit narrower in scope, is *A Bright Shining Lie*.³ Recipient of both the Pulitzer Prize and the National Book Award in 1989, it chronicles America’s involvement in Vietnam through a biography of John Paul Vann. He served as an Army lieutenant colonel in South Vietnam in the early 1960s and, after retiring from active duty, returned to the country as a civilian employee of the U.S. Agency for International Development. By the end of 1966, Vann was the chief of the civilian pacification program for eleven South Vietnamese provinces and by 1971, he was the senior advisor for the corps region comprising Vietnam’s Central Highlands—with control over all U.S. military forces in the area. *Newsweek* called it “the best book ever about Vietnam.”⁴

How do the war crimes committed by Calley and his men fit into the larger tapestry of American military misconduct in Vietnam? Was My Lai 4 an aberration—a horrific crime committed by some ‘bad apples’ in an otherwise law-abiding Army—or did My Lai instead reflect an Army culture that condoned or even encouraged violence against Vietnamese civilians?

A few historians have concluded that My Lai 4 and other war crimes committed by U.S. forces in Vietnam were the direct result of a flawed Army. In *War Without Fronts*,⁵ Bernd Greiner, a professor at the University of Hamburg, Germany, analyzed the 10,000 pages of war crimes allegations compiled by the Pentagon-based Vietnam War

Crimes Working Group (VWCWG). Greiner concluded that the VWCWG study *proved* that My Lai and other war crimes were committed by Soldiers in Vietnam who, realizing that they were “useless” and “disposable” and lacking in “self-esteem” empowered themselves through random killing. As Greiner sees it, the American war in Vietnam “was a strategy of civilian slaughter sanctioned by American leaders” and My Lai was the inexorable result of an Army culture that condoned violence against civilians.⁶

The vast majority of professional historians reject this view; they do not find that the historical record supports the conclusion that war crimes resulted from institutional flaws in the Army and its culture. In his highly acclaimed *America in Vietnam*,⁷ political scientist Guenter Lewy examined American strategy and tactics in Vietnam between 1961 and 1975, and analyzed hundreds of after action reports of military operations, command directive, field reports, and staff studies of pacification efforts. He also looked at courts-martial records and war crimes investigations. Lewy concluded that “charges of *officially condoned* illegal and grossly illegal conduct are without substance.”⁸ (emphasis in original) As Lewy demonstrates, the Army did not ignore misconduct by its Soldiers. On the contrary, the Army “kept statistics on the number of [war crimes] allegations made and their disposition.”⁹ For Lewy, this was proof that the Army as an institution was not turning a blind eye to war crimes committed by Americans in uniform.

In Vietnam, senior commanders in fact took their responsibilities under the law of armed conflict seriously. In *Law at War: Vietnam 1964-1973*,¹⁰ an official study published by the Army’s Center of Military History, author George S. Prugh¹¹ explains that the Commander, Military Assistance Command, Vietnam (MACV), considered creating special war crimes teams (to both investigate and prosecute these offenses). Ultimately, however, General

¹ The Arabic numeral “4” in My Lai 4 distinguishes it from five other sub-hamlets in the larger hamlet of My Lai, which itself was part of the larger village of Son My. My Lai 4 was quite small; only about 400 meters wide and 250 meters long and with a population of about 400 men, women and children. While “My Lai” is commonly used to refer to My Lai 4, this essay on literature related to the war crimes uses My Lai 4 because it is a more accurate description of the sub-hamlet where Calley and his men committed their war crimes. My Lai 4 is also sometimes called “Pinkville,” after the pink color used to indicate a populated area on U.S. Army maps of South Vietnam. WILLIAM R. PEERS, *THE MY LAI INQUIRY* 40-41 (1979).

² JOHN PRADOS, *VIETNAM: A HISTORY OF AN UNWINNABLE WAR, 1945-1975* (2009).

³ NEIL SHEEHAN, *A BRIGHT SHINING LIE* (1988).

⁴ *Id.* at 5.

⁵ BERND GREINER, *WAR WITHOUT FRONTS* (2009).

⁶ *Id.* at 129.

⁷ GUENTER LEWY, *AMERICA IN VIETNAM* (1978).

⁸ *Id.* at vii.

⁹ *Id.* at 348.

¹⁰ GEORGE S. PRUGH, *LAW AT WAR, 1964-1973* (1975).

¹¹ Major General George S. Prugh served as The Judge Advocate General of the Army from 1971 to 1975.

William C. Westmoreland decided that this was not needed since the laws prohibiting war crimes were clear and the administrative and judicial machinery for investigating and punishing such offenses was sufficient.¹²

Westmoreland did, however, establish detailed rules governing the investigation of war crimes. Of particular importance is MACV Directive 20-4, which not only required the reporting of any war crime alleged to have been committed by U.S. personnel, but made it a criminal offense to fail to make such report. Finally, it was American military lawyers in Vietnam who were responsible for convincing their South Vietnamese counterparts that the 1949 Geneva Conventions were applicable to the conflict (thereby ensuring that international law governed the treatment of enemy combatants), and that it was Army lawyers who, intent on complying with the Conventions, authored rules governing the treatment of detained persons, including innocent civilians and civil defendants. But, while the Army as an institution was serious about preventing war crimes in Vietnam, this is not to say that some war crimes did not go unpunished. They did. While the VWCWG had documented some 300 documented war crimes incidents, including murder, rape, and torture, only sixty-one soldiers were tried for war-related offenses at courts-martial; 32 were convicted (including Lieutenant Calley).¹³

As for books, monographs, and articles dealing exclusively with My Lai 4 and its aftermath, the story of the murders was first disclosed by journalist Seymour M. Hersh.¹⁴ Hersh did not know about Ridenhour's letters. Rather, he learned about My Lai 4 only after Calley's arrest and then began investigating incident. Ultimately, Hersh conducted interviews with some 50 men who had either participated in the attack on My Lai 4 or were members of Calley's company.

Hersh's 1969 stories on the atrocity earned the 1970 Pulitzer Prize for International Reporting and many other top journalism awards. His book *My Lai 4: A Report on the Massacre and its Aftermath*¹⁵ is primarily based on these personal interviews. But Hersh also used a limited number of transcripts of key witnesses to the war crime questioned by the Army's Inspector General (IG). A "first person" account

of the IG investigation, written by the lead investigator is William Wilson's "Massacre at My Lai."¹⁶

Details of Hersh's role in bringing the story to the American public are found in "How I Broke the My Lai Story"¹⁷ and "The Story Everyone Ignored."¹⁸ After Lieutenant General William R. Peers completed his official inquiry into the events at My Lai 4, Hersh used Peers's report as the basis for his book *Cover-Up*,¹⁹ the story of how and why the war crimes had been covered up and who was responsible for it.

While it was Seymour Hersh's reporting that first brought My Lai 4 to the attention of the American reading public, it was ex-Army Sergeant Ronald L. Haeberle's color photographs of dead women and children at My Lai 4, published by *Life*²⁰ that brought the horrific nature of the crimes committed by Calley and his platoon into the homes of every *Life* subscriber. Haeberle, who was an official Army photographer, carried two cameras with him that day in My Lai 4: one an Army-issue camera, the other a personal camera. Although Haeberle took pictures with both cameras, the *Life* magazine photographs were taken with his personal camera. This is an important point, as the Army would never have permitted the release of Haeberle's official government My Lai 4 photos. In any event, his pictures in *Life* reached millions of Americans.

The single best source on the killings, and individual and command responsibility for them and other war crimes, is the official inquiry headed by Lieutenant General William R. Peers. Now known as the "Peers Inquiry," it was published by the Department of the Army in March 1970 as the *Report of the Department of the Army Review of the Preliminary Investigations in the My Lai Incident*.²¹ The Peers Inquiry consists of four volumes: Volume 1 is the report; Volume 2 contains the testimony of 400 witnesses (it is 20,000 pages in length); Volume 3 consists of exhibits considered by Peers and his team; and Volume 4 collects the statements obtained by Army Criminal Investigation Division agents. The first three volumes of the official inquiry are posted on the Library

¹² PRUGH, *supra* note 10, at 77.

¹³ *Id.* at 72-74.

¹⁴ Alabama Journal (Montgomery) reporter Wayne Greenlaw apparently published a story about war crimes at My Lai 4 one day before Seymour Hersh's broke the story, but it was Hersh who captured the national spotlight with his exclusive interview of former Private First Class Paul Meadlo. This interview was groundbreaking because Meadlo told Hersh that he and Calley had shot and killed numerous old men, women and children in My Lai 4 on March 16, 1968.

¹⁵ SEYMOUR M. HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* (1970).

¹⁶ William Wilson, *Massacre at My Lai, VIETNAM*, Aug. 1991, 42-48. Wilson served as a combat infantryman with the 101st Airborne Division in World War II, as an intelligence officer in Vietnam, and with the

Department of the Army's Office of the Inspector General. He retired from active duty as a colonel.

¹⁷ Seymour Hersh, *How I Broke the My Lai Story*, *SATURDAY REV.*, Jul. 11, 1970.

¹⁸ Seymour Hersh, *The Story Everyone Ignored*, *COLUM. JOURNALISM REV.*, Winter 1969-1970.

¹⁹ SEYMOUR HERSH, *COVER-UP* (1972).

²⁰ Ronald L. Haeberle, *Exclusive pictures, eyewitness accounts: The Massacre at Mylai*, *LIFE*, Dec. 5, 1969, at 36-45.

²¹ LIBR. OF CONGRESS, *PEERS INQUIRY REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATION INTO THE MY LAI INCIDENT* (1970), https://www.loc.gov/frd/Military_Law/pdf/RDAR-Vol-I.pdf [hereinafter PEERS REPORT].

of Congress website.²²

Much more accessible, and with a comprehensive analysis and commentary written by General Peers, is his *The My Lai Inquiry*.²³ Sections of the Peers report also are found in Joseph Goldstein, Burke Marshall and Jack Schwartz, *The My Lai Massacre and its Coverup: Beyond the Reach of Law*,²⁴ but *The My Lai Inquiry* by General Peers is the better source.

Peers was harshly critical of the chain of command in the 23d Americal Division. He and his civilian and military investigators concluded that at every command level within the division, “actions were taken . . . which effectively suppressed information concerning war crimes committed” at My Lai 4. Ultimately, Peers’ report identified 30 persons who were implicated in various “commissions and omissions,” some of which were criminal offenses. These crimes not only included multiple unlawful killings, but also rape and sodomy. There were at least twenty rapes that day in My Lai 4. One girl was raped by three Soldiers in succession, and another was the victim of a “three-on-one gang rape.” As Peers put it, “it was a gruesome picture.”²⁵ As for the killings, Peers minced no words when he wrote that they were “a gruesome tragedy, a massacre of the first order” and “a black mark in the annals of American military history.”²⁶

Slightly more than six years after the official Peers Inquiry was published, a second official report was released: the House of Representative’s Armed Services Investigation Subcommittee’s *Investigation of the My Lai Incident*.²⁷ This important 893–page document contains transcripts of witness testimony heard by the subcommittee between April 15, and June 22, 1970. The testimony was “classified” and not released by the House of Representatives until “final disposition” had been made of all criminal cases that might arise out of the My Lai 4 incident. Not until April 1976 was the “My Lai Incident Subcommittee” convinced that the testimony could be released to the public.²⁸

Those who testified before the subcommittee included Captain (CPT) Ernest Medina, Colonel (COL) Oran Henderson, and First Lieutenant (1LT) Hugh Thompson. Generals Creighton Abrams and William C. Westmoreland also testified under oath. The testimony of Ernest Medina is worth reading because it is so evasive and self-serving.²⁹ The

sworn statement of Hugh Thompson, however, is especially poignant because it discusses how he landed his helicopter to help rescue children hiding in a bunker.³⁰ Notably absent from the *Investigation of the My Lai Incident* is any testimony from Calley.

Another excellent book, which consists chiefly of official documents (like combat action reports and witness statements) but also contemporary newspaper reports about My Lai 4, is *My Lai: A Brief History with Documents*.³¹ The value of this book is that a reader can examine complete and unfiltered witness statements (given mostly to Army Criminal Investigation Division investigators) from those were present at My Lai 4 or involved in the subsequent cover-up of the crime.

Several other books on the incident deserve mention. Michael Bilton and Kevin Sim’s *Four Hours at My Lai*³² is an accurate account of the event. The authors interviewed both Americans who had been at My Lai 4 and Vietnamese who survived the killings and consulted all the official investigations of the atrocity. But the book, written by two English filmmakers who first produced a television documentary about My Lai 4, is a more sensational account of the killings—perhaps to be expected given that the authors are not trained historians.

After a conference about My Lai 4 was held at Tulane University in 1994, David Anderson edited the remarks of the participants and published them as *Facing My Lai: Moving Beyond the Massacre*.³³ This is an excellent book, and the edited comments and observations of Ron Ridenhour and Hugh Thompson are particularly useful. Ridenhour’s sense of justice and his patriotism compelled him to write the many letters that led the Army to investigate what happened at My Lai 4. Similarly, Thompson’s “compassion and moral courage amid a scene of human depravity” reveal him as a hero in every sense of the word.³⁴

A key question about the killings and sexual assaults at My Lai 4 has always been why they occurred and who is to blame. Most who have examined the evidence believe that a key reason was poor leadership. Ben G. Crosby’s *My Lai: Where Were the Leaders*³⁵ is an excellent summary of this view.

²² LIBR. OF CONGRESS, https://www.loc.gov/rr/frd/Military_Law/(last visited Apr. 24,2018).

²³ WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979).

²⁴ JOSEPH GOLDSTEIN, BURKE MARSHALL & JACK SCHWARTZ, *THE MY LAI MASSACRE AND ITS COVERUP: BEYOND THE REACH OF LAW?* (1976).

²⁵ PEERS, *supra* note 22, at 175.

²⁶ *Id.* at xi-xii.

²⁷ *Investigation of the My lai Incident: H.R. 105 Before the Armed Services Investigating Subcomm. of the H. Comm. On Armed Services*, 91st Cong. (1976).

²⁸ *Id.* at iii.

²⁹ *Id.* at 53-84.

³⁰ *Id.* at 224-48.

³¹ JAMES S. OLSON AND RANDY ROBERTS, *MY LAI: A BRIEF HISTORY WITH DOCUMENTS* (1998).

³² MICHAEL BILTON & KEVIN SIM, *FOUR HOURS AT MY LAI* (1992).

³³ DAVID ANDERSON (ED), *FACING MY LAI: MOVING BEYOND THE MASSACRE* (1998).

³⁴ *Id.* at 10.

³⁵ Ben G. Crosby, *My Lai: Where Were the Leaders*, VIETNAM, Apr. 2009, at 46-53.

The latest book on the subject is Howard Jones's *My Lai: Vietnam, 1968, and the Descent into Darkness*.³⁶ A professor of history emeritus at the University of Alabama, Jones spent nearly a decade researching and writing the book and it certainly covers the events of March 16, 1968 in great detail. While a recent review in the *New York Times* opined that Jones' book "is likely to become the standard reference work on My Lai,"³⁷ this is not correct; the 'Peers Inquiry' will always be the authoritative source and the best reference.

The *Calley* court-martial was arguably the only 'bright spot' in an otherwise disastrous legal aftermath—at least from the Army's perspective. The record of trial is located at the National Archives Annex, College Park, Maryland and it contains a verbatim transcript of the proceedings.³⁸

The single best book on the trial itself is Richard Hammer's *The Court-Martial of Lieutenant Calley*.³⁹ Hammer attended the trial proceedings and his narrative captures the intensity of the proceedings. His vignettes of the trial participants—prosecutors Aubrey Daniel and John Partin, defense counsels George Latimer and Kenneth "Al" Raby, and military judge Reid Kennedy—are excellent.⁴⁰

Michal R. Belknap's *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*⁴¹ provides more context about My Lai 4 and Calley. It is a legal history of the event. As Belknap's book also makes abundantly clear, *United States v. Calley* was one of the major political issues of 1971 because those on both sides of an increasingly acrimonious "debate over Vietnam viewed the verdict as exemplifying what they thought was wrong with the war."⁴² Belknap's book has a wealth of detail about Calley's background—he was very much a below average officer. As one Soldier who served under Calley put it: "He [Calley] couldn't read no darn map and a compass would confuse his ass."⁴³ What happened at My Lai is explained, at least in part, by Calley's substandard skills as an officer and leader.

Since no photographs were permitted inside the courtroom at Calley's trial, the news media used artists to sketch important events during the trial. *The Ledger-Enquirer* (Columbus, Ga.) newspaper collected these trial sketches and published them as *The Trial of Lt. William Calley*.⁴⁴ There

are more than 70 drawings. They depict all the lawyers involved in the trial, plus court-members, witnesses (like Meadlo and Medina) and some members of the media (like John Sack, Calley's self-styled biographer).

No discussion of the *United States v. Calley* trial would be complete with a brief look at what author John Sack claims is the "the only authorized autobiography" of Calley. *Lieutenant Calley: His Own Story As Told to John Sack*⁴⁵ purports to be tell the real truth about what happened at My Lai 4. It comes as no surprise to read Calley's claim that Medina ordered the killings of civilian women and children at the sub-hamlet,⁴⁶ although the jury that heard the evidence at his trial certainly rejected this assertion. Portions of Sack's book also were published in an interview format in *Esquire* magazine, with Calley steadfastly insisting that CPT Medina told him "neutralize everything . . . to kill everything," including women and children, in My Lai 4.⁴⁷

More telling, however, are the passages in Sack's book in which Calley talks about leading and caring for his men. Although his battalion headquarters had instructed Calley that he was to discourage his men from visiting Vietnamese prostitutes, he ignored this directive. As Calley explained: "Face it: most every guy in America, the average guy, is for pussy. . . I say, if a little pussy keeps a platoon together, a little pussy they've got."⁴⁸ No wonder Lieutenant General Peers concluded that Calley was totally unfit to serve as an Army officer.⁴⁹

There is some literature on the court-martial of Calley's immediate commander, Captain Ernest M. Medina, who was found not guilty of all charges in September 1971 at Fort McPherson, Georgia. The Third U.S. Army published an official "After Action Report" titled *Public Affairs Activities Pertaining to the Court-Martial of Captain Ernest L. Medina*⁵⁰ and this contains copies of court documents, press releases about the trial, and lessons learned by the public affairs office.

A much better source is Mary McCarthy's essay "Medina," some of which was originally published in *The New Yorker* magazine and was reprinted in her book *The Seventh Degree*.⁵¹ A journalist, McCarthy witnessed the legal proceedings, and her pithy descriptions of the accused, prosecution, defense, military judge, and court-members are

³⁶ HOWARD JONES, *MY LAI: VIETNAM, 1968* (2017).

³⁷ Tom Ricks, *Review*, N.Y. TIMES BOOK REVIEW, Nov. 12, 2017, at 36.

³⁸ *United States v. Calley*, CM 426402, National Archives and Records Administration, Record Group 153.2.3.

³⁹ RICHARD HAMMER, *THE COURT-MARTIAL OF LIEUTENANT CALLEY* (1971).

⁴⁰ *Id.* at 50-55, 65-68.

⁴¹ MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2002).

⁴² *Id.* at 3.

⁴³ *Id.* at 42.

⁴⁴ LEDGER-ENQUIRER, *THE TRIAL OF LT. CALLEY* (1971).

⁴⁵ JOHN SACK, *LIEUTENANT CALLEY: HIS OWN STORY AS TOLD TO JOHN SACK* (1971).

⁴⁶ *Id.* at 89.

⁴⁷ John Sack, *The Concluding Confessions of Lieutenant Calley*, *ESQUIRE*, Sept. 1971, at 85.

⁴⁸ SACK, *supra* note 44, at 34-35.

⁴⁹ *Supra* note 21, at 227-28.

⁵⁰ THIRD U.S. ARMY, *PUBLIC AFFAIRS ACTIVITIES PERTAINING TO THE COURT-MARTIAL OF CAPTAIN ERNEST L. MEDINA* (1971).

⁵¹ MARY MCCARTHY, *THE SEVENTH DEGREE* (1974).

masterfully done and bring them to life in the pages of her book.

Finally, literature on Hugh Thompson is an important part of the story. *The Forgotten Hero of My Lai*⁵² is a biography that traces Thompson's life from his birth in Atlanta in 1943 through his 20-year career in the Army. Much of the book focuses on successful efforts to obtain the Soldier's Medal for him. This is the Army's highest award for non-combat valor, and Thompson ultimately received it in March 1998 for "saving the lives of at least 10 Vietnamese civilians during the unlawful massacre of noncombatants" at My Lai 4."⁵³

The Forgotten Hero of My Lai also contains a wealth of detail about the actions of Thompson's two helicopter crewmen, Larry Colburn and Glenn Andreotta, at My Lai 4. There also is a list of Vietnamese victims, provided by the Embassy of Vietnam. The victims are identified by name, gender and age; according to the Vietnamese government, 504 civilians were killed on March 16, 1968.⁵⁴

This review of literature on My Lai 4 is not exhaustive—there are other articles, monograph, and books on the topic, and more will no doubt be written. But as we mark fifty years since the killings at My Lai 4, it is worth re-examining the what, where, how and why of Lieutenant Calley, his platoon, and other individuals involved in the event.

⁵² TRENT AGERS, *THE FORGOTTEN HERO OF MY LAI* (1999).

⁵⁴ *Id.* at 223-26.

⁵³ *Id.* at 230.

MILITARY COMMISSIONS: TRIAL OF THE EIGHT SABOTEURS^{a1*}

General Myron C. Cramer

When your President asked me to talk about something and gave me the choice of subjects, I really didn't know just what to select. I much would have preferred that he would have told me what he would like to have me talk about, but being this is a lawyers' meeting and being that we have been through the trial of the eight saboteurs in Washington, I thought that probably you ladies and gentlemen would be interested in the legal aspects of that trial. Now, I have got to say at the outset that so far as the facts are concerned, the record of the trial has been ordered sealed by the President until the close of the war and those connected with the trial have been told not to disclose any of the facts concerning it. However, to all intents and purposes, I might say what you have read in the papers is the gist of the whole trial, where these eight men, who were trained in a sabotor school in Germany, came over to this country in two submarines, four of whom landed on Long-Island and the-others in Florida, with \$180,000 altogether in United States money, a lot of ammunition, secret paraphernalia for secret writing, and instructions on how to bomb bridges and munition plants and that sort of thing. They were speedily caught. They were tried. We even went through habeas corpus proceedings in the Supreme Court of the United States. And six of them were electrocuted and the other two sentenced to long prison terms, the terms being reduced by the President, all in the short time of two months and one day.

Our Commander-in-Chief has assured the American people that there will be no "blackout" of Democracy in this great country of ours. Our Anglo-American institutions that have been developed over a period of a thousand years are now held in the balance. Never in recorded history has civilization, as we know it, faced such a crisis. Lights go out in many parts of the world. The freedoms fought for and established by free men are being challenged on all sides. Democracy and totalitarianism are gripped in mighty battle and totalitarianism must be destroyed. Constitutional Government must find within itself the powers necessary to its own preservation. In total war, the rule of law rather than the rule of men, must be preserved. This contrast in philosophy of Government and in the rights of man is the world issue today.

In a critical period of war and national danger, it is the duty of the military establishment to protect and defend the nation. But this duty is exercised, under our form of Government, as a constitutional function. The war power, as Mr. Chief Justice Hughes once said, includes all that is necessary "to wage war successfully". It was by an exercise of the war power that the President brought the case of the eight saboteurs to trial before a Military Commission. These agents of the Nazi Government were apprehended, in the

guise of civilians, after they had secretly entered our lines. This was a violation of the law of war, and the Commander-in-Chief brought them before a tribunal competent to try such an offense.

Military Commissions are primarily war courts. They may sit in conquered territory over which we have established military Government, as in the Rhineland after the armistice; or, in domestic territory over which, because of war conditions, we have taken military control, as in Hawaii. They may also sit and try cases for violations of the law of war in domestic territory over which martial rule has not been established and where the courts and other civil functions of the Government are being carried on normally. The last was the situation existing at the time of the recent trial of the eight saboteurs in Washington.

In our history, one of the first instances of a trial by the military for an offense against the Law of War was the celebrated case of Major John Andre, Adjutant General of the British Army, in 1780. You will recall that this British officer had conspired with Benedict Arnold for the surrender of the post at West Point and, when captured while returning to his own lines in civilian clothes, made the somewhat novel defense that as he had a safe conduct passport from the traitor, Arnold, he should have been allowed to go free (Winthrop, *Military Law and Precedents*, 24 Ed. P. 666). The tribunal by which Major Andre was tried and found guilty was convened as a "Board" and was directed "to report a precise state of the case" with an "opinion of the light in which he (Andre) ought to be considered and the punishment that ought to be inflicted" (Winthrop, p. 518).

During the same year, Joshua Hett Smith was tried before a special court-martial, under a Resolution of Congress, for complicity in the Arnold conspiracy. A general court-martial, however, was convened by General Andrew Jackson in New Orleans during 1815 for the trial of Louis Louaillier, as a spy, and various other war crimes were tried before courts[-]martial during that same period.

As a part of his scheme of military Government in Mexico, General Winfield Scott set up two types of courts, in addition to courts-martial, for the trial of offenses. The first was a court for the trial of crimes such as murder, robbery, rape, etc., charged to have been committed by civilians in Mexico and was called a "Military Commission". The second type of court was denominated a "Council of War" and was established for the trial of offenses against the laws of war (Winthrop, p. 832). It will be noted that, although the offenses over which the first Military Commission had jurisdiction were those over which normally the civil courts have jurisdiction, the offenders over whom such jurisdiction extended were persons outside our armed forces.

With the advent of the Civil War, the two types of court used by General Scott were combined into one called thereafter a Military Commission and which received its first legislative recognition, by Congress, when it passed the act of March 3, 1863 (12 Stat. 736). Section 30 of this act

^{a1} Reprinted with permission of Washington Law Review, General Myron C. Cramer. *Military Commissions: Trial of the Eight Saboteurs*, 17 Wash. L. Rev. & St. B. J. 247 (1942).

* Address of the Judge Advocate General of the Army, given before the annual meeting of the Washington State Bar Association and Association of Superior Court Judges, September 25, 1942.

provided that in time of war, insurrections or rebellion, murder, robbery, arson, rape, larceny, etc., shall be punishable by a general court-martial or Military Commission, when committed by persons in the military service and subject to the Articles of War. Section 38 of the same act provided that all persons, which includes all persons within as well as without the military service of the United States, who in time of war or rebellion are found lurking or acting as spies in or about military establishments or elsewhere shall be tried by a general court[-]martial or a Military Commission. Several thousand such courts functioned during the Civil War, and the conspirators in the assassination of President Lincoln were tried by a Military Commission in 1865. Although Military Commissions have been referred to in statutes since that time, and although they are mentioned a number of times in our present Articles of War, there has been little attempt by the Congress to define definitely their jurisdiction or outline their procedure. In only three instances is jurisdiction of specific offenses directly conferred on Military Commissions by statute. These are the offenses of dealing in captured or abandoned property, relieving the enemy, and spying, found in Articles of War 80, 81 and 82, respectively. All three of these are war offenses and the last two confer jurisdiction by general court-martial to try any person, whether or not he is a member of our armed forces.

In addition to those cases in which jurisdiction is directly conferred, legislative recognition of the jurisdiction to try all offenses against the law of war is found in Article of War 15, which provides, among other things, that the Articles of War shall not be construed as depriving Military Commissions of jurisdiction over offenders or offenses that, by the law of war, are triable by such tribunals. The Congress, by these enactments, has made provision for the trial of offenders against the law of war, but has left to the discretion of the President, as Commander-in-Chief of the Army, the authority to convene such tribunals under such orders and regulations as will best serve the exigencies of the Military situation. Although Articles of War 81 and 82 confer concurrent jurisdiction for the offenders named therein on Courts-martial and Military Commissions, customarily persons in the military service have been tried by courts-martial, while those not in the military service have been tried by Military Commissions.

Laws of War are defined by Oppenheim in his treatise on "International Law" (6th ed. Vol. II, p. 179), as "the rules of Law of nations respecting warfare".

In his work "The Law of War" (p. 73), Risley said:

"* * * the Rules of War are pervaded by one grand animating principle—to obtain justice as speedily as possible at the least possible cost of suffering and loss to the enemy, or to neutrals, as the result of belligerent operations."

Many learned writers have discussed this subject, but suffice it to say, that as a result of centuries of experience, civilized nations have recognized that war is a temporary and abnormal condition, having for its purpose the settlement of specific disputes. It has been found that the long range ends of belligerents are best served by conducting their military operations within the limits of a fairly well defined sphere of

action. The rules, evolved from custom, in accordance with which nations have confined their operations within that sphere of action are the laws of war, and acts of warfare outside that sphere are offenses against the law of war.

The first re-codification of the laws of war was contained in Leiber's "Instructions for The Government of the Armies of the United States in the Field" promulgated in War Department General Orders 100, 1863, and said by Spaight in his "War Rights on Land" (p. 14) to be "not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative." The various international conventions have modified these instructions somewhat, but the Articles of the Hague and Geneva Conventions and the Rules of Land Warfare, by which our forces are governed today, are substantially the same as those originally promulgated in General Orders 100.

Trials of persons not in the military service by military tribunals outside the immediate field of battle have been few, and the body of case law with respect to such trials is small. Eliminating those cases growing out of martial law in connection with domestic disturbances, not amounting to war, very few court decisions on the jurisdiction and power of military tribunals remain. Of these, the leading case is *ex parte Milligan*, 4 Wall., 2, decided in 1866. Let us compare the facts and holding in that case with the recent saboteur cases of *United States ex rel Burger, et al v. Brigadier General Cox*. The facts of the Milligan case are simple: Lampdin P. Milligan had been a citizen of Indiana for twenty years before he was taken into custody by the -military authorities. He had not been a resident of one of the states in secession during the period of the Civil War or a member of the military forces of the Union. He was charged with conspiracy against the United States, affording aid and comfort to rebels against the authority of the United States, inciting insurrection, disloyal practices and violation of the laws of war. He was tried before a Military Commission, found guilty and was sentenced to be hanged. The sentence was duly approved and ordered executed.

There was then in force the act of March 3, 1863 (12 Stat. 755) which authorized the President to suspend the privilege of the writ of habeas corpus, and required the Secretary of War and the Secretary of State to furnish to the judges of the Federal district and circuit courts a list of the names of citizens of loyal states, held by authority of the President or either of such Secretaries as state or political prisoners, or otherwise than as prisoners of war, who resided in the respective jurisdiction of such judges or who may be deemed by such Secretaries to have violated any law of the United States in any of said jurisdictions. The act also provided that when after the furnishing of the name of such a person, a grand jury had convened and had terminated its session without finding an indictment, presentment or other proceedings, the prisoner should be discharged after taking the oath of allegiance to the United States and swearing to support the Constitution thereof, and to not thereafter in any way, encourage or give aid and comfort to the rebellion or its supporters.

Milligan's name had never been furnished to the judges as directed by the act, but a grand jury had convened months subsequent to his arrest and had terminated its session without finding an indictment, presentment or other

proceeding against him.

On these facts, Milligan presented his petition for a writ of habeas corpus to the Federal Circuit Court, wherein he prayed that he either be turned over to the civil authorities or be discharged completely. The case came to the Supreme Court of the United States on a certificate of division of the Circuit Court judges. The court was unanimous in holding that the writ should be granted and that Milligan should be discharged under the terms of the statute involved. But the majority of the court, in an opinion written by Mr. Justice Davis, went further and discussed the jurisdiction of Military Commissions in general and the constitutional limitations on the powers of Congress with respect thereto. Chief Justice Chase wrote the opinion for the minority, dissenting from some of the broad conclusions reached in the majority opinion. To attempt a summary of the majority opinion in that case, which covers twenty-five pages in the report, would be tedious. I have attempted, however, to abstract the legal basis on which the opinion seems to turn and to analyze its significance.

Reference by the court to the extent of the jurisdiction of military tribunals and the applicable constitutional guaranties, when considered separately, would seem to indicate that the jurisdiction of military tribunals over persons not in the military service is practically non-existent. On page 120 of the decision, the court said:

"The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

and at page 123:

"* * * this right (trial by jury) * * * is preserved to everyone accused of crime who is not attached to the Army, or Navy, or Militia in actual service."

The effect of the foregoing language, however, is qualified by other language, as follows:

"All other persons, (not in the military or naval forces) citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury." (p. 123)

and again:

"It can serve no useful purpose to inquire what those laws and usages (of war) are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the Government, and where the courts are open and their process unobstructed * * * and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service." (p. 121)

It would appear from this statement that the broad implications of the language first quoted were not intended to

apply, with respect to offenses against the law of war, to those who are not citizens, nor in a place where the courts are not open. Although the opinion is consistent in the view that trials of citizens, generally, by military tribunals may not be had when the courts are open and functioning in their normal course of business without assistance from the military, it does proceed to circumscribe the class of citizens to whom this is applicable.

On page 116, the court said:

"If he was detained in custody by order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service * * * then the court had the right to entertain his petition and determine the lawfulness of his imprisonment."

From this language it is manifest that the court would have had no right to entertain the petition of a prisoner of war and determine the lawfulness of his imprisonment. In dealing with the contention that Milligan was a prisoner of war, the court said, at page 131:

"It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there and had not been, during the late troubles, a resident of any of the states in rebellion * * * he was not engaged in legal acts of hostility against the Government, and only such persons, when captured, are prisoners of war."

By stating that Milligan was not a prisoner of war because he had not been a resident of any of the states in rebellion during the war, the court implied the contrary—that he might be so considered if he had resided in any of the states in rebellion.

I believe that the majority holding in the Milligan case may be summarized as follows:

No person who is a citizen of the United States who has not during war resided in enemy territory, who is not in the military service and who may not be considered a prisoner of war, may be tried by a military tribunal or denied the right to a jury trial for any crime or for any offense against the laws of war, in the United States, when the courts are open and functioning in their normal course of business without the aid or support of the military.

Since the Milligan case, no case has come before the Supreme Court involving the wartime jurisdiction of military tribunals. In the case of *United States ex rel Wessels v. McDonald* (265 Fed. 754), the Federal Court for the Southern District of New York, in 1920, refused to follow the Milligan case and held that jurisdiction existed in military tribunals for the trial of a German citizen apprehended in New York who was charged with being a spy. That case was taken to the Supreme Court of the United States, but was dismissed by stipulation before it was argued (256 U.S. 705 (1921)).

When, therefore, the eight saboteurs were apprehended by the Federal Bureau of Investigation, consideration was given to whether they should be brought to trial before a

Military Commission. The first question, naturally, was whether the facts fell within the interdiction of the Milligan case. As might be expected, there was no complete unanimity of opinion on this subject, but it was finally determined that trial by Military Commission was the proper course.

On July 2, 1942, the President issued a proclamation denying access to the civil courts, except under regulations prescribed by the Attorney General and approved by the Secretary of War, to all persons who are subjects, citizens or residents of any nation at war with the United States, or who give obedience to or act under the direction of any such nation, and who during time of war enter the United States through coastal or boundary defenses and are charged with committing, or attempting or preparing to commit sabotage, espionage, hostile or war-like acts or violations of the laws of war.

On the same day, the President as Commander-in-Chief of the army, issued an order convening a Military Commission for the trial of the eight alleged saboteurs. The same order, in accordance with military practice, named counsel for the prosecution and for the accused. Subsequently, separate counsel was named for one of the accused

From the outset, it was expected by the prosecution staff that counsel for the accused would seek a writ of habeas corpus in the civil courts, and, as six days intervened between the issuance of the order appointing the commission and the date set for the trial to begin, it was considered quite possible that a petition for the writ would be filed before the trial began. As you know, this was not done, and the trial was begun as scheduled.

The argument of preliminary questions and the taking of testimony occupied sixteen days—an average of two days for each accused. After both sides had rested, counsel for seven of the defendants filed a motion directly to the Supreme Court of the United States for leave to file a petition for a writ of habeas corpus. In the gravest times of war, our highest court convened quickly during midsummer in extraordinary session to hear and weigh the arguments of counsel for petitioners and Government, in a manner characteristic of its spirit and traditions. On the evening of the day before that set for a hearing on the motion before the Supreme Court, counsel for the seven accused presented a similar motion to a judge of the United States District Court for the District of Columbia, by whom it was refused *instanter*.

Counsel for the petitioners first took the position that jurisdiction for the issuance of the writ existed in the court as an aid to its appellate jurisdiction to review the action of the District Court. During the course of the two-day argument, however, the petitioners, after having informed the Supreme Court of their intention in this regard, perfected an appeal to the Circuit Court of Appeals for the District of Columbia from the order of the judge of the District Court and then filed a petition in the Supreme Court for certiorari before judgment in the Circuit Court of Appeals. An interesting sidelight on this phase of the case is the fact that the petition for certiorari was actually filed in the Supreme Court at 11:59 a. m., on July 31, 1942. The court convened one minute

later, granted the certiorari and announced its decision. The original motion in the Supreme Court was abandoned by the petitioners, with the consent of the court, and the decision of the court affirmed the order of the Judge of the District Court. Thus, the cause which included the presentation of a motion for leave to file a petition for the writ in the District Court, an appeal to the Circuit Court of Appeals, a petition for the writ of certiorari, argument and final decision—was disposed of by the civil courts within the brief space of approximately sixty-four hours.

Before attempting to analyze the issues of the saboteur cases in the Supreme Court, I should like to state briefly the contentions of each side and distinguish between the facts of these cases and those of the Milligan case.

In the saboteur cases the Government contended that all seven petitioners (one defendant not having sought the writ) were German nationals, and hence enemy aliens, who had entered into a theatre of operations in the United States by penetrating the lines of the armed forces of the United States, during a time of war, while in the uniform of the German Reich; who brought with them a large amount of money, certain explosives and the knowledge of means of secret communications; who thereafter assumed civilian guise for the purpose of spying, giving aid to the enemy and committing hostile acts against the armed forces of the United States; and that as a result of these alleged facts, the petitioners having violated the law of war and acts of Congress had no right to the issuance of the writ of habeas corpus.

Six petitioners admitted all the factual contentions of the respondent except allegations as to the purpose of entry and the existence of a theatre of operations at the place of entry. These six contended that they were entitled to the writ of habeas corpus on the following grounds: The President's proclamation of July 2, 1942, was invalid; the order appointing the commission was unconstitutional and contrary to statute; the commission had no jurisdiction of the offenses charged, or of the persons of the petitioners, and had in many ways acted contrary to law in its proceedings in violation of claimed "constitutional" rights of the petitioners; and finally that any offenses which they might have committed were cognizable by civil courts by which courts they were entitled to trial. The seventh petitioner, in addition to the contentions of the other six, contended that he was not an enemy alien, but a citizen of the United States.

The Government urged that there were at least three factors by which these saboteur cases could be distinguished from the Milligan case. One difference, admitted by all parties, was that the petitioners all resided in enemy territory during the present war and entered the United States on a war vessel of the enemy power. Milligan had never resided elsewhere than in Indiana for the duration of the Civil War and there was no evidence that he had been in direct contact with the states in rebellion.

Secondly, six of the petitioners were admittedly non-citizens and enemy aliens, whereas Milligan was a citizen of the United States and of the loyal State of Indiana—presumably natural born. The seventh petitioner had become a citizen of the United States by derivation, that is, by naturalization of his father, prior to our entry into the war.

There was evidence, however, and the Government so contended, that his subsequent actions constituted a forfeiture of citizenship under our nationality laws.

A third distinguishing factor was the contention of the Government that the eastern seaboard of the United States was a theatre of operations. The existence of such a theatre of operations was vigorously denied by the petitioners. The court in the Milligan case expressly took judicial notice that there was no theatre of operations in Indiana where Milligan was arrested and tried.

In addition to the question of whether the Milligan case is a precedent for these cases, there were at least ten other possible issues presented to the court. Categorically, these were:

1. Are invading alien enemies entitled to access to the courts in the absence of denial of such right by Executive action?

2. May the President deny alien enemies, within the terms of his proclamation, access to the courts?

3. May the President deny citizens, within the terms of his proclamation, access to the courts?

4. Does a citizen enemy have any more rights than an alien enemy?

5. Are the petitioners within the terms of the President's proclamation?

6. Is the eastern seaboard of the United States a "theatre of operations"?

7. Are the offenses charged within the jurisdiction of a Military Commission?

8. Does a Military Commission have jurisdiction over the persons of the petitioners?

9. Was this Military Commission legally constituted?

10. Were any rights of the accused invaded by the proceedings of the Military Commission and if so, are such invasions reviewable on habeas corpus? In particular, the petitioners charged that their rights were violated by two rules prescribed by the President, one, authorizing a conviction or sentence by concurrence of two-thirds of the members of the Commission; and the other, authorizing the Commission to receive any evidence which would have probative value to a reasonable man.

The actual holdings of the court in its decision were:

1. The charges alleged offenses which the President could order tried before a Military Commission.

2. The Military Commission was lawfully constituted.

3. The petitioners were held in lawful custody for trial before the military Commission and did not show cause for being discharged by writ of habeas corpus.

The court announced that its formal opinion would be handed down later. To date this has not been done.

Of all the issues raised, only the three relating to the jurisdiction of the offenses and persons of petitioners and the lawfulness of the constitution of the Commission, can unequivocally be answered in the affirmative by the decision rendered.

Whatever the opinion of the Supreme Court may state, its decision has already dissipated whatever doubt may have existed as to the legal power of the Commander-in-Chief to deal summarily with those who dare cross and come behind our lines for hostile purposes. The enemy must be dealt with as speedily and effectively on the home front on the battle front. Under our form of Government, the rules of law, even in the gravest of times, must and do remain intact. Even an enemy shall be done justice, but the exigencies of war demand that the administration of that justice be swift as well as fair. So has held our highest court in the case of the eight saboteurs.

For these cherished principles, this nation has been always ready to fight. The question is again—Whether we and our posterity shall live as free men or perish as slaves. But, of what avail, all our labors and sacrifices, if our purpose were not, and if out of this struggle came not, equal justice for all under the law? Throughout the centuries, the lawyer has proved himself the vigilant champion of the rights of man. The lawyer's duty has never been more pressing than today. We all fight that the lamp of freedom may ever burn. In your daily efforts you must toil and sacrifice that democracy may live, that its principles may never die. In war, as in peace, law in this nation is never passive. Preserve and extol its virtues. The battle is difficult; but this country has never failed in any task to which it has set its hand, and no more worthy task has it ever had. The spirit of a free people does not die or surrender. This war must and will be won so that constitutional government and the rule of law, rather than the rule of man, shall not perish. (Applause)

The Defense of Superior Orders^{a1}

Aubrey M. Daniel, III^{**}

Introduction

The court-martial and premeditated murder conviction of First Lieutenant William L. Calley, Jr., for his participation in the My Lai Massacre on March 16, 1968, was one of the most controversial criminal trials, either military or civilian, in the history of this nation. Although the trial brought to the surface many troubling aspects of this country's conduct of the Vietnam War, the primary focus of the controversy centered on the question of whether an American soldier should be held criminally accountable for his participation in the mass execution of unarmed and unresisting men, women, children and babies taken captive by him during the course of a military operation, if he did so in obedience to orders from a superior officer. Highlighting the issue, one writer who covered the trial wrote:

Hovering over the My Lai Massacre cases is a storm cloud of menacing implications from a question that many professional soldiers would just as soon ignore:

Is the modern-day GI supposed to be an unquestioning myrmidon to his leaders—or a reasoning individual with an obligation, and the guts, to disobey an order he decides is illegal.

Until My Lai publicly revived the question, it was widely assumed that the Nuremberg Trials after World War II had issued the universal answer and finally put the matter to rest. The principles of Nuremberg which were adopted by the United

Nations, gave international recognition to the concept that an individual may be held responsible for a war crime even if he committed it under orders from his superior or his government.

Yet it's become increasingly clear that a lot of Americans either are not aware of that principle of international law, do not agree with it, or fail to see in it any relevance to what happened at My Lai 4 on March 16, 1968.¹

In defense of his conduct in the village of My Lai 4, Lieutenant Calley testified:

Well, I was ordered to go in there and destroy the enemy. That was my job on that day. That was the mission I was given. I did not sit down and think in terms of men, women, and children. They were all classified the same, and that was the classification we dealt with, just as enemy soldiers.

....
I felt then and I still do that I acted as I was directed and I carried out the orders that I was given, and I do not feel wrong in doing so, sir.²

When the military court rejected this plea and sentenced Lieutenant Calley to life imprisonment, the American public reacted in overwhelming opposition to the conviction. This resulted in President Nixon's intervention on April 1, 1971, and his order to release Lieutenant Calley from confinement one day after the sentence had been imposed.³ At least part of the reason for the public response was evidenced by the

^{a1} Reprinted with permission of the University of Richmond Law Review, Aubrey M. Daniel, III, *The Defense of Superior Orders*, 7 U. Rich. L. Rev. 477 (1973).

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^{**} I would like to gratefully acknowledge the extremely competent and diligent assistance of Mr. David Zisser, a second-year law student at the Georgetown University Law Center, in the research and preparation of this article.

¹ Green, *In the Heat of Battle, Orders Are Orders, But When Can a Soldier Say No?*, *The National Observer*, January 18, 1971, at 24.

² Testimony of Lieutenant William L. Calley, Jr., Ft. Benning, Georgia, February 22, 1971. Based on the testimony of Lieutenant Calley and other evidence concerning the orders for the operation, the military judge instructed the jury on the defense of obedience to orders. His instructions on this issue are set out in full in an Appendix to this article and are discussed more fully at p. 504 *infra*. Lieutenant Calley's conviction was affirmed by a panel of the United States Court of Military Review on February 16, 1973. CM 426402, Calley, — *CM.R.* — (1973). The court found the trial judge's instructions on obedience to orders to be entirely correct and further observed, after a thorough examination of the evidence of the orders given, that if the jury found that Calley had fabricated his claim, their finding had abundant support in the record.

³ A poll was taken by George Gallup to assess the public's reaction. The questions and answers were as follows:

Do you approve or disapprove of the court-martial finding that Lt. Calley is *guilty of premeditated murder*?

Approve 9%

Disapprove: 79%

No opinion: 12%

Do you disapprove of the verdict because you think what happened at My Lai was not a crime or because you think others besides Lt. Calley share the responsibility for what happened?

[Based on those who disapproved]

Not a crime: 20%

Share responsibility: 71%

No opinion: 9%

Do you think Lt. Calley is being made the scapegoat for the actions of others above? him or not?

Yes: 69%

No: 12%

No opinion: 19%

Do you approve or disapprove of President Nixon's decision to release Lt. Calley pending appeal of his conviction?

Approve: 83%

Disapprove: 7%

No opinion: 10%

Do you think the incident for which Lt. Calley was tried was an isolated

poll conducted by Louis Harris in January of 1970, which sought to determine the public's attitude toward the defense of superior orders. Those questioned were asked to put themselves in the positions of soldiers ordered to shoot old men, women and children. When asked if they would consider it "more right" to follow the orders or "more right" to disobey them, 37 percent selected the first alternative and 45percent the latter. Two-thirds of those sampled thought soldiers who participated in the massacre "should be let off if they proved they did the killing under orders." The sample's attitude toward the Nuremberg principle of individual culpability was equally divided, with 39 percent agreeing and 39 percent in disagreement. This represents a dramatic change in public opinion on this issue since 1947, the year the Nuremberg Trials were held, when the vast majority of the public felt that the Nazi war criminals should not escape punishment because of obedience to orders.⁴

It is not the purpose of this article to undertake an in-depth analysis of the reasons for this change in attitude or the public's reaction to the Calley verdict, but rather, in light of the case and the interest it has aroused, to examine the historical development and precedent for the defense of superior orders in American jurisprudence, and to discuss some of the practical problems involved in the application of that standard.

Historical Development of the Standard

Despite an apparent popular belief, the defense of obedience to superior orders, *i.e.*, that the acts charged to a defendant were committed pursuant to orders from military or civilian superiors to whom a duty of obedience was owed, was not first raised and litigated at the Nuremberg Trials, and is not only a principle of international law but a recognized principle of American jurisprudence. The effect of superior orders on an individual's responsibility for his conduct, and

incident or a common one?
 Isolated: 24%
 Common: 50%
 No opinion: 26%

New York Times, April 4, 1971, at S6, col. 3, Gallup.

⁴ On April 27, 1947, a poll was conducted in which the sample was asked,

After the war, what do you think should be done with members of the Nazi party who defend themselves by claiming that they committed crimes under orders of higher-ups in the Party?

The following responses were obtained:

None of our affair	2%
Trials	19%
Re-education	3%
Imprisonment	42%
Kill them	19%
Other answers	15%

AIPO Poll, quoted in W. Bosch, Judgement on Nuremberg, 91-92 (1970). Compare also Bosch's study showing that 75% of the American public, 69% of the newspaper columnists, 73% of the newspapers and 75% of the periodicals approved of the Nuremberg trials. *Id.* at 109.

the moral question implicit within that concept, *i.e.*, under what circumstances will an individual be deemed to be an unthinking instrumentality of the state, relieved of his normal obligation to exercise individual thought and make appropriate moral decisions, is one that has been debated for centuries. The earliest articulations of views came not from courts of law, but from philosophers. Saint Augustine observed:

[A]n unjust order may perhaps render the king responsible, while the duty of obedience preserves the innocence of the soldier.⁵

Others were less willing to allow individuals to avoid the consequences of their acts. Grotius observed:

If those under the rule of another are ordered to take the field, as often occurs, they should altogether refrain from so doing if it is clear to them that the cause of the war is unjust.⁶

As the philosophers have been unable to agree on the superior-orders defense, so too have the courts been of differing minds. The earliest decisions had little difficulty in finding that obedience to superior orders was not a defense; however, these cases did not deal exclusively with military considerations, and political circumstances surrounding the trials doubtlessly influenced the decisions. For example, in 1474 Peter von Hagenbach, a German governor, tried for perpetrating a reign of terror in the name of Duke Charles "The Bold" of Burgundy, raised the plea: "Is it not known that soldiers owe absolute obedience to their superiors?"⁷ The plea was not successful and *van Hagenbach* was be-headed.

And, in *Axtell's Case*,⁸ Axtell, the commander of the guards at the execution of Charles I, was tried for and convicted of murder and treason despite his plea that all "he

⁵ Quoted in Marcin, *Individual Conscience Under Military Compulsion*, 57 A.B.A.J. 1222 (1971).

To the same effect, the Municipal Law of Rome: "He does the injury they say who orders that it be done; there is then no guilt on him that has to obey," and Tacitus: "To the Prince the gods have given the supreme right of decision; for a subject there remains the glory of obedience." *Id.* at 1222-23.

⁶ *Id.* at 1223. Also, Francisci de Victoria, a Sixteenth Century Spanish theologian and professor, wrote, "if a subject is convinced of the injustice of the war, he ought not to serve in it, even on the command of a prince." Victoria, ON THE LAW OF WAR, 173 (Classics of International Law ed., 1917).

⁷ SCHWARTZENBERGER, INTERNATIONAL LAW, 308-10 (2d ed., 1949).

⁸ 84 Eng. Rep. 1060 (1660). See also *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (C.P. 1774), where Lord Mansfield recalled a case in which a Naval Captain had been found civilly liable for following the orders of the Admiral when he pulled down the houses of some settlers on the coast of Nova Scotia, noting that the representatives of the Admiral defended the cause and paid the damages; and *Keighly v. Dell*, 176 Eng. Rep. 781 (C.P..1866).

did was as a soldier, by the command of his superior officer, whom he must obey or die.” In rejecting this defense, the court reasoned that:

his superior was a traitor, and all that joined him in that act were traitorous and did by that approve the treason; and where the command was traitorous, there the obedience to that command is also traitorous.⁹

Although not expressed in these terms, the principle underlying the *von Hagenbach* and *Axtell* decisions is that while it is the soldier's duty to obey *lawful* orders, the soldier also has a duty to disobey unlawful orders, and his failure to do *so ipso facto* will subject him to criminal accountability. This statement of the legal standard is expressive of the standard as it was first adopted in American jurisprudence soon after the birth of the nation. The earliest American decision involving the defense of superior orders was a civil case, *Little v. Barreme*,¹⁰ which arose out of the hostilities between France and the United States at the end of the eighteenth century. Congress had passed a non-intercourse act that authorized the President to order the Navy to seize any American vessel bound to a French port. The President implemented the act by an executive order that exceeded the Congressional grant of authority by ordering Navy captains to seize American vessels bound to and from French ports. Captain Little, relying upon the executive order, seized a Danish ship not bound to a French port, and was subsequently sued for damages by the ship's owners. Little attempted to rely on the President's orders in defense of his action. Chief Justice Marshall, in rejecting the orders as a defense, confessed that his initial bias was that the orders of the executive, while not giving a right, might provide Captain Little with an excuse, because

[i]mplicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appears to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them.

However, he rejected his initial bias and held, as a matter

of law, that

the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.¹¹

Chief Justice Marshall of course recognized, in wrestling with the question, the inherent problem with deciding whether a superior order should provide an absolute defense. That is,

when a soldier is confronted with an [illegal] order to perform an act constituting a criminal offence, the demands of military discipline, as expressed in the duty of obedience to superior orders, come into conflict with the imperative need to preserve the supremacy of the law as manifested in the proscriptions of criminal law: military discipline requires unflinching compliance with orders; the supremacy of law proscribes the commission of criminal acts.¹²

The rule of *Little v. Barreme* was first applied in a criminal case in *United States v. Bright*,¹³ where a state militiaman, pursuant to orders from the Governor of Pennsylvania, interfered with a federal marshal in the performance of his duties. The court rejected the militiaman's defense of superior orders, citing *Little v. Barreme* and saying:

In a state of open and public war, where military law prevails, and the peaceful voice of military law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of the country.¹⁴

As one can see, these early decisions dogmatically rejected the superior-orders defense if the order on which the subordinate relied was illegal in the abstract sense, without regard to the order's appearance of legality to the subordinate. The first decision to include within the standard a consideration of the state of mind of the actor and the reasonableness of his reliance upon the order was *United*

⁹ 84 Eng. Rep.1060 (1660).

¹⁰ 1 U.S. (2 Cranch) 465,467 (1804).

¹¹ *Id.*

¹² Y. DINSTEIN, THE DEFENSE OF OBEDIENCE TO SUPERIOR ORDERS IN INTERNATIONAL LAW 6.

¹³ 24F. Cas.1232 (C.C.D.Pa.1809).

¹⁴ *United States v. Bright*, 24 F. Cas. 1232, at 1237-38 (1809). Other cases, along with *Bright*, recognized that some sort of indulgence should exist for the military, given the exigencies of the military. See *Martin v. Mott*, 25

U.S. (12 Wheat) 537 (1827). In *United States v. Bevens*, 24 F. Cas. 1138 (C.C.D. Mass. 1816), the court recognized the importance of discipline and the fact that civilian tribunals could not fully understand military needs, and felt therefore that courts should not apply too exacting a standard to military orders. But, the court further said: [T]his can only be when those rules and orders are consistent with law, and not when they are against the express provisions of law, and against natural justice. *Id.* at 1140. However, many cases did not even give lip service to special rules for the military, *United States v. Jones*, 26 F. Cas. 653 (C.C.D. Pa. 1813): No military or civil officer can command an inferior to violate the laws of his country; nor will such a command excuse, much less justify the act. . *Id.* at 657; and *Hyde v. Melvin*, 11 Johns (N.Y.) 521 (1814).

*States v. Jones.*¹⁵ “In *Jones*, the crew of an American privateer was charged with piracy for stopping a neutral vessel, assaulting her captain and crew, and stealing certain merchandise. The court rejected the claim that the crew acted pursuant to the orders of the captain:

This doctrine, equally alarming and unfounded, . . . is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify, the act. . . . We do not mean to go further than to say, that the participation of the inferior officer in an act which he knows, or ought to know to be illegal, will not be excused by the order of his superior.¹⁶

Unlike the standard enunciated in *Little v. Barreme* and *United States v. Bright*, here the court enunciated what is, in effect, the recognized standard today, *i.e.*, that obedience to a superior order is not a defense if the subordinate knows or ought to know it is illegal. *Jones* considered not only the order in terms of its abstract legality, but the order in relation to the act it commanded as viewed by the subordinate. By focusing attention on the state of mind of the actor and the surrounding circumstances, a reasonable belief in the legality of the orders would exculpate the defendant by negating the requisite *mens rea*.¹⁷

Later, in *Mitchell v. Harmony*,¹⁸ another civil case, the Supreme Court followed the rule enunciated in *Little v. Barreme*, that an order to do an illegal act was an illegal order and would not excuse the subordinate's performing the act. However, the Court recognized that, depending on the circumstances, military necessity might purge the act of its illegality.

As one might expect, the Civil War prompted consideration of the problems involved with the superior-orders defense. At the outset of the Civil War, President Abraham Lincoln approved the promulgation by the War Department of “Instructions for the Government of the Armies of the United States in the Field,” by Francis Leiber,

a professor of law and political science at Columbia University. Leiber's “Instructions” represent the first codification of international law relative to prisoners of war ever issued by a government as a directive to its armed forces in the field.¹⁹ Although the regulations did not deal expressly with the question of superior orders, Dr. Leiber recognized the underlying principle:

Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.²⁰

Several cases arose out of the Civil War that underscored Dr. Leiber's statement of individual accountability. In one of the most articulate and frequently cited cases of this period, the court found no error in a lower court instruction that:

Any order given by an officer to a private, which does not expressly and clearly show on its face or in the body thereof its own illegality, the soldier would be bound to obey and such an order would be a protection to him.²¹

Another case of the same vintage worthy of consideration, both for reasoning and result, is *State v. Sparks*,²² an action for contempt of court against Major Sparks, who, pursuant to orders, ignored a writ of habeas corpus and removed two individuals from the custody of the court. The court stated that:

[T]here is nothing better settled, as well by the military as the civil law, than that neither officers nor soldiers are bound to obey any illegal order of their superior officers; but on the contrary, it is their bounden duty to disobey them. The soldier is still a citizen, and as such is always amenable to the civil authority. We are of the opinion, therefore, that the orders of Major General Magruder can furnish the defendant, Major Sparks, no justification for his forcible interference with the jurisdiction of this court, and settling at naught its lawful order.²³

¹⁵ 26 F. Gas. 653 (C.C.D. P., 1813).

¹⁶ *Id.* at 657-58.

¹⁷ The doctrine of *Jones*, was later reaffirmed in *Despan v. Olney*, 7 F. Cas. 534 (C.C.D. 1852). The case involved an action for false arrest brought by a civilian against a soldier who had arrested him pursuant to the orders of a superior. The court instructed the jury: I do not think the defendant was bound to go behind an order, thus apparently lawful, and satisfy himself, by inquiry, that his commanding officer proceeded upon sufficient grounds. To require this, would be destructive of military discipline, and of necessary promptness and efficiency .of the service. *Id.* at 535

¹⁸ 13 How. 115 (1851).

¹⁹ This was published as General Order No. 100 of the Union Army on April 24, 1863, and it is reproduced in JAGS Text 20-7, *Law of Land Warfare* (The Judge Advocate General's School, U.S. Army, 1943), 155-86.

²⁰ T, TAYLOR: NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 41

(1970).

²¹ *Riggs v. State*, 3 Coldwell 85, 91 Am. Dec. 272, 273 (1866). The charge went on to say:

But: an order illegal in itself and not justified by the rules and usages of war, or in its substance being clearly illegal so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order. *Id.* at 273.

The court in *Riggs* also held that a soldier who was ordered to join a detachment would not be vicariously liable for a crime committed by another member of the detachment, as a co-conspirator or as an aider or abettor. *Id.* at 275,

²² 27 Tex. 627 (1864).

²³ *Id.* at 633. To get a sense of the confusion of the cases, compare *Commonwealth v. Holland*, 1 Duv. (Ky.) 182 (1864) with *Jones v.*

But the court also said that if Sparks were acting under orders, that fact would go far to excuse him, and therefore Major General Magruder would be the principal offender. In *McCall v. McDowell*,²⁴ the defendant soldier was sued for false imprisonment for having arrested and imprisoned the plaintiff as part of an effort to quell an outbreak of riots in California following President Lincoln's assassination. The defendant pleaded in his defense that he had acted pursuant to a general order from his commanding officer. The court held for the defendant, saying:

Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the laws should excuse the military subordinate when acting in obedience to the orders of his commander.²⁵

The court would accept the superior order as a defense except where the order is as a defense so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed, by whomever given.²⁶

The most famous case of the period was the trial of Major Henry Wirz, the commandant of the Confederate prisoner-of-war camp at Andersonville, Georgia, who was brought to trial for the inhumane conditions that existed at Andersonville. *Wirz* raised the defense of obedience to superior orders, claiming that he suffered the conditions at the prisoner-of-war camp to exist pursuant to the orders of John H. Winder, the officer in charge of Confederate prison camps. The court-martial rejected *Wirz's* claim, found him guilty, and sentenced him to hang.²⁷

By the turn of the century, the courts, with increasing

frequency, began using the standard of apparent illegality, first held out in *United States v. Jones*, where actual knowledge of illegality was lacking, to judge the legality of the order followed in determining whether the order would exonerate the defendant.²⁸ In *In re Fair*, where a soldier shot another soldier escaping from custody, the court said:

While I do not say that the order given by Sergeant Simpson to petitioners was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If then, the petitioners acted under such orders in good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the state.²⁹

While by this time the law seemed well established in the civilian courts that, although it was a soldier's duty to obey lawful orders, he was under a duty not to obey orders he knew to be unlawful or that were apparently unlawful, a dramatic change took place in military law with respect to the individual soldier's responsibility for violations of the law of war. In 1914 the Army published its successor to the Leiber "Instructions," the *Rules of Land Warfare*, which expressly placed the responsibility for violations of laws of war on those giving the illegal orders, not on the subordinates who carried them out:

Individuals of the Armed Forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under

Commonwealth, 1 Bush (Ky.) 34 (1866). In *Holland*, the issue was whether the taking of a civilian's horses by the military, in execution of a military order, was a crime. The court said that it was, noting that "[a]rgument to prove this would be superfluous," and gave no citations. In *Jones*, the defendant took slaves belonging to a civilian to another town, where they subsequently became lost to the owner. The court found against the defendant, citing *Mitchel* for the propositions that: 1) because an order to do an act forbidden by statute is an illegal order, there is no defense of superior orders; and 2) property may be converted for the military, but there must be an emergency. *Commonwealth v. Holland* was not cited.

²⁴ 15 F. Cas. 1235 (C.C.D. Calif. 1867).

²⁵ *Id.* at 1240.

²⁶ *Id.* at 1241.

²⁷ G.C.M.O. 607 of 1865. Ex. Doc., No. 23, H.R. 40th Cong., 2d Sess. The *Wirz* trial is discussed in depth in CHIPMAN, THE TRAGEDY OF ANDERSONVILLE, TRIAL OF CAPTAIN HENRY WIRZ, THE PRISON KEEPER (1911).

²⁸ This was not a unanimous view, however. In *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911), the court said that although the general rule was that orders reasonably believed to be legal would be a defense, we cannot consent that all military orders, however reasonable they may appear, will afford protection in the civil or criminal courts of the state. *Id.* at 490-91.

²⁹ 100 F. 149, 155 (1900). In a case with almost identical facts as *Fair*,

United States v. Clark, 31 F. 710 (1887), the court said: As there is no reason in this case to suppose that *Clark* was not doing what he conceived to be his duty, and the act was not so cruelly illegal that a reasonable man might not suppose it to be legal... and as there was an entire absence of malice, I think he ought to be discharged. *Id.* at 717.

Another case of this period, *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165 (1903), arose out of a United Mine Workers strike, which was accompanied by much violence, and resulted in the calling out of the National Guard. *Wadsworth*, on sentry duty with orders to shoot to kill, shot one *Durham*, who did not obey several commands to halt. The court quoted with approval from *Hare*, *Constitutional Law*:

A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point, a soldier or member of a *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well-informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt.

whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.³⁰

Thus, obedience to orders became an absolute defense.

This provision remained in effect throughout World War I, a war in which there is an absence of any record of the prosecution of American military personnel for the unlawful execution or maltreatment of prisoners of war or for any other violations of the law of war.³¹ One can only speculate whether this was the result of the provisions of the 1914 *Rules of Land Warfare* then in effect, or if in fact there, were simply no incidents that would have justified prosecution.

When World War II began, the law of superior orders in this country was in a state of confusion as a result of the conflict between the 1914 *Rules of Land Warfare* and the rule recognized in the civilian courts.³² The military rule was changed, however, on November 15, 1944, by a revision to the *Rules of Land Warfare*, by adding Section 345(1):

Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to the order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may

also be punished.³³

This change in the standard from recognizing obedience to orders as an absolute defense to letting it be considered a factor in determining individual responsibility was the first step in a return to the standard that had existed in the military prior to the adoption of the 1914 Rules of Land Warfare. The conclusion seems inescapable that this change was brought about, at least in part, by the Allied attitude toward the Nazi atrocities and the anticipated prosecutions for those violations of the laws of war.

At Nuremberg, the world's attention focused on the issue of the defense of superior orders in a way that was unprecedented in history; and Nuremberg produced the most stringent standard to which American jurisprudence has ascribed since *Little v. Barreme*. While the 1944 *Rules of Land Warfare* provision permitted the fact of obedience to superior orders to be considered as a defense, the War Crimes Tribunal specifically rejected obedience to superior orders as a defense, and made a sub-ordinate absolutely liable for his actions. The Charter of the International Military Tribunal provided in Section II, Article 8:

The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.³⁴

³⁰ *Rules of Land Warfare*, USA, Chapter X, Section 366 (1914). This change apparently resulted from a similar change in the BRITISH MILITARY MANUAL, which, in 1913, incorporated a similar provision. EDMONDS AND OPPENHEIM, BRITISH LAND WARFARE, AN EXPOSITION OF THE LAWS AND USAGES OF WAR ON LAND FOR THE GUIDANCE OF OFFICERS OF HIS MAJESTY'S ARMIES (1913). At the time this change was put into effect, British case law paralleled American decisions on this subject. See, *Ensign Maxwell*, 2 BUCHANAN, REPORTS OF REMARKABLE TRIALS, 3, 58 (1813); *Regina v. Smith*, 17 Cape.

Reports 561 (South Africa, 1900).

³¹ While a review of the court-martial orders at the National Archives fails to reveal any prosecutions of American personnel for the killing or maltreatment of German soldiers, Private Leo Renn was tried and acquitted for killing Edmond Poldus, a Belgian stevedore who failed to stop when Renn, while on guard duty in France, ordered Poldus to halt. The basis for the acquittal was that he had acted in "obedience to lawful orders." G.C.M.O. No. 2, August 17, 1917; Court-Martial Record No. 105620.

³² The applicable rule as enunciated in the 1914 *Rules of Land Warfare* was republished in the 1940 edition and remained unchanged, BASIC FIELD MANUAL (FM27-10) § 347 (1940). It is uncertain how many prosecutions of American soldiers for unauthorized killing of aliens arose out of World War II, but there were at least two courts-martial for the killing of enemy prisoners by American G.I.s, who claimed they were acting pursuant to the orders of General George S. Patton, Jr., in the "Massacre of Scoglitti" during the invasion of Sicily in 1943, discussed more fully at p. 498 *infra*.

³³ Change I, 15 November 1944, to the *Rules of Land and Warfare*, ¶ 345.1. As in 1914, the British took the lead in this change and amended their Field Manual in April 1944 to provide:

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent government or

of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it in principle confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity Amendment No. 34, *British Field Manual. I WAR CRIMES TRIALS*, Appendix II, at 150 (1948).

³⁴ Charter of the International Tribunal, I Trials of War Criminals at XII. The provision for the military tribunals trying the Japanese war criminals was essentially the same.

Charter of the International Military Tribunal for the Far East, April 26, 1946: Section II, Article 6. Responsibility of the Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires. Reprinted at R. MINEAR, VICTOR'S JUSTICE, THE TOKYO WAR CRIMES TRIAL 187

In light of the sheer magnitude of the atrocities reviewed at Nuremberg, it is not surprising that the Tribunal made an attempt to cut through the abstract legalisms surrounding all the defenses raised and focus on what was really at issue: under what circumstances should those who participated in the Nazi atrocities be relieved of responsibility for their actions? The Tribunal stated:

The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.³⁵

This test of “moral choice” led to the requirement of duress as a necessary part of the defense of superior orders.³⁶ However, it was clearly pointed out that if duress was pleaded, the accused must establish that he had a reasonable fear of immediate death or serious bodily harm. It was not enough for the accused to claim that the coercion inherent in an order, and in the superior-subordinate relationship, even in the military, left him without a moral choice:

Superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank.... The test to be used is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order.³⁷

Clearly, the Nuremberg standard of obedience to superior orders is a much stricter standard than any applied by American courts since *United States v. Jones* allowed an apparently legal, though actually illegal, order to be a defense. The original American position on the defense of obedience to orders before the adoption of the Charter and Article 8 was much closer to the traditional American view. In his report to the President just prior to the Nuremberg Trials, Justice Robert H. Jackson wrote:

(1971).

³⁵ *United States v. Ohlendorf* (the Eisensatzgruppen Case) 4 N.M.J. 470.

³⁶ Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious bodily harm in order to avoid committing a crime which he condemns. *Id.* at 480.

The plea of duress, while seemingly a natural companion to the plea of obedience to superior orders, has not been raised often in the obedience to superior orders cases. Although there is undoubtedly some coercion inherent in the mere giving of an order by a superior to a subordinate, it is necessary, to make out a defense of duress, that there be sufficient coercion to put the actor in a reasonable apprehension of immediate death or serious bodily harm. *E.g.*) *United States v. Fleming*, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957), *United States v. Olsoo*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957). Since an officer cannot summarily execute a subordinate for failure to obey an order, the mere fact of an order, without more, would not seem to meet the duress standard. Although a fact situation could certainly arise where the subordinate is put in a reasonable fear of immediate death, such as where an order is given at gunpoint, the defense of duress would be made out without reference to the giving of an order. Therefore, although the two defenses may *theoretically* overlap, in reality duress must be seen as a separate defense which requires its own special fact situation.

There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out.... An accused should be allowed to show the facts about superior orders. The tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no import at all.³⁸

The principle of a defense to superior orders was included in the American drafts of Article 8 as a “defense per se” and not merely as a factor that would mitigate punishment. However, the Soviet Union opposed the use of the defense of obedience to orders even in mitigation, and the United States withdrew its proposal for the “per se defense” under Soviet pressure.³⁹

Thus, the international law rule, as expressed by the Nuremberg standard, was quite different from and much stricter than the existing American rule.⁴⁰

Following World War II, Congress enacted the Uniform Code of Military Justice, which became effective on May 31, 1951.⁴¹ While none of its provisions deal with the defense of superior orders as such, the *Manual for Courts-Martial, United States, 1951*, which contains the rules of procedure and evidence in court-martial proceedings, contained a specific provision relating to the defense of orders, providing that:

[T]he acts of a subordinate done in good faith compliance with his supposed duties or orders are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of authority, or the order is such that a man of ordinary sense and understanding would

³⁷ *United States v. Ohlendorf*, 4 N.M.J. at 480.

³⁸ Report of Robert H. Jackson to the President, released by the White House on June 7, 1945, Department of State, *Trials of War Criminals*, Publication 2420 (1945) at 3-4.

³⁹ Y. DINSTEN *supra* note 10, at 116-17. Dinsten calls this withdrawal “remarkable.”

⁴⁰ Universal application of the Nuremberg rule of absolute liability would totally ignore the interest that a state has in maintaining a military that can expect immediate obedience of at least apparently legal orders, which is essential to the efficient functioning of the military. The present American rule of manifest illegality, bottomed in the principle of lack of *mens rea*, accommodates both society's interest in controlling individual action and the interest of having an effective military, and seems to be a more reasonable, though less strict, standard.

⁴¹ Act of May 5, 1951, Pub. L. No. 81-506, Ch. 169 § 1, 64 Stat. 108 (codified at 50U.S.C.) §§ 551-736. It should be noted at this point that through this enactment Congress established the military judicial system providing for an intermediate tribunal for each service, designated Boards of Review, and the United States Court of Military Appeals. Decisions of these tribunals have since been published in the Court- Martial Reports.

know it to be illegal.⁴²

The Korean War, which closely followed the adoption of the Uniform Code of Military Justice, once again gave rise to consideration of the defense of superior orders in the case of *United States v. Kinder*,⁴³ probably the leading reported military case on the issue of superior orders. Airman Thomas F. Kinder, while on sentry duty at an ammunition dump 300 miles south of the battle line, captured a Korean intruder. Kinder transferred custody of the Korean to Corporal Robert C. Toth, who, while taking the Korean to the guard house, pistol-whipped him, rendering him unconscious. Upon their arrival at the guard house, the matter was reported to Lieutenant George C. Schreiber, the officer in charge. Kinder came in shortly after Toth, and Lieutenant Schreiber ordered him to take the Korean out and shoot him. Kinder carried out the order while Toth waited in a jeep. Kinder was tried and convicted of premeditated murder and conspiracy to commit murder. On appeal his counsel raised in oral argument the contention that obedience to a superior order was a defense, regardless of the legality of the order. In an opinion containing a thorough consideration of the civilian authority, the Air Force Board of Review rejected Kinder's contentions, holding that obedience to superior orders is no excuse when a man of common understanding would know an order to be unlawful, and saying further:

[O]f controlling significance in the instant case is the manifest and unmistakable illegality of the order.⁴⁴

Kinder brought into the stream of reported military authority both the reasoning and language from the early development of the rule in civilian courts, quoting quite liberally and with approval from *State v. Riggs* and

⁴² MCM, USA, 1951, ¶ 197b. Substantially similar provisions appeared in the MCM, USA, 1928 ¶ 148a and MCM, USA, 1949, ¶ 179a. When the Manual for Courts-Martial was revised in 1969, the subject was covered under the general category of "Special Defenses" and provided:

Obedience to apparently "lawful" orders. An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable. MCM, 1969 (Rev.) ¶ 216d.

⁴³ A.C.M. 7321, 14 C.M.R. 742 (1953).

⁴⁴ *Id.* at—, 14 C.M.R. at 774. For his part in ordering the shooting, Lieutenant George C. Schreiber was convicted of premeditated murder by general court-martial. *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955). The other participant, Robert W. Toth, was charged with murder and conspiracy to commit murder in violation of Articles 118 and 81 of the UNIFORM CODE OF MILITARY JUSTICE, 64 Stat. 140, 134, 50 U.S.C. §§ 712 and 675, after he was honorably discharged from the Air Force, Toth was arrested and returned to Korea to stand trial. The Air Force asserted court-martial jurisdiction under Article 3 (a), UNIFORM CODE OF MILITARY JUSTICE, 64 Stat. 109, 50

U.S.C. § 553, which provided:

Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense

Commonwealth ex rel. Wadsworth v. Sbordall.

Following the Korean War, the law governing superior orders as a defense to violations of the law of war was further clarified in 1956, when the Army published Field Manual 27-10, *The Law of Land Warfare*, July 1956, which provided:

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time, it must be borne in mind that members of the armed forces are bound to obey only lawful orders. Paragraph 509.⁴⁵

against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Toth's sister brought habeas corpus proceedings in the District of Columbia, *Toth v. Talbott*, 113 F. Supp. 330, 114 F. Supp. 468 (D.C.D.C. 1953). The case was ultimately decided by the Supreme Court, which held in one of the leading decisions on the scope of military jurisdiction that Article 3(a) of the UNIFORM CODE OF MILITARY JUSTICE was unconstitutional. *Toth v. Quarles*, 350 U.S. 11 (1955). The military courts thus being deprived of jurisdiction, Toth was released and never stood trial for the offenses, because the federal courts were also without jurisdiction.

⁴⁵ There is an apparent difference of opinion among the commentators as to the import of the 1956 revision. Wilner, *Superior Orders as a Defense to Violation of International Criminal Law*, 26 MD L. REV. 127, 141-42, is of the opinion that it reflects a softer position than that enunciated in 1944, by leaving "open the loophole of evading punishment for acts represented by superior officers as reprisals." He further characterizes the provision as an equivocal statement which can serve as authority for the commission of almost every type of atrocity against the military forces of a belligerent nation, as well as, in many cases, against civilians. On the other hand, T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY, is of the opinion that the principles contained in the 1956 provision are sound and must be assessed in all cases involving the defense of superior orders, regardless of the circumstances.

Since *Kinder* was decided, reported military cases dealing with the superior-orders defense have arisen out of the Vietnam War. Vietnam has, based on available records, produced more prosecutions of American military personnel for killing foreign nationals than any previous conflict, and consequently has produced more cases in which the issue could be raised.⁴⁶

The reported Vietnam decisions have reaffirmed the principle that obedience to orders that are manifestly illegal is not a defense. In *United States v. Keenan*,⁴⁷ the Court of Military Appeals approved an instruction that stated that the justification for acts done in compliance with an order did not exist if the order was of such a nature that a man of ordinary sense and understanding would know it to be illegal.⁴⁸

In *United States v. Griffin*,⁴⁹ an Army Board of Review, in approving a finding of manifest illegality as a matter of law used this language:

[W]e view the order as commanding an act so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding.⁵⁰

And in *United States v. Schultz*,⁵¹ the Court of Military Appeals, in approving the denial of any instruction on the obedience to orders defense, said the order in that case

would have been palpably unlawful. See *United States v. Kinder*, 14 CMR 742, and the abundant authority contained in that case.⁵²

Thus, the standard of the defense of obedience to superior orders in American military jurisprudence has been settled for the last twenty years and can be traced in civilian law to the time of the Federalists in *Jones*, and not to the Nuremberg Trials.

Applying the Standard

⁴⁶ NUMBER OF MILITARY PERSONS TRIED AND CONVICTED OF MURDER OR LESSER INCLUDED OFFENSES OF VIETNAMESE NATIONALS

	Tried	Convicted	Acquitted	Lesser Included Offenses
1965	0			
1966	7	4	1	2-Manslaughter
1967	16	10	3	2-Manslaughter 1-Negligent homicide
1968	15	3	3	4-Manslaughter 3-Negligent homicide 1-Assault
1969	18	11	6	1-Willfully discharging firearm so as to endanger life
1970	22	7	10	1-Willfully discharging firearm so as to endanger life
1971*	25	4	15	2-(not enumerated) 3-Manslaughter 2-Negligent homicide 1-Aggravated assault

Information obtained from the office of the Clerk, United States Army Judiciary

* Includes through October 31, 1972.

⁴⁷ 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969).

⁴⁸ *Id.* at—, 39 C.M.R. at 117, n.3 (1969). The order that Keenan was given was to shoot an elderly Vietnamese. It is interesting to note that the man

Despite the myriad factual situations in which superior orders have been raised as a defense, and the apparent simplicity and clarity of the rule, it has posed difficult problems in application since Chief Justice John Marshall struggled with the issue in *Little v. Barreme*. A number of writers have analyzed the standard as it exists in international law.

Dr. Yoram Dinstein, author of *The Defense of 'Obedience to Superior Orders' in International Law*, the leading work on the subject, after an exhaustive analysis of the literature in the area, concludes that the proper role should be:

[T]he fact of obedience to orders constitutes not a defense *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of *mens rea*, that is, mistake of law or fact of compulsion. Only lack of *mens rea*, of which obedience to orders constitutes circumstantial evidence, serves to protect from criminal responsibility in this case.⁵³

Under Dinstein's rule, the manifest illegality of the order is an objective criterion that should be treated as a role of evidence. This role of evidence would facilitate the task of proving the subordinate's knowledge of the illegality of the order by creating a presumption of actual knowledge where proof of knowledge is lacking.⁵⁴

Telford Taylor, author of *Nuremberg and Vietnam: an American Tragedy*, notes that the "lack of knowledge of an order's unlawfulness is a defense, and fear of punishment for disobedience a mitigating circumstance." Thus, Taylor's view is similar to Dinstein's in that he also recognizes that the crux of the defense is lack of *mens rea*, but Taylor does not see obedience to orders merely as an element showing lack of *mens rea*, but under certain circumstances, as a complete affirmative defense. This view is embodied in the Army's current standard as set forth in Par. 509, FM27-10, *The Law of Land Warfare*, and in Par. 197 of the *Manual of Courts*

giving Keenan the order, Corporal Luczko, for his part in the slaying, was acquitted by reason of insanity.

⁴⁹ C.M. 416805, 39C.M.R. 586 (1969).

⁵⁰ *Id.* at 590. Sergeant Griffin had been ordered to shoot a Vietnamese who was bound with his hands behind his back.

⁵¹ 18 U.S.C.M.A. 131, 39 C.M.R. 133 (1969).

⁵² *Id.* at 136. Corporal Schultz entered the house of a Vietnamese family, took the male of the house outside, and shot him. Schultz was at that time on a patrol to ambush Vietcong, but his assignment did not contemplate any action such as he took.

⁵³ Y, DINSTEIN, DR. YORAM, THE DEFENSE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 88.

⁵⁴ *Id.* at 29.

Martial.⁵⁵ Regardless of whether one views obedience to orders as an independent defense or as an evidentiary fact, there are practical problems that face the court and counsel in applying the standard in a given case. Taylor accurately observes that:

[T]he language [of Par. 509, FM27-10] is well chosen to convey the quality of the factors, imponderable as they are, that must be assessed in a given case. As with so many good rules, the difficulty lies in its application—in weighing evidence that is likely to be ambiguous or conflicting. Was there a superior order? Especially at the lower levels, many orders are given orally. Was a particular remark or look intended as an order, and if so what was its scope? If the existence and meaning of the order are reasonably clear, there may still be much doubt about the attendant circumstances—how far the obeying soldier was aware of them, and how well equipped to judge them. If the order was plainly illegal, to what degree of duress was the subordinate subjected? Especially in confused ground fighting of the type prevalent in Vietnam, evidentiary questions such as these may be extremely difficult to resolve.⁵⁶

While it may be belaboring the obvious, the threshold question in establishing the obedience to superior orders defense is determining whether there was an order from a superior to the defendant.⁵⁷ The defendant facing trial who intends to rely on an order from a superior in justification for his act has the burden of going forward with evidence of the order, because the plea is an affirmative defense—essentially, one of confession and avoidance. And once the prosecution has presented a *prima facie* case of the crime charged, the defendant has the burden of going forward with the evidence of his affirmative defenses.⁵⁸

The existence of the order in the first instance is obviously a question of fact and may be proved by any competent evidence, *i.e.*, necessarily, the testimony of the defendant plus any corroborating evidence he might present. Suffice it to say that the order relied upon could be either written or oral, but, depending upon the circumstances of the case, it may raise serious problems of proof, and require the resolution of conflicting testimony and the interpretation of ambiguous language. One of the more interesting examples of this problem arose during the Second World War, and

involved the disputed interpretation of statements made by General George S. Patton on June 27, 1943, in a speech to the officers and men of the 45th Infantry Division just prior to their embarkation for the invasion of Sicily in Operation Husky. The controversy arose over Patton's prepared remarks, which included these statements:

The fact we are operating in enemy country does not permit us to forget our American tradition of respect for private property, noncombatants, and women
....
Attack rapidly, ruthlessly, viciously and without rest, and kill even civilians who have the stupidity to fight us.⁵⁹

Several days after the operation began, during which time the fighting was extremely fierce, a Captain Compton, who had lost several of his men, lined up forty-three captured Germans, some of whom were wearing civilian clothes, and had them executed by machine gun. At about the same time and in the same general location, a Sergeant West (of another company) shot and killed thirty-six Germans whom he was escorting to the prisoner-of-war cage in the rear.

When General Patton learned of these incidents, he ordered both men court-martialed on charges of pre-meditated murder. At their trials, the two men asserted as a defense the orders issued by General Patton on June 27, 1943 in his preparatory speech. According to the defense, Patton had instructed the men that:

If the enemy resisted until we got to within 200 yards, he had forfeited his right to live.

As for ambushes, General Patton was alleged to have said:

When you are sniped at, especially from the rear, the snipers must be destroyed.

The defense's assertions prompted a subsequent inquiry into the speech given by Patton, in which he was ultimately exonerated after producing the prepared text of the speech and delivering it orally to a board of investigating officers. Captain Compton and Sergeant West, however, were convicted as charged.

Similar problems of interpretation of general pre-operation addresses were involved in the *Calley* trial. In

⁵⁵ See *supra* note 45 and accompanying text.

⁵⁶ T. TAYLOR, *supra* note 20, at 51-52. For the purpose of this discussion, I will treat obedience to orders as an affirmative defense, which is the present military rule, and not under Dinstein's "*mens rea* principle." In addition, while under the military judicial system trials by courts-martial are presided over by a "military judge," and the equivalent of the civilian jury are "the members of the court-martial," I shall refer to them by the equivalent civilian terms of "judge" and "jury."

⁵⁷ In some cases there may be insufficient evidence of the existence of the

order to require an instruction on the defense of obedience to orders. See *United States v. Schultz*, *supra* note 52.

⁵⁸ See A.C.M. 7321, Kinder, 14 C.M.R. 742.

⁵⁹ Ladislav Farago, author of *PATTON: ORDEAL AND TRIUMPH* provided the information concerning these trials, which were not recorded in any of the combat narratives of World War II. Letter from Ladislav Farago to the author, April 8, 1971.

addition to the testimony of Lieutenant Calley and Captain Ernest Medina, approximately seventy-five witnesses testified concerning not only the orders given by Captain Medina to the Company on March 15, 1968, but also to the entire development of the plans including the briefings given at the Brigade level and by the other company commanders who were involved in the same operation but not in the assault on My Lai 4.

Assuming that the defendant has presented sufficient evidence to establish a reasonable inference of the existence of an order, the next question to be decided is whether the order relied upon by the defendant was lawful in the abstract, which must be determined by the judge purely as a matter of law, and is not within the province of the jury.⁶⁰ If the judge determines that the order relied upon was lawful, and the defendant's conduct did not exceed the scope of his authority under the order, then necessarily there would be a directed verdict in his behalf because his actions would not have constituted a crime. If, however, the order was unlawful, the next questions to be resolved are whether the defendant had actual knowledge of its illegality, or whether the Superior's order was manifestly illegal, *i.e.*, one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful. Proof of the subordinate's actual knowledge of the illegality of the order is difficult to establish, and absent a judicial admission or a lawfully obtained confession, it would be a question of fact for the jury to decide. While it is unlikely that a defendant would attempt to plead superior orders as a defense while at the same time admitting knowledge of the order's illegality, in such a case the judge should decide as a matter of law that obedience to the order is not a defense.⁶¹

The most difficult problem, of course, is the question of the manifest illegality of the order, *i.e.*, its apparent illegality to a reasonable man under the circumstances. In the usual case, direct evidence of the defendant's actual knowledge of the illegality of the order would not be present, and it becomes necessary to examine the "manifest illegality" of the order. Although the present military standard recognizes superior orders as an independent affirmative defense and has not expressly adopted Dinstein's "*mens rea* principle," Dinstein's analysis of the manifest illegality principle as a rule of evidence and aid in proof to establish knowledge of illegality is helpful in understanding the rule. However, the question that apparently has not been thoroughly analyzed, and one on which judges appear to be divided is when, if ever, after having determined that an order is unlawful, should the judge decide it is "manifestly illegal" as a matter of law.

⁶⁰ *E.g.*, United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965).

⁶¹ See CM 417153, Figueroa, 39 C.M.R. 494 (1968), where the Board of Review rejected the accused's defense of superior orders to a larceny charge when the accused admitted knowing that his order to steal was an unlawful one.

⁶² Wilner, *Superior Orders as a Defense to Violations of International*

Wilner alluded to this question when he observed that the problem with the standard in international criminal law is

the failure to create a solid and unimpeachable basis for rejecting the defense as a matter of law—and not for reasons of political or emotional expedience....⁶²

The problem is illustrated by the difference in the approaches used by the judges in the *Griffen* and *Calley* cases, both of which involved prosecutions of premeditated murder for the summary executions of unarmed and unresisting captives, and conflicting evidence of the orders.

In *Griffen*, the judge instructed the jury that if the defendant received an order to kill the helpless Vietnamese prisoner, such an order would have been "manifestly illegal" as a matter of law. On appeal, the Army Board of Review sustained the judge's instruction, holding that an instruction is not required unless there is some evidence that will allow a reasonable inference that a defense is in issue. Under the facts of the case, they found

no evidence which could provide an inference suggestive of self-defense, or that the killing was to prevent the escape of the prisoner, or for that matter, any other justification or excuse for the killing.⁶³

The Board added:

As there was no evidence which would have allowed a reasonable inference that the accused justifiably killed the prisoner pursuant to the order of a superior officer, it follows, as a matter of law, that this defense was not in issue, the law officer did not err by refusing to give an instruction on it, and that the law officer properly instructed the court that such an order would have been manifestly illegal.⁶⁴

In *Calley*, however, the judge, while instructing the jury that an order to kill unresisting Vietnamese within his control would be illegal as a matter of law, left for the jury to decide the question of "manifest illegality" by having them determine whether a man of ordinary sense and understanding would know the order to be illegal.⁶⁵

While convictions resulted in both the *Calley* and *Griffen* cases and the defense was rejected despite the differences in the instructions, this nevertheless could make a significant

Criminal Law, 26 MD. L. Rev. 127 (1966).

⁶³ *Supra* note 50, at 590.

⁶⁴ *Id.*

⁶⁵ See the instructions to the court-martial in the *Calley* case included in the Appendix.

difference *in* the outcome of a given case.

Although it is always difficult to analyze and fathom the reasons for a jury's verdict without actually questioning them, in another case arising out of the My Lai Massacre, where the judge left it to the jury to decide the question of manifest illegality, an acquittal did result where the evidence seemingly dictated a conviction. The case involved the prosecution of Sergeant Charles Hutto, a machine gunner, for assault with intent to commit murder. At the trial the prosecution introduced a statement made by Hutto that he had shot at a group of My Lai villagers who had been taken captive and had killed perhaps eight to ten of them. Hutto described this as "murder" in the statement, but testified at his trial that he was following Captain Medina's orders, which he believed to be lawful. If one views the evidence in a light most favorable to the accused, the evidence of Hutto's actual knowledge of the illegality of the order was conflicting; nevertheless, had the judge instructed the jury that such an order would have been "manifestly illegal" and therefore no defense, the result might well have been different.

The question of "manifest illegality" should be decided as a "matter of law" in those extreme cases involving the summary execution of an unarmed and unresisting prisoner, because the United States is committed to the protection of prisoners both morally and legally through long standing treaty obligations.⁶⁶ Indeed, under her present treaty obligations, the United States is required to disseminate in time of peace and war this portion of the text of the conventions, affording protection

as widely as possible..., and in particular, to include the study there of in their programmes of military and if possible, civil instruction, so that the principles may become known to all [its] armed forces and to the entire population.⁶⁷

Moreover, the United States has an obligation "to search for persons alleged to have committed, or to have ordered to be committed" the willful killing, torture or inhumane treatment of persons taken captive and to bring them to trial.⁶⁸

While it may be argued, and not without some basis, that in light of the public's reaction to the *Calley* verdict the United

States has failed to fully implement its treaty obligation to educate the public and the members of the Armed Forces, it would also seem, in light of the public's awareness and concern for the treatment of our own prisoners of war by the North Vietnamese, that there should not be any question about any American citizen or soldier knowing that it is morally wrong to summarily execute helpless captives. Consequently, at this point in our history, it would seem that a judge should unquestionably and without hesitation determine the "manifest illegality" of such orders as a matter of law, and not permit them to be used as a defense, but only as a matter in mitigation.

Conclusion

Mr. Justice Robert H. Jackson observed prior to his appointment as Prosecutor for the International Military Tribunal at Nuremberg that

the chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and the moral judgments of history.⁶⁹

If one views the rejection of obedience to orders as a defense to the summary execution and inhumane treatment of persons taken captive by our forces as a restraint on our physical forces, which clearly one must, then in light of the public reaction to the *Calley* trial, one must wonder how quickly the military will emphasize the importance of compliance with this moral and legal commitment. For the sake of our own prisoners now and in possible future wars, which hopefully will not occur, one would hope that the *Calley* verdict will serve a useful purpose in educating the citizenry of this country, and will act as a deterrent to future My Lai's. But if similar cases should occur in the future involving our own troops, hopefully obedience to superior orders will be rejected as a defense as a matter of law, and once again emphasize that a soldier is not an automaton but a reasoning agent who is under a duty to make appropriate moral judgments.

⁶⁶ WINTHROP, *MILITARY LAW AND PRECEDENTS* 788–96 (2d ed. 1921); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, T.I.A.S. 3365. These treaties were ratified by the United States on February 2, 1956.

⁶⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 47, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 48, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949,

Article 127, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 144, T.I.A.S. 3365.

⁶⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 49, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 50, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 127, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 146, T.I.A.S. 3365.

⁶⁹ *Korematsu v. United States*, 323 U.S. 214, 248 (1944)(dissenting opinion)

APPENDIX

We next come to the area of acts done in accordance with the order of a superior. If, under my previous instructions, you find that people died at My Lai (4) on 16 March 1968, as charged—which would include a finding that Lt. Calley caused their deaths—you must then consider whether Lt. Calley's actions causing death were done pursuant to orders received by him. There is considerable evidence in the record on this point.

Captain Medina, you will recall, testified that he told his assembled officers and men the C Company had been selected to conduct a combat assault on My Lai (4), which intelligence indicated was the current location of the 48th VC Battalion; that they would probably be outnumbered two to one; that they could expect heavy resistance; that they would finally get an opportunity to engage and destroy the battalion which they had been chasing unsuccessfully, and which was responsible for all the mines, booby-traps and sniper fire they had received. He recalled telling his personnel that “innocent civilians or noncombatants” would be out of the village at market by the time of the assault; and that they had permission to, and were ordered to destroy the village of My Lai (4) by burning the houthches, killing the livestock, destroying the food crops, and closing the wells. He testified that he recalled being asked whether women and children could be killed, and that in response to that question he instructed his troops to use common sense, and that engagement of women and children was permissible if women or children engaged or tried to harm the American troops. He denied saying that everything in the village was to be killed.

Lt. Calley testified that he attended the company briefing and that Captain Medina instructed the company to unite, fight together, and become extremely aggressive; that the people in the area in which they had been operating were the enemy and had to be treated like enemy; that My Lai (4) was to be neutralized completely; that the area had been prepped by “psy war” methods; that all civilians had left the area and that anyone found there would be considered to be enemy; that everything in the village was to be destroyed during a high speed combat assault; and that no one was to be allowed to get in behind the advancing troops. Subsequent villages, through which they would be maneuvering enroute to the primary assault on the 48th VC Battalion at Pinkville or My Lai (1), were to be treated in the same manner. He testified that at a platoon leaders' briefing after the company briefing, Captain Medina reemphasized that under no circumstances would they allow anyone to get behind them, and that nothing was to be left standing in these villages. Lt. Calley also testified that while he was in the village of My Lai (4), on the eastern side, he twice received orders from Captain Medina: first to “hurry and get rid of the people and get into position that [he] was supposed to be in;” and thereafter, to stop searching the bunkers, to “waste the people,” and to move his troops out onto the defensive perimeter as Captain Medina

had ordered. Captain Medina denied giving any such orders.

A number of other witnesses have also testified about the terms used by Captain Medina in issuing the assault order to his platoon leaders and troops on 15 March; about their actions done in response to these orders; about radio transmissions remembered—and not remembered—occurring during the operation; and about other matters that may have a bearing on what orders, if any, were issued Lt. Calley. I have not summarized all this evidence, but you should consider it all. As I have previously stated, it is your recollection of the evidence, not mine, that governs. On the basis of all the evidence you have heard, you should determine what order, if any, Lt. Calley acted under when he caused the deaths of any or all of the alleged victims, if he did cause their deaths. As I previously stated, you do not reach the question of orders unless you have found one or more of the charged victims dead—or in the case of specification 2 of the Additional Charge, have found the charged victim to be dead or to have been assaulted-and, under my previous instructions, have found the deaths to have been caused or assault to have been committed in that one case, by Lt. Calley. As I also previously instructed you, for the death of an individual to be termed murder or manslaughter under our law, the killing must have been done without justification or excuse. To convict Lt. Calley, you must also reach that conclusion. Thus you must consider the legality or illegality of any acts done by Lt. Calley resulting in the death of charged victims, and the legality or illegality of any order which you find him to have been acting pursuant to and in accordance with, during your deliberations on guilt or innocence. I will again give you the law. You must apply it to the facts.

The conduct of warfare is not wholly unregulated by law. Nations have agreed to treaties limiting warfare; and customary practices governing warfare have, over a period of time, become recognized by law as binding on the conduct of warfare. Some of these deal with the propriety of killing during war. The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killing justifiable in this case. The law attempts to protect those persons not actually engaging in warfare, however; and limits the circumstances under which their lives may be taken.

Both combatants captured by and noncombatants detained by the opposing force, regardless of their loyalties, political views or prior acts, have the right to be treated as prisoners until released, confined, or executed, in accordance with law and established procedures, by competent authority sitting in judgment of such detained or captured individuals. Summary execution of detainees or prisoners is forbidden by law. Further, it is clear under the evidence presented in this case, that hostile acts or support of the enemy North Vietnamese or Viet Cong forces by inhabitants of My Lai (4)

at some time prior to 16 March 1968, would not justify the summary execution of all or a part of the occupants of My Lai (4) on 16 March, nor would hostile acts committed that day, if, following the hostility, the belligerents surrendered or were captured by our forces. I therefore instruct you, as a matter of law, that if unresisting human beings were killed at My Lai (4) while within the effective custody and control of our military forces, their deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus if you find that Lt. Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order.

The question does not rest there, however. A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

To reach this issue of "superior orders" during your deliberations, you must first have concluded, as I have outlined above, that one or more of the charged victims died, or that the alleged victim in Specification 2 of the Additional Charge was assaulted, as a result of the accused's actions. You must next determine whether the actions which you have found Lt. Calley to have committed, if any, were done in accordance with and pursuant to the orders which he testifies that he received from Captain Medina.

The record contains substantial evidence bearing on the question of the order given. You have heard the testimony of Lt. Calley, Captain Medina, and others as to the orders that Lt. Calley was given. I have recounted part of this previously. There is also circumstantial evidence that you may find relevant. For example a number of witnesses have testified that there were bodies scattered throughout the village, from west to east. Other witnesses testified that when they discovered that there was light or no resistance, they ceased firing and began to gather and move the occupants of the village as on previous search and clear operations. There is evidence that this was labeled a search and destroy operation. There is evidence also that artillery was to be placed close to or on the village. Other witnesses have testified about the

actions of the gunships, and of the members of all three platoons and the headquarters element. Various radio-telephone conversations on the day of the assault have been recounted, and you have heard testimony from all of Captain Medina's RTO's and from Mr. Sledge, who was one of Lt. Calley's RTO's. Lt. Calley's other RTO, whom Lt. Calley has testified was carrying the company-push radio, was later killed in combat. You have also heard Lt. Calley's testimony that Captain Medina's two radio calls, on which he testified he acted, were transmitted to him while he was on the eastern side of the village, and that he was never south of the village at the area that has been referred to here as the intersection of the North-South and East-West trails.

As I have mentioned a number of times, I am only calling your attention to some of the evidence to give you an indication of the variety of matters you might consider in resolving these questions. The evidence, as we are all aware, is voluminous; and you must decide what portions of it are relevant and credible to determine the issues presented to you. In determining what order, if any, Lt. Calley acted under, if you find him to have acted, you should consider all the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in substance and effect to kill unresisting occupants of My Lai (4), you must determine whether Lt. Calley actually knew those orders to be unlawful.

Knowledge on the part of any accused, like any other fact in issue, may be proved by circumstantial evidence, that is, by evidence of facts from which it may justifiably be inferred that Lt. Calley had knowledge of the unlawfulness of the order which he has testified he followed. In determining whether or not Lt. Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lt. Calley's rank; educational background; OCS schooling; other training while in the Army, including Basic Training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lt. Calley knew the order was unlawful. If you find beyond reasonable doubt, on the basis of all the evidence, that Lt. Calley actually knew the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful. Your, deliberations on the question do not focus solely on Lt. Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.

Think back to the events of 15 and 16 March 1968.

Consider all the information which you find to have been given Lt. Calley at the company briefing, at the platoon leaders' briefing, and during his conversation with Captain Medina before lift-off. Consider the gunship "prep" and any artillery he may have observed. Consider all the evidence which you find indicated what he could have heard and observed as he entered and made his way through the village to the point where you find him to have first acted causing the deaths of occupants, if you find him to have so acted. Consider the situation which you find facing him at that point. Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found Lt. Calley to have committed. Unless you are satisfied from the evidence, beyond reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit Lt. Calley for committing acts done in accordance with the order.

PROSECUTING WAR CRIMES
BEFORE AN INTERNATIONAL TRIBUNAL^{a1}

By

HOWARDS. LEVIE*

It is probably appropriate to begin this discussion by stating that while the author has acted as an official reviewer of records of war crimes trials, and has read and analyzed innumerable records of those trials, he has never personally prosecuted an individual accused of a war crime.¹ Accordingly, this discussion will necessarily be based upon what others have said and done with respect to the problem of prosecuting war crimes cases before international tribunals.² Some people would label such a discussion as "academic", intending the word to be interpreted pejoratively. If "academic" means knowledge gained from the study of what the majority of actors in the arena have done when confronted with the problems of prosecuting charges of the commission of war crimes, then this presentation will, indeed, be "academic". However, the author prefers to consider that a discussion based on the experiences of many such prosecutors is practical and instructive, rather than academic.

Generally speaking, except in a few specific areas, the functions of the prosecutor in war crimes trials do not differ greatly from the functions of the prosecutor in any other area of criminal law although they will, of course, differ in detail and, frequently, in magnitude.³ Thus, just as the first function of any prosecutor, whatever name the locality gives to that

position, is to get himself appointed or elected to office, the first function of the war crimes prosecutor is to get himself appointed to that position. Such an appointment is, in the opinion of this author, a dubious honor.⁴ War crimes prosecutions are far more tedious, far more exhausting, than ordinary local prosecutions.⁵ In almost every instance the prosecutor is dealing with accused persons and witnesses who speak a language which he does not understand and with documents written in a language which he cannot read. Not only must he rely entirely on his translator-interpreter, which in and of itself can be a very frustrating business, but every interrogation, both off and on the stand, consumes double the normal time - or more. In other words, only seek the job of prosecuting war crimes if the case is important enough to give you a place in history- as it did for Justice Jackson, Benjamin Ferencz, Telford Taylor, and a few others.⁶

Article 14 of the 1945 London Charter of the International Military Tribunal provided for four Chief Prosecutors of equal stature with their overall functions specified in detail.⁷ Article 8 of the Charter of the International Military Tribunal for the Far East provided for one Chief of Counsel responsible for the investigation and prosecution with no other limitations on his-activities, and

^{a1} Reprinted with permission of the Akron Law Review, Howard S. Levie, *Prosecuting War Crimes before an international Tribunal*, 28 Akron L. Rev. 429 (1995).

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¹ Together with Colonel (later Major General) George Hickman, then the Command Staff Judge Advocate of the United Nations and Far East Command, in Tokyo, and Major (later Colonel) Toxey Sewell, a member of the Command Staff Judge Advocate's Office, the author, then the Chief of the War Crimes Section of that office, spent the 1950 Thanksgiving weekend as a member of a Board charged with reviewing the records of the last three Japanese war crimes trials in which some of the accused had received death sentences and in writing one opinion and reviewing the two other opinions written with respect to these cases. (Due to clemency granted by the Supreme Commander for the Allied Power's, General Douglas MacArthur, none of these accused was executed.)

² In addition to the records of trial themselves, see, for example, Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, 15 August 1949 [hereinafter Report]; Clio Straight, Report of the Deputy Judge Advocate, War Crimes, European Command, 29 June 1948; Kerr Memorandum, Archives of the Hoover Institution, Owens Collection, File No. 79084-A.

³ While the hometown prosecutor prosecutes for a single murder, the prosecutor before an 429

⁴ Raman Escovar-Salom, the first individual named as the Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (SIRES/827 (1993), 23 May 1993, *reprinted* 111 32 I.L.M. 1203 (1993)), resigned that office in order to accept what he must have considered to be a more favorable appointment without having instituted any proceedings before the Tribunal [this Tribunal is hereinafter referred to as the International Tribunal for the Former Yugoslavia].

⁵ However, they are also far more gratifying when brought to a successful conclusion by the prosecutor.

⁶ The present Prosecutor for the International Tribunal for the Former Yugoslavia is Judge Richard J. Goldstone of South Africa. He is also the Prosecutor for the international Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (S/RES/955 (1994)), 8 November 1994 [the latter Tribunal is hereinafter referred to as the International Tribunal for Rwanda]. It remains to be seen whether he will join the elite group mentioned above.

⁷ Charter of the International Military Tribunal, 8 August 1945, 566 Stat. 1544, 82 U.N.T.S. 279, in 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNJTED STATES OF AMERICA, 1776-1949, at 43 (Charles Bevans ed.) [hereinafter BEVANS]; HOWARD LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES*, Appendix VIII, at 549 [hereinafter LEVIE].

with the other ten nations which had been at war with Japan each having the option of designating an Associate Counsel.⁸ This latter arrangement would appear to be much more preferable inasmuch as an organizational pyramid topped by a committee is not exactly recommended as a sound management practice.⁹

Now, having disregarded the advice given above, and having sought and obtained the job of prosecuting war crimes before an international tribunal — or, being a military lawyer, having been told of your assignment to that job — your next function, and your primary and most important task, is the collection of the evidence that will identify and establish the guilt of the culprits, the evidence that you will produce at the trial and which will, you hope, result in the conviction and punishment of the accused.¹⁰

You will find that a great mass of material will have already been collected by various governmental and non-governmental agencies.¹¹ Unfortunately, it will all too frequently develop that many of the interrogations of witnesses were inadequate; that witnesses who have been interrogated and from whom helpful statements have been obtained have been released and have merged into the population or, if they were not local residents, they will have returned to their homes, probably halfway around the world; and that many of the documents with which you are presented have either not yet been formally translated or, if they have been, that the translations are not reliable. At some point along the way you will ask yourself why you ever sought and took the job of prosecuting war crimes. But, like any good lawyer, you will press ahead, seeking the documents and the witnesses that you need to fill the lacunae which will continuously make their appearance. Make no mistake — this will pose many problems unknown to the hometown prosecutor. Many potential witnesses will not have survived the hostilities; essential official documents will have been destroyed during the course of hostilities, or, more recently, by their custodians; others will be in the possession of uncooperative agents of the government of the potential accused, perhaps even in the hands of the potential accused himself; they will be in a foreign language and will be difficult to identify, even if you know exactly what you are seeking and for the most part you will not have that knowledge. Prevarication and stalling by unfriendly

witnesses is a phenomenon known to every prosecutor-but it is much easier to accomplish and much harder to identify when it is being done in a foreign language, a language with which the prosecutor is not familiar. Frequently, the interpreter will omit the hemming and hawing that has taken place during an interrogation and, after what appears to have been a five-minute back-and-forth argument with the witness, he will turn from the witness to you and state: "He says 'No'" - and all you can do is shrug it off and continue plodding along.

But all is not as bleak as might appear. You will have some good investigators and interrogators and some good translators and interpreters and gradually you will accumulate the evidence that you believe will establish beyond a reasonable doubt the commission of war crimes by specific persons. Incidentally, the searching out, collection, analysis, and indexing of documents by the U.S. investigators in Germany during and after World War II probably contributed more than any other single factor to the success of the prosecution before the International Military Tribunal at Nuremberg and the Subsequent Proceedings conducted there.¹²

Now you are confronted with the next function of the prosecutor of war crimes before an International Tribunal - the decision as to the identity of the persons to be indicted and tried. In the international arena there is no grand jury to make the final decisions on this question. Unlike the hometown prosecutor, you may be selective and omit naming an individual as an accused even though you believe that you have evidence that proves his guilt beyond any possible doubt.¹³ Leave the small fry, no matter how guilty, to some national court, military or civilian. You are going to prosecute before an International Tribunal and you want only the top people, those who established policy, those who were responsible for the decision to undertake an aggressive war, those who gave the orders for massive atrocities against the civilian population, including genocide, those who were responsible for the policies that resulted in the studied maltreatment of prisoners of war. This selection is not an easy task, particularly if it has to be done by group decision, as was the case for the International Military Tribunal in

⁸ Charter of the International Tribunal for the Far East, 19 January 1946, T.J.A.S. 1589; 4 Bevans, *supra* note 7, at 27; Levie, *supra* note 7, Appendix XII, at 571.

⁹ The single Chief Prosecutor has been adopted for all of the more recent International Tribunals. See the international Tribunal for the Former Yugoslavia, *supra* note 4; the International Tribunal for Rwanda, *supra* note 6; and the International Law Commission's 1994 Draft Statute of an International Criminal Court, *infra* note 26.

¹⁰ Omitted are such mundane tasks as the need to obtain funding, the securing of office space and, perhaps, a courtroom, the organization of a staff of attorneys, technicians, computer operators, investigators, interrogators, translators, secretaries, etc.

¹¹ By the end of hostilities in the Persian Gulf Crisis the United States Army had one War Crimes team on location and one in Washington and a lengthy Report on Iraqi War Crimes (Desert Shield/Desert Storm) was prepared.

Amnesty International also prepared a lengthy report on the subject. For a considerable period before the International Tribunal for the Former Yugoslavia was established a Commission of Experts created by the Security Council of the United Nations was collecting evidence which became available to the Prosecutor of that Tribunal. S/1994/674, 27 May 1994. See also the data submitted by the United States, U.S. Department of State Dispatch, Vol. 4, No. 15, at 24 (12 April 1993). Human Rights Watch Helsinki also produced a number of reports containing evidence of specific war crimes committed in the former Yugoslavia.

¹² See, e.g., FRANCIS BIDDLE, IN BRIEF AUTHORITY, 401 (1962); see also Report, *supra* note 2, at 17-18.

¹³ The failure of the prosecution in Tokyo to include the Emperor, Hirohito, among the accused was the only decision not to prosecute that engendered controversy - and that was a political decision made by other than the Prosecutor. LEVIE, *supra* note 7, at 144.

Nuremberg.¹⁴ There the prosecutors included the name of one individual, Gustav Krupp, who was senile and *non colpos mentis* and whose prosecution the Tribunal had no alternative but to defer indefinitely. As he was in the U.S. Zone of Occupation, the American prosecutors should have been aware of this and should not have named him in the indictment. Two other names, those of Raeder and Fritsche, were added to the list at Soviet insistence solely in order to include among the accused some prisoners who were in Soviet custody.¹⁵ (Fritsche was acquitted and Raeder received a sentence to life imprisonment.)

Of course, in determining the identity of the persons to be named in the indictment charging the commission of war crimes, the most important element that the prosecutor must bear in mind is the evidence available against each in dividual. While acquittals are unquestionably evidence of the impartiality of the Tribunal,¹⁶ they are anathema to the prosecutor, particularly when he can be so much more selective than the hometown prosecutor in naming the persons whom he proposes to prosecute. The drafting of the indictment is, therefore, of major importance. He must ensure that while the charges correspond the offenses listed in the Tribunal's constitutive document, they also correspond to the evidence against each named accused which he is going to be able to present at the trial.

The substantive law that will be the basis of your prosecution will not be difficult to identify. Basically, it will undoubtedly be stated in your constitutive document and will be supplemented by well-known and generally accepted laws and customs of war.¹⁷ However, one problem that the prosecutor of war crimes before an international tribunal will have to face, which is unknown to his hometown counterpart, is the question of the procedure pursuant to which the trial is to be conducted. While it may happen that the prosecution and the defense in a war crimes trial have similar legal systems and trial procedures, the chances are very great that they will not - and even if they do, inasmuch as your trial is before an International Tribunal its rules of procedure will be tailored to that Tribunal and will differ markedly from most national procedural systems, probably being a composite of several systems; and if both the prosecution and the members of the Tribunal are multinational in character, as occurred in

the International Military Tribunal in Nuremberg with four nations with different legal systems represented in the prosecution and on the bench. And in the International Military Tribunal for the Far East in Tokyo with eleven such nations represented in the prosecution and on the bench, the problem is multiplied.¹⁸ For example, the continental civil law does not know many of the traditional common law rules of evidence and such rules were generally not followed in war crimes trials, even by American military commissions; and one of the reasons for the dissent of the French judge in the Tokyo trial was that there had been no examining magistrate, the procedure which initiates a criminal trial under French law, and which he considered to be indispensable to a fair trial. (Strange to relate, the French judge at Nuremberg had apparently not found this to be a problem.)

The major procedural change included in the 1945 London Charter and in the laws under which trials were conducted in the American and British Zones of Occupation in Germany after World War II, the one that will undoubtedly be included in any charter or law under which you will act as Prosecutor, and the one which was found to be most repugnant by American lawyers bred on the common law system, was the provision exempting the tribunals from "technical rules of evidence."¹⁹ Three aspects of this matter do not appear to be so widely known: first, that while the use of affidavits was and is contrary to traditional common law rules of evidence, it was not and is not contrary to the rules of evidence of many other legal systems; second, that where an affidavit was introduced in evidence by either side, the other side had the right to demand the production of the affiant on the witness stand, a right which was rather infrequently exercised; and third, that the defense use of this affidavit privilege, as compared to its use by the prosecution, was on the order of more than ten to one.²⁰

Article 19 of the 1945 Charter of the International Military Tribunal stated not only that *it* was not bound by technical rules of evidence, but that the Tribunal should admit "any evidence which it deems to have probative value."²¹ Article I 3(a) of the Charter of the International

¹⁴ For the more or less haphazard manner in which the accused to be tried by the International Military Tribunal at Nuremberg were selected, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, 85-90 (1992).

¹⁵ Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, International Conciliation No. 450, at 260 n.25 (April 1949) [hereinafter *Nuremberg Trials*].

¹⁶ There were three acquittals by the International Military Tribunal - Fritsche, Schacht, and van Pape. LEVIE, *supra* note 7, at 57 n.76. There were no acquittals by the International Military Tribunal for the Far East. *Id.* at 143. Of the 177 individuals actually tried in the "Subsequent Proceedings" at Nuremberg, 35 were acquitted. *Nuremberg Trials*, *supra* note 15, at 371.

¹⁷ However, even in this area some problems will be encountered. Thus, the crime of conspiracy, well-known to the common law, is not known to the civil law, a matter which caused problems for the draftsmen of the London

Charter of the International Military Tribunal, *supra* note 7; see also Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials vii (1949); see also NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT 54-56 (1949) (for the Tribunal reaching judgment at Nuremberg).

¹⁸ The International Tribunal for the Former Yugoslavia, *supra* note 4, likewise has a bench drawn from eleven different nations, as does the International Tribunal for Rwanda, *supra* note 6.

¹⁹ Charter of the International Military Tribunal, art. 19, *supra* note 7.

²⁰ LEVIE, *supra* note 7, at 259-60.

²¹ See *supra* note 4.

Tribunal for the Far East was to the same effect.²² Article 14 of the Statute of the International Tribunal for the Former Yugoslavia authorizes the judges of that Tribunal to adopt rules for "the admission of evidence."²³ Rule 85(C), adopted by the judges of that Tribunal, provides that "A Chamber may admit any relevant evidence which it deems to have probative value."²⁴ Article 14 of the Statute of the International Tribunal for Rwanda requires the judges of that Tribunal to adopt the rules of procedure and evidence adopted by the International Tribunal for the Former Yugoslavia "with such changes as they deem necessary."²⁵ It would appear obvious that the international community does not intend that international tribunals should be bound by technical rules of evidence such as those which are typical of the common law system.²⁶

Finally, you have collected your evidence, you have reached a decision as to whom you will charge, you have drafted your indictment, you have served it on the persons accused, you have filed it with the Tribunal, and you are ready to go to trial. There we will leave you. Apart from the different rules of evidence discussed above, and some comparatively minor variations in other aspects of the trial procedure, the trial itself should present few novelties for any attorney who has previously tried a criminal case in an American court.

²² See *supra* note 8. Paragraph c of that article was quite detailed in enumerating items which would be admissible in evidence, most of which violate the traditional common law rules of evidence.

²³ See *supra* note 4.

²⁴ International Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, adopted 11 February 1994, 33 LL.M. 484, 533 (1994).

²⁵ See *supra* note 6.

²⁶ Article 19(b) of the International Law Commission's 1994 Draft Statute of an International Criminal Court (Report of the International Law Commission on the work of its forty-sixth session, G.A.O.R., 49th Sess., Supp. No. JO (UN Doc. A/49/10, 1994)), provides that the judges of the Court may make rules regulating "the rules of evidence to be applied."

There appears to be little doubt that any rules adopted by the judges of such a Court will closely resemble those referred to in the text.

GETTING LEFT OF BOOM:

HOW LEADERSHIP AND MANAGEMENT WORK TOGETHER TO SHAPE OUTCOMES

COLONEL RANDALL BAGWELL*

Have you ever wondered how two people can experience the same event, yet have completely different outcomes? For example, two students are enrolled in a poorly taught college course, one student gets an “A” in the course while the other student fails. They both experienced the same event, a bad course, yet their outcomes from the event were exactly opposite. Or have you thought about how two organizations experience the same economic event, yet one company survives while the other goes bankrupt? When this happens with companies, people often attribute it to the surviving company having a great leader. While this may be true, it is equally likely that the company also had great managers. While some people consider leadership and management to be one and the same, there are differences that are worth exploring. Understanding the unique aspects of leadership and management and how they work together to shape outcomes for organizations can provide organizations a competitive advantage.

Jack Canfield, in his book, *The Success Principles—How to Get from Where You Are to Where You Want to Be*,¹ explains the phenomenon of how two individuals can experience the same event, yet have different outcomes with a simple formula taught to him by psychotherapist, Dr. Robert Resnick²: $E + R = O$ (Event + Response = Outcome).³ While Canfield and Resnick were on to something as a way to explain individual behavior, building on their formula can help organizations understand how management and leadership work together to shape events and improve outcomes.

A Formula for Individual Success, $E + R = O$

An event can be anything that happens to us—a bad boss, a bad employee, a car crash, an upturn in business or a downturn in business. Although it is easy to think of events

in a negative sense, events can be good or bad. Events are also largely out of our control. This is why people who perpetually see themselves as victims typically live their lives believing that they have no influence on the outcome of their life events. They believe that events equal outcomes; that $E = O$.⁴ Luckily, this is not the case. We get a vote in the outcomes of our lives. It is not $E = O$ that dictates our lives, it is $E + R = O$.⁵ It is the R that enables people to experience the same event, but have different outcomes. Our response to an event is in our control, and it is our response that controls the direction of our lives.

The example above of the two students actually occurred when my daughter was in college. In her freshman year at a large university, she enrolled in Calculus 101. The class was comprised of over 200 students and was taught by a graduate assistant who spoke from a stage using a microphone to battle the poor acoustics of the lecture hall. With the bad acoustics seemingly amplifying the instructor's heavy accent, my daughter (as well as many of her classmates) was completely lost as to what he was trying to teach. Shortly after her first class, she called me, worried and wanting my advice on what to do. It was too late to change classes as all the other calculus classes were full and to wait to take it the following year would put her a year behind in pursuing her degree. In terms of $E + R = O$,⁶ she was experiencing a very bad event. But there was hope. She did not control the event, but she did control her response. Being unable to change the room acoustics, instructor's accent, the class size, or the way the class was taught, she changed what she could control: how she learned. Her response to this event was YouTube videos. She found YouTube videos that walked step-by-step through the same calculus problems from class. Her response, supplementing her difficult classroom situation with

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Forces, State of Arkansas, and State of Texas.

¹ JACK CANFIELD, *THE SUCCESS PRINCIPLES HOW TO GET FROM WHERE YOU ARE TO WHERE YOU WANT TO BE* (2015).

² *Id.* at 6

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

instructional videos, changed her outcome, and she was able to get an “A” in the class while other students failed.

A Formula for Leader Success, $E + L = O$

While $E + R = O$ ⁷ is useful to help individuals take charge of outcomes in their lives, it can work equally well for organizations. Leaders direct the responses when events occur within organizations. To understand how this works in organizations the $E + R = O$ ⁸ formula can be modified so that the R of response becomes an L for leadership. It is $E + L = O$ that determines outcomes for organizations. In organizations, it is leadership applied against events that can shape the outcome. Like with individuals, good and bad events happen to organizations. Layoffs are required or new people need to be hired, sales are substantially lower than expected or substantially higher, major clients are lost or gained, all of these events will have outcomes for the organization. So how do two organizations experience the same event and have different outcomes? Their leaders respond to the event in different ways.

When events happen to an organization, leaders must step up and provide the organization's response to the event. In my years as a senior leader in the U.S. Army, I have learned that leaders are not judged as much by the fact that a negative event occurs in their organization, but rather they are judged on their response to the event. When a negative event occurs, leaders must respond in a manner that inspires people. Leaders are also responsible for providing the organization's emotional response to the event. If the response of a leader is to be hopeless, the feeling within the organization will likely be one of hopelessness. If the response is one of inspiration by displaying a calm, positive, “we can do this” attitude, the organization's chances for a positive outcome greatly improve.

A Formula for Organization Success, $(M + E) + L = O$

The good news for organizations is that events are not completely out of their control. In many situations, events are at least partially predictable and conditions can be shaped before the events occur so that the impact of negative events will be less severe; and in some instances can be avoided altogether. In the Army, this is called “getting left of boom.”

A Major briefed the commanding general on the previous day's Improvised Explosive Device (IED) attack. As the convoy moved down a dusty Afghan road,

*the early morning calm was shattered by an explosion. The lead vehicle in the convoy was thrust into the air, landing in a heap of twisted metal and smoke. The response to the attack was both quick and efficient. The area was secured, the wounded were evacuated, and the remaining vehicles continued the mission. The Major concluded his briefing by stating that the leadership response to the event could not have been better. The general nodded his agreement that the leader's response to the incident was good. Then he focused on the timeline displayed on the PowerPoint slide. His eyes tracked the timeline left to right as it portrayed the progress of the convoy from departure to explosion. He then said to the Major, "You're right. The leaders did a great job responding after the bomb exploded, but what we have to figure out is how to do better before the explosion. How do we get left of boom?"*⁹

Getting left of boom is a concern for all leaders. It is not enough to just have a good response once events occur; organizations must figure out how to set conditions before events occur so the severity of negative events are lessened, if they cannot be avoided altogether. If leadership is the calm, inspirational response to an event, management is the policies, systems, procedures, planning and anticipation that take place before an event occurs, setting conditions so when an event does occur, its impact on the organizations is less severe than it could be without management's preparation. Good management is what gets organizations left of boom.

While some people see leadership and management as the same thing, there is benefit in analyzing them as separate concepts. Doing so allows people to understand that leadership is an organization's response to an event, while management is the process of setting conditions that shape the event before it occurs. This can be visually explained by further modifying the original $E + R = O$ ¹⁰ formula. If $E + R = O$ ¹¹ explains how individuals can take control of their lives, and $E + L = O$ explains how a leader's response can influence the outcomes for their organizations, $(M + E) + L = O$ can explain how management sets the conditions that alter events before leaders apply the organization's leadership response that will ultimately determine the outcome.

The M , or management, is the actions taken by an organization that set conditions for the organization before an event occurs. Because management is applied before an event

⁷ *Id.*

⁸ *Id.*

⁹ The analogy is based on the author's professional experiences as an active duty judge advocate for twenty-seven years, which include operational deployments to Afghanistan (2003 and 2012-2013) and Iraq (2006-2007).

¹⁰ CANFILED, *supra* note 1 at 6

¹¹ *Id.*

occurs, the $M + E$ is in parentheses to indicate that management influences the event before anything else is done. The result is that when an event does occur, it will have been altered by management practices. Events still occur, but they are altered by management. Only then is it leadership's turn to apply itself against the now altered events and the final outcome for the organization determined.

It is important at this point to highlight a major difference between leadership and management. You do not have to be in charge to be a leader, but you must be in charge to be a manager. John Quincy Adams famously stated, "If your actions inspire others to dream more, learn more, do more, and become more, you are a leader."¹² There is nothing about this definition of a leader that requires the person to be in charge. It is not the person's orders that require others to do more, it is the person's *actions* that *inspire* others to do more. Leadership—actions that inspire others to act—can be performed by anyone in the organization at any level. A person may be in charge by virtue of her position, but she is a leader by virtue of her actions.

*It was a wet miserable morning to exercise outside. At 6:30 a.m., it was thirty-nine degrees, still dark, and a light rain was falling. No one was looking forward to rolling around in the cold mud doing sit-ups and push-ups, but it was on the training schedule, so it had to be done. The Army does not shy away from a little cold, wet weather. As the Soldiers assemble in formation, most grumbled their displeasure at the morning's conditions, except for Private First Class Jones, the junior member of the unit. Jones let out a yell and shouted, "Let's do this." As the exercises begin, he is extra loud and motivated when counting the exercise cadence. Before long others are getting into it and sounding off loud as well. By the end of the session, everyone is motivated, excited, and feeling good as they walk off the field. They had a great workout, and, to the surprise of everyone, they actually had fun.*¹³

How was Private Jones, the most junior member of the organization, able to take a miserable event and change the outcome for the entire organization? After all, he was not in charge of the unit. The answer is simple: on that day, at that time, Jones was a leader. His actions in response to a bad event inspired others and led change in his organization that produced a good outcome. Leaders do not have to be in charge to lead, but it is different with managers; managers *do* have to be in charge to manage.

Managers establish policies, set goals, establish timelines and schedules, provide resources, monitor systems, assign tasks, track metrics and hold subordinates accountable. All of these things require the person doing them to be in charge. Unless a person has the authority to impose these requirements on others, she cannot manage. These are also the same actions that will set conditions for an organization which will alter events before they occur. The term "crisis management" has become popular to describe an organization's actions after a crisis has occurred. This, however, is an incomplete definition. Crisis management includes what organizations do *before* a crisis occurs. It includes the actions an organization puts in to practice before a crisis so that the organization is better situated when a crisis does occur. *After* the crisis occurs, organizations should apply "crisis leadership."

Transitioning Army personnel in Alaska provides a good example of this concept. Moving to an Army unit in Alaska is the longest move in the army in terms of travel days allowed because anywhere else the Army would move a Soldier requires the Soldier to fly, rather than drive. The typical number of travel days for Soldiers moving to or departing from Alaska is fourteen. Most Soldiers move in and out of Alaska in the summer; and summers in Alaska, with the sun shining nearly twenty-four hours a day, are amazing. Everyone assigned to Alaska wants to take time off in the summer. Therein lies the problem. At the exact time most newly assigned people are arriving late because of the long travel time and departing people are leaving early for the same reason, the Soldiers not in transit that year want to take some well-deserved time off while it is warm and sunny. It is a ticking time bomb of an event each summer that calls for good leadership, but leadership alone is only half of the equation.

A method of dealing with the event is to just let it happen unaltered by management. $E + L = O$ will kick in once summer arrives and leaders, both those in charge and those who aren't, will step up to inspire and motivate others to do more to handle the summer personnel shortage. The outcome may be okay, but it almost certainly will not be great.

The result is significantly different if $(M + E) + L = O$ is applied. In this case, managers forecast the coming event through predictive models from previous years. They establish vacation policies regulating when Soldiers can take time off in the summer so that they take it before and after the transition period for incoming and departing personnel. They also require people to take vacation in the summer months in smaller amounts so everyone gets a fair opportunity to take some time off. They establish a system to monitor departure dates of Soldiers leaving in the summer so that they are staggered and not departing at the same time. They adjust the training schedule so that there are not significant periods of time where large groups of Soldiers are away training during

¹² John Quincy Adams Quotes, AZ QUOTES, http://www.azquotes.com/author/91-John_Quincy_Adams (last visited Apr. 23, 2018).

¹³ Professional Experience, *supra* note 9.

the peak transition time. The result of their management actions, applied well before the event occurs, is that when summer arrives and the event occurs, the negative impact of it is greatly reduced. There are still some gaps in personnel coverage, and leaders must still inspire and motivate others to step up to cover the gaps, but the impact to the organization is less severe. The mission continues to be accomplished throughout the summer, people get to take vacation in a fair and equitable way, and the morale of everyone is higher. Overall, the organization becomes better as it was able to accomplish its mission with minimum disruption. Good management combined with good leadership results in better outcomes.

Even though leadership and management may play different roles before and after events occur, if a person is in charge, she will need to be able to do both to truly succeed. Remember, a person can be a leader even if not in charge, but a manager must be in charge to manage. For this reason, a manager will also always be a leader for the simple reason that the person in charge is always looked to for leadership. That does not mean the person is necessarily a good leader; it just means that when an event occurs, the people on her team will look to her for leadership. For this reason, a manager who is weak in leadership should work hard to become a better leader. This becomes even more important as the manager becomes more senior and the duties of management and leadership diverge.

For people in charge of small organizations, or subunits of organizations, the actions of leadership and management are embodied in the same person because the supervisor manages the work product for the same people she leads. This is generally the case when a supervisor has a small team, usually no more than 5 to 10 subordinates. Any more, and the supervisor is at risk of being overwhelmed by the tasks of management. Management—the assigning and reviewing of work, setting monitoring deadlines, the monitoring of systems, the development of subordinates and the drafting and implementation of policy—takes time,¹⁴ and it can quickly become overwhelming if a person is asked to manage a large number of people. As supervisors increase the number of people for whom they are responsible, out of necessity, the duties of management and leadership diverge. To be successful at the senior level, supervisors must learn how to manage a few, while being a leader to all.

In the Army it is commonly said that regardless of rank or position, nobody manages more than 5-10 people (the number of Soldiers typically assigned to a squad; the smallest building block for all Army units). That is because management takes time. Any more than 5-10 people, and the supervisor does not have the time to properly manage the work the workers perform, and the ability to use management to shape events before they occur begins to break down. When this happens, work is performed, but not reviewed by

the supervisor in a timely manner, resulting in backlogs and frustration on the part of those doing the work. Performance counseling, meant to be routine, is delayed or not done at all. Training, vital to the growth and success of the organization, is delayed or poorly executed. Overall, the organization fails to perform as efficiently as it should due to overwhelmed managers.

The Army's solution to this problem is to divide the large organization into smaller subunits. Supervisors, regardless of how big the unit they supervise, only manage the few supervisors of the subunits, while at the same time they are leaders to everyone assigned to their organization. The result is the commander of an army Corps, comprised of 50,000 or more Soldiers and commanded by a three-star general, only manages the 3-5 commanders of the divisions that are subordinate to the corps, but is a leader to all 50,000 Soldiers in the corps. In turn, a division commander, comprised of 15,000 or more Soldiers and commanded by a two-star general, only manages the 4-7 commanders of the brigades that are subordinate to the division, but is a leader to all Soldiers in the division.¹⁵

This process of manager to a few, but leader to all, continues all the way to the platoon level, which is comprised of forty Soldiers and commanded by a second lieutenant. The lieutenant manages the three-four squad leaders (sergeants who have five-ten Soldiers in their squad), but is a leader to all 40 Soldiers in the platoon. For the squad leader, the lowest level supervisor, the responsibility for management and leadership are fused, meaning the sergeant manages the same five-ten Soldiers he leads. This model of manager to a few, but leader to all, is something all organizations should consider. It not only frees up the senior supervisors to do other things she needs to be doing, it reduces the risk of micromanaging, management paralysis by trying to do too much, and missed management opportunities to shape events because the manager has too much on her management plate to act before the event occurs.

The good news for the organizations is that $(M + E) + L = O$ applies equally well to the most senior supervisor in the organization as it does to the most junior, and it does not require individuals to be strong in both leadership and management for organizations to have better outcomes. Strong management can improve outcomes even if there is weak leadership and strong leadership can improve outcomes where there is weak management. Management is about systems, processes and projects, while leadership is about people. Managers manage work, leaders lead people. In the Alaska example, a weak manager might have only done some of the things discussed above, or if he did do them, he may not have done them well. In that case, a strong leader, even someone not in charge, can likely create a better outcome for the organization through strong leadership. This is good news if an organization or individual is strong in one area, but weak

¹⁴ *Id.*

¹⁵ *Id.*

in the other. Some people are very good with systems, policies and processes, but are not good at inspiring and motivating people. Others are inspirational leaders, but poor managers of process. The strength in one area can make up for a weakness in the other.

Changing the Outcomes for Your Organization

$(M + E) + L = O$ can help organizations visualize the interplay between leadership and management. In doing so, organizations can come to realize that they are not victims of events. They can take charge of the outcomes for their organizations. They can get left of boom. Good management may seem steady, prodding and unexciting, but it is vital to setting conditions before events occur so that organizations are better positioned when crises do occur. Good leadership may be dynamic and exciting, but it often is not sustainable at a high level over time. It inspires and motivates to power the organization through an event, then it is done until the next event. Leadership is the energy drink that powers the organization through a tough time, while management is water that keeps the organization hydrated for the long haul. Good leadership may be able to make exercising in the cold mud fun. Good management can put a system in place to monitor the weather and adjust the training schedule so on the cold muddy day, the group exercises inside.

Organizations could have a real problem if people were only leaders or managers, but they are not: they are both leaders and managers. To some degree, every supervisor is both leader and manager; the issue for most supervisors is understanding when the responsibilities of leadership and management are fused and when they diverge. When should you be a leader and manager to the same few people on your team, and when should you be a manager to a few, but leader to all? Understanding the differences allows us to work to improve both leadership and management so we are overall better for the organization. People more inclined to leadership skills can learn to use management to shape events before they occur, and people more inclined to management skills can learn to inspire and motivate their organization so they can lead the organization through a bad event. Understanding and applying $(M + E) + L = O$ organizations can take control of their destiny and create better outcomes.

“My Lai at 50” Events at CSIS and the Pentagon

By Fred L. Borch

Regimental Historian and Archivist

On March 15 and 16, 2018, the Corps took part in two events that examined war crimes committed by American Soldiers at the small Vietnamese hamlet of My Lai. “The My Lai Massacre: History, Lessons and Legacy” was held at the Center for Strategic and International Studies (CSIS) on March 15. The following day, the Corps was the lead sponsor of a similar symposium at the Pentagon, called “My Lai at 50.” Co-sponsors for this second event were the Center of Military History (CMH) and the Center for the Army Profession and Ethic (CAPE)

The goal of both events was to examine the history of this horrific war crime and then discuss the lessons that have been learned by our Army and our Corps from it.

The CSIS is an American ‘think tank’ based in Washington, D.C., and it welcomed a suggestion from CMH that a panel examining the legacy of My Lai be convened at CSIS. The result was a two-hour panel discussion moderated by Dr. James H. Willbanks, the General of the Army George S. Marshall Chair of Military History at Command and General Staff College, Fort Leavenworth, Kansas.

The first speaker was Dr. Erik Villard of CMH, who provided a historical overview of what the 23d Americal Division was doing in South Vietnam in early 1968; since Americal Division Soldiers committed the war crimes at My Lai, knowing what the division was doing gave the audience a context for the follow-on presentations.

Dr. Villard was followed by Mr. Fred Borch, the Regimental Historian, who told those attending the CSIS event what happened at My Lai on March 16, 1968, and also discussed the court-martial of Lieutenant William L. “Rusty” Calley. Calley was the only Soldier to be convicted for war crimes committed at My Lai.

Mr. Borch was followed by Prof. Gary Solis, who presented information about the five other courts-martial that were convened to prosecute war crimes arising out of events at My Lai (all resulted in acquittals). Prof. Solis also talked about those individuals who probably should have been prosecuted for war crimes but who escaped justice.

Rounding out the panel was Brigadier General (BG) Joseph B. Berger, who told those in attendance what the Army and the JAG Corps have learned from My Lai. The thrust of BG Berger’s remarks was that the Army worked hard to become a more ethical, values-based organization after My Lai, and that the JAG Corps developed operational law as a legal discipline and assigned judge advocates to deploying units so that commanders and their staffs would have round-the-clock legal advice in military operations.

The following day, starting at 10 AM in the Pentagon Auditorium, Lieutenant General Charles N. Pede, The Judge Advocate General, began the “My Lai at 50 Symposium” by introducing General Mark Milley, the Army Chief of Staff, as the keynote speaker for the event. After General Milley spoke, the first of two panels made 60-minute presentations. The first panel, consisting of the same four individuals who had spoken the day before at CSIS, presented essentially the same content as they had done at CSIS, albeit in an abbreviated format. This panel was moderated by Mr. Charles Bowery, CMH’s executive director.

This first panel was followed by a second panel sponsored by CAPE. Moderated by Colonel Geoffrey Catlett, the CAPE Director, this panel examined the ethical challenges raised by the My Lai incident and explained how the Army’s has learned from it. Dr. Lewis “Bob” Sorley, Major General (USA, Retired) Robert “Bob” Scales, and Dr. Richard Lacquemont were the three panel speakers. Dr. Sorley stressed that General Creighton Abrams, who served as Army Chief of Staff after Vietnam, believed that integrity was the key to a more ethical Army and that integrity was critical to preventing any future events like My Lai. Major General Scales spoke at some length about the health of the Army being dependent on having a well-educated, well-trained, and professional Noncommissioned Officers Corps. He said that the Army’s NCOs were the ‘canary in the coalmine’ and a deficient NCO corps inexorably led to a failed Army. The last panelist, Dr. Lacquemont, explained how the Army has worked to develop structures in the institution that promote a more ethical and professional Army.

The Pentagon symposium closed with a speech by Lieutenant General Pede in which he stressed that the strength of our Army was its ability to discuss a horrific and tragic event like My Lai. Moreover, the Army has made changes in the last 50 years so as to ensure that there would never again be a war crime on the scale of My Lai. As a result of these changes, the trust and confidence of the American people in our Army has never been better.



The following speech was delivered by Lieutenant General Charles N. Pede at the My Lai at 50 symposium on 16 March 2018.

Introduction

In 1999, a judge advocate sitting at his desk in the General Law Branch of our Litigation Division, then at Ballston, VA, was at the end of an otherwise ordinary day. As he prepared to leave his phone rang. The caller identified himself as William Calley. The Judge Advocate, knowing something of his Army History, and taken a little aback, asked, pensively: “THE William Calley? The LIEUTENANT William Calley?” The caller replied “Yes.” Calley proceeded to explain that he was being sued, he believed as part of a law school project in Utah, and had been told to call this particular Army legal office to request free legal representation from the Department of Justice for his actions in Vietnam. His request, of course, was ultimately denied.

Thirty-one years after one of the worst battlefield crimes in our Army’s history, perhaps the most notorious Soldier in our Army short of General Benedict Arnold was still dealing with the aftermath of the massacre at his hands at My Lai. And of course — so was our JAG Corps — pulled back into one of its darkest hours —and to one of the most remarkable — yet squandered achievements in justice.

Thank you all for being part of this event today. I want to thank the Center of Military History and the Center for the Army Profession and Ethic for co-hosting this morning’s retrospective. I’d also like to thank our many speakers today who have provided so many valuable reflections. I’d especially like to thank our Chief of Staff whose presence and remarks punctuate as nothing else could the importance of the serious study of history, even those most painful passages — so that we, and future generations of Soldiers will abide history’s important lessons.

As painful as the My Lai experience is to our Army, its study reflects an institution mature and professional enough to face the hard facts – and to learn from them. This truly is the mark of a gratifyingly reflective and learning institution.

Aeschylus, the famous Greek writer wrote 2500 years ago that “In War, the Truth is the first casualty.” For a time in 1968 and 1969 that, in fact, was true.

But somehow, some way – the truth always wins. And so it did on 29 March 1969, when Mr. Ridenour sent his lengthy letter to the White House, State Department, the Army, and Congress. It described the murders reported to him over the preceding months by Soldiers he met up with following their return from Vietnam.

The story we talk about today defies description in its impact on a small hamlet in Vietnam in 1968, and frankly on the American consciousness - even 50 years later.

It is a story that the Judge Advocate General’s Corps is intimately familiar with. Our Corps took to heart the finding

of LTG Peers that the law of war training in the Americal Division was substandard. We took that finding as that our Corps had failed. I think anyone associated with these crimes – either in their unfolding or in their investigation and prosecution would acknowledge that you don’t need training to recognize that you can’t round up men, women and children and summarily execute them. Even the Soldiers on scene struggled with the orders to shoot.

But our substandard training contributed, among several dynamics then in play - to subvert the right culture in the Americal Division. Obviously, the nature of the war in Vietnam influenced what happened that day. The pressures of a nonlinear battlefield, and an unseen and asymmetric enemy and the fears and anxiety that brings to the moment by moment existence of the common Soldier. But as GEN Peers pointed out, poor training allowed our worst inclinations and fears to displace common sense, compassion, and discipline. It gave space to poor leaders to act on their fears and frustrations and Soldiers to hide behind clearly illegal orders. The lack of drumbeat training gave space for leaders to play to the worst of the human condition—to lie and cover up what had happened. To not ask questions, to ignore their responsibilities, up and down the chain — to profess ignorance about process and procedure for reporting war crimes.

The creation of the DoD Law of War program in 1974 is a direct and modern result of this key lesson learned. It helped to usher in a new era in understanding our obligations as Soldiers under the law of war – and it also began the process of more integration of judge advocates into operations. The Army transformed the way in which it inculcates professionalism and ethics after My Lai – with the Army Values and the Warrior Ethos being just two recent examples. The Army Values of Loyalty, Duty, Respect, Selfless Service, Honor, Integrity and Personal Courage are the most recent manifestation of the My Lai lessons.

We have also been reminded this morning that we are not a perfect institution — but we are an accountable one — then and now.

Commanders and judge advocates were chiefly responsible for achieving some measure of accountability once the real story of Task Force Barker became known. Careful examination of My Lai, in my view, reveals the beginning of our redemption.

We should not forget the Army had flagged LT Calley and preferred charges before the events at My Lai became known to the public. Before the discharged Army photographer sold his photos to Life Magazine and before Seymour Hersh published his article.

If you look closely, from almost the very beginning of the operation —to the darkest moment of that horrid day on the

battlefield there was something else, thankfully, at work. That something else was what I'd like to think was and remains the real heart of our Army.

In the weeks and months that followed – during which the darker aspects of the human condition operated to conceal the truth, the truth clawed itself back up and out of the abyss of our baser instincts.

The Path of Accountability – Leaders of Courage and Integrity.

The story of the aftermath of My Lai is one of sobering resolution. In my view it is our moral obligation to bravely embrace the terrible lessons of My Lai, but it is equally important that we hold up the principled leaders and lawyers who brought some measure of justice to those whose lives ended on that day, and who began the Army's redemption by putting us on a respectable path of accountability.

I speak of the many in our Army who knew that something was wrong and set about righting that wrong. They should not be forgotten in remembering the terrible events of My Lai. That we failed in many respects in addressing full accountability should not lessen the work of many honorable and dogged leaders. These various men should be praised – for their task was daunting in the face of great pressure and criticism.

It began, of course, with men like Pilot Hugh Thompson –later LT and his door gunner Larry Colburn – who were flying in support of the operation; We know his story — he witnessed the unlawful acts occurring below, and took action.

But the list of honorable Soldiers is longer.

I want to speak of 2 such men — LTG Peers and CPT Daniel.

Lieutenant General William “Ray” Peers

Lieutenant General William “Ray” Peers was commissioned in 1938 and saw action in World War II with the Office of Strategic Services in northern Burma. A big, cigar-chomping man, he also served with the O.S.S. in China, sent American spy teams to Japanese prison camps in China and Korea and led a Chinese parachute assault on Nanking to occupy that city. General Peers also commanded the Fourth Division in heavy battles in Vietnam's Central Highlands in 1967. His decorations included a Silver Star and the Distinguished Flying Cross. As a combat veteran of three wars, if ever there was a Soldier who knew the dangers, pressures and depravities of war it was General Peers. If ever there was man who had a yardstick for battlefield conduct — who understood the obligations of Soldiers to civilians — it was General Peers.

General Peers was clearly a man who had seen it all — experience and reputation was beyond reproach. He did not disappoint either the critics or the Army leadership.

As judge advocates will often tell commanders – choose your investigating officer wisely. The Army chose wisely in 1969. General Peers was also very wise in the ways of the world. Three days after his appointment, he requested an ‘outside counsel’ “to promote public recognition and acceptance of the objectivity of the inquiry and to enhance its effectiveness.” General Peers recognized early on that his work needed external legitimacy sometimes required for institutional self-policing investigations. That outside counsel was Robert McCrate, a NY lawyer and VP of the NY Bar Association. Mr. McCrate provided a special memo in the official report affirming his estimation that the investigation was “thorough, effective... and well done.” His memorandum is effectively the dedication page of the Peers report.

General Peers assembled a staff of roughly 90 in December 1969 and in three months' time heard from 398 witnesses, took 20,000 pages of testimony and inspected what was left of My Lai and in theater unit records. His report is comprehensive, direct, candid and unvarnished. It sets out very clearly what happened — from the planning of the operation to its execution to the cover-up. And his findings about those involved in the cover-up are — frankly shockingly candid and I'll add, refreshing to read. There is no mincing of words – no delicate phrasings. Just as plain as a specification on a charge sheet. From the Americal Division Commander to the platoon leader he calls them out in a litany of failures and explains their culpability in plain English.

In four pages of omissions and commissions General Peers sets out with painful clarity where Major General Koster – the Division Commander failed. From failing to ensure proper orders in handling noncombatants, to failures to follow up on US and Vietnamese reports of noncombatant casualties — including Chief Thompson's report, to suppressing evidence and knowledge of the event.

The report is equally unsparing in calling out the acts of omission and commission by the rest of the command and staff including placing a great deal of responsibility at the company and platoon level – with direct and plain spoken attribution to LT Calley.

Importantly, LTG Peers report stands the test of time in terms of thoroughness and quality – and in raw but precise candor. His Army had failed and he was the one who would forever be known for holding it to account – under extraordinary scrutiny and pressure – LTG Peers did not blink.

Captain Aubrey Daniel

The second person I'd like to highlight is the judge advocate who prosecuted LT Calley – CPT Aubry Daniel.

There is no question that in the case of LT Calley, it was a circus. From the first moment Seymour Hirsch published his article in the New Yorker. From charge to arraignment six weeks elapsed. Another year would go by before the first witness was called. Imagine a year of very public scrutiny. Following his conviction we see the unprecedented entry of the President ordering House Arrest in place of prison. The body politic had buried the President in over 700K letters of support. Despite the President's public outrage upon learning of the massacre, his Presidential Order of house arrest a year later after the court sentence was announced was a clear response to the pressure from the American Public to absolve a clearly guilty murderer. The people had spoken in one sense – but as often happens were unaware of the facts that emerged in the court-room. The appeals thru the military courts were exactly what you would expect – professional and thorough, well-reasoned and discursive. Once direct appeals were concluded in the military system, highly politicized habeas proceedings began which also left unchanged the findings of the court-martial.

The upshot of this exhaustive due process was a man whose conviction stood the difficult test of appeals and unceasing public scrutiny and criticism. Legal debates swirled about whether the amount of media coverage prevented a fair trial, whether unlawful influence was exercised by the chain of command, to include the president, and whether the judge had instructed the jury properly. No argument was left unattended. And in the end, his conviction for murdering defenseless men, women, and children stands. Having withstood the storm of scrutiny and public outrage, CPT Daniel had tried a solid case.

But for me, it is CPT Daniel's letter to President Nixon after he ordered Calley's house arrest. The letter should resonate with each of us.

I have read his letter to President Nixon many times. As your TJAG, if an SJA called to tell me his prosecutor was sending a letter to the President about one of the cases he or she had tried — I'd be more than a little perplexed — you might say. But in the context of My Lai, and the Calley case — it is a wonder more such letters were not written.

CPT Daniel's letter is powerful, and stands the test of time not only in its measured indignation, but in its principled exposition and defense of the victims of My Lai. It is also an eloquent and powerful defense of the military justice system and the principles of American due process. This is not melodrama or historical revisionism talking. It is the simple truth. I commend it to you and this particular passage from it:

I truly regret having to have written this letter and wish that no innocent person had died at My Lai on March 16, 1968. But innocent people were killed under circumstances that will always remain abhorrent to my conscience.

While in some respects what took place at My Lai has to be considered a tragic day in the history of our nation, how much more tragic would it have been for this country to have taken no action against those who were responsible.

That action was taken, but the greatest tragedy of all will be if political expediency dictates the compromise of such a fundamental moral principle as the inherent unlawfulness of the murder of innocent persons, making the action and the courage of six honorable men [the jurors] who served their country so well meaningless.

I have often marveled that I would be sorely challenged to write such a letter with a year of composition at my disposal. It is an inspired letter.

CPT Daniel also represents the operating principles of our JAG Corps today. Absolute adherence to the rule of law and total professionalism and competence in the face of extraordinary pressure. Imagine one of the counsel whose wife was pregnant and near delivery requiring a security detail for her safety in the hospital. A time when the President was receiving 25,000 telegrams a day to free LT Calley. The perceived dangers and pressure were at levels we cannot imagine today.

Despite the clear evidence of crime and findings of guilt, the nation had no appetite for more. Although more cases were pursued they withered. CPT Medina was tried but as we know acquitted – in my personal estimation because the wrong law was applied as to commander responsibility.

GEN Peers and CPT Daniel however, despite the checkered history of accountability were 2 men of tremendous courage and moral fiber – who stood the test under extraordinary public pressure.

Finally, I'd like to recognize the – six members of the panel mentioned by CPT Daniel in his letter (an 06, 4 04s and an 03) who found Calley guilty and pronounced sentence. Combat veterans who understood the national atmosphere and who nonetheless voted the evidence before them and in so doing upheld our Army's honor in the face of terrible pressure.

Conclusion - The Future of our Conduct on the Battlefield.

Having lived through years of high profile investigations, from combat theater investigations of target engagements gone wrong, to the detainee abuse era and the multitude of Service level investigations and beyond – the Peers Inquiry stands above them all in my estimation for its rigor, integrity, fairness and clarity.

The Peers Investigation gave the Army a path forward to redemption. It avoided the facile criticism of 'whitewash' by its simple candor. It demonstrated with its clarity of account that self-policing is not a farce – that indeed self-critique and correction is possible.

Our path forward 50 years later remains one of vigilance and constant emphasis.

The emergence of Operational Law in the late 1980s was a direct result of My Lai. Operational law was a recognition by the JAG Corps that it could best serve commanders and the Army---and help prevent crimes like My Lai--- if judge advocates embedded and deployed with units. This meant that Army lawyers were with commanders to help them achieve mission success – in accordance with the Law of Armed Conflict. Today, we have three judge advocates organic to every BCT, helping to ensure that commanders and their staffs have 24/7 legal advice and support. Judge advocates regularly advise on targeting, they assist in the development of Rules of Engagement and, importantly, in the manner in which noncombatants are treated. Training in LOAC is sustained at the lowest unit level possible and a key component in all of our operations.

Our integration into the operations of units, and the development of a LOAC program and of operational law has increased our ability to ward off and ID the ever present evil of depravity on the battlefield.

I would suggest however, that what we're talking about is a bit like a disease. We may rid ourselves of the problem through aggressive inoculation. But if we stop inoculating, if certain portions of our corporate body decide they no longer have time for the inoculation – the danger of the disease's return magnifies.

So as Soldiers and leaders we can never be comfortable that the 'problem is solved.' Every battlefield will be different, and every year our Army refreshes with 150K new Soldiers. How do we 'inoculate' these 150K Soldiers every year with the lessons of our Army at war.

If we begin to think we'll never have another My Lai – it is our evil twin talking. We see glimpses of such depravity in the brutality of our recent wars – think of our high profile murder cases and Abu Ghraib, where prisoners were mistreated and humiliated for the amusement of some of their guards. The thin line is there – and we must be 1) conscious of it and 2) keep our Soldiers away from it.

We come together today to use the terrible events of 1968 to recommit to our aspirations to be better than our past.

To promise each other that we will carry on the legacy of justice represented in the actions of the honorable Soldiers like Hugh Thompson, GEN Peers and CPT Daniel who held our institution accountable. It is our job now to ensure we perpetuate the legacy of adherence to the law of war, that honor in war is the essence of our operations, and that the

hand of a Soldier in combat is one that destroys the enemy – but will always protect the innocent.

I close with the antithesis of My Lai. Another platoon leader in Vietnam, in another rice paddy, moving thru another Vietnamese village – who I'd like to think represented the rest of the Army at that time. The contrast is at once restorative as it is sobering. It is taken from "Platoon Leader," arguably the best memoir written about leading men to come out of Vietnam.

LT Jim McDonough wrote,

I had to do more than keep them alive, I had to preserve their human dignity. I was making them kill, forcing them to do the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader. They were good men, but they were facing death, and men facing death can forgive themselves many things. War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines that they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed. And anything can happen."

A leader has to help them understand that there are lines that they must not cross....

So let us all keep our eyes on that thin line – and remain vigilant.

I thank you all for coming today. This concludes our seminar.

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