

# A My Lai case lawyer sees comparison to Iraq

*Common sense needs to cut through fog of war*

## Merle Wilberding

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There are some events we should not forget, lest we forget the lessons they teach us.

March 16, 2006, marked

the 38th anniversary of the My Lai massacre which occurred during the Vietnam War. On that day, Lt. William L. Calley led his platoon into My Lai 4, a small hamlet near the China Sea. As a result of the ensuing massacre, Calley was ultimately convicted of the deaths of 22 men, women and children.

For me, the My Lai massacre was the focal point of the Vietnam War. It has stayed fresh in my memory because I was part of the appeal of Calley's court-martial conviction within the military court system.

As a young Army captain in the JAG Corps, I spent more than a year studying the record and the underlying legal arguments and precedents. I wrote the brief on behalf of the government and argued the case before the military appellate courts.

The legal theories were all about judging conduct clouded by the fog of war, the responsibility of the chain of command, and whether or not the order to "waste them" was a valid legal order.

These arguments embodied intricate concepts and distinctions — abstractions that are rarely considered in the field of battle. Decisions in the midst of battle must be made immediately. There is no time for debate. In the military, good decisions are premised on good training. This is the essence of being prepared to do battle.

Despite the controversy about the Calley case, I was never troubled about the court-martial conviction. The record was replete with facts supporting the convictions. After the platoon completed its sweep of the village, they herded the remaining men, women and children into a drainage ditch that ran along the hamlet, and had them under guard.

Capt. Ernest Medina then allegedly ordered Calley to "waste them." The evidence was clear that Calley had personally taken part in the killings and that two privates, Dennis Conti and Harry Stanley, had refused to take part in the killings.

I thought of these enlisted men when I read an account about an incident that occurred recently in Iraq. Five soldiers stopped a pickup containing two Iraqi civilians at a checkpoint outside the city of Samarra. After they searched the individuals and the pickup, the soldiers concluded that these individuals were not a danger to the community.

Instead of waving them through the checkpoint, however, four of the soldiers marched the two Iraqis down to the Tigris River and forced them at gunpoint to jump into the Tigris. The fifth soldier, Pvt. Ralph Logan, refused to participate, even though he recognized that he was refusing a direct order.

The other soldiers later claimed that they were just getting them "wet" as a prank, but when a corpse was retrieved from the river some days later, the incident took an ugly turn.

When the men involved were subjected to a criminal investigation for murder, the same defenses were lodged as had been lodged in the My Lai courts-martial — we were in a strange land and could not distinguish the good guys from the bad guys, we were reacting (if not retaliating) for recent casualties that we had suffered, the generals wanted higher

body counts, we were just obeying orders, and so on. Two of the soldiers were convicted of assault.

When I think about the My Lai massacre and the Tigris dunking and drowning, I don't think about whether these Americans fighting a war in a foreign land are adequately trained to distinguish between legal orders and illegal orders, and I don't think about the fog of war.

I do think about common sense.

What struck me about these incidents in wars separated by a generation of lives is that, in both, low-ranking enlisted soldiers refused to take part in the mistreatment of innocent civilians.

Conti and Stanley at My Lai and Logan in Iraq all recognized that "it just wasn't right" to do what they were ordered to do. When I worked on the Calley litigation, I always believed the actions of Conti and Stanley were a good measuring stick for what was reasonable to expect of our soldiers.

After reading about the dunking and drowning in the Tigris River, I came away with that same conclusion. Logan's actions reflected just plain common sense of how to treat someone when you are satisfied that the person is not a danger to you or your unit, and you have them completely under control.

The risk to personal safety is very high in all wars, and certainly the risks escalate in wars like Vietnam and Iraq because your friends during the day may be your enemies at night. However, it is important to recognize that those individuals who exercised common sense were able to cut through the fog of war, and that is a good lesson for all of us.

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