

War Crimes & The Military Justice System

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WAR CRIMES & THE MILITARY JUSTICE SYSTEM



My Bio

- From Dallas, TX
- Texas A&M Class of 1987 (Whoop!)
- Commissioned 1987 U.S. Marine Corps
- Artillery Officer 1988-1995
- Law Program/School
- Judge Advocate
- Retire Nov 2008
- Civilian Practice



Military Justice “You Can’t Handle The Truth!” A Brief Overview

- What Do You Know?
 - Is “Military Justice” an oxymoron?
 - Myths
- UCMJ
- Convening Authority Concept
- Deliberations
- Constitutional Rights



A Few Differences with Civilian Systems

- Convening Authority vs. DA
- Article 32 vs. Grand Jury/Prelim Hearing
- Prosecutorial Discretion
- Court-Martial members vs. Civilian Jury:
Composition & Selection
 - Pros - Cons? Better/Worse Than Civilian?

HADITHA

- What Happened
- What is Alleged
- Key Military Justice Concepts Involved:
 - Rules of Engagement
 - Unlawful Command Influence
 - Obedience to, and Reliance Upon, Orders of Superiors



Ahmed Family Residence
(House 4)

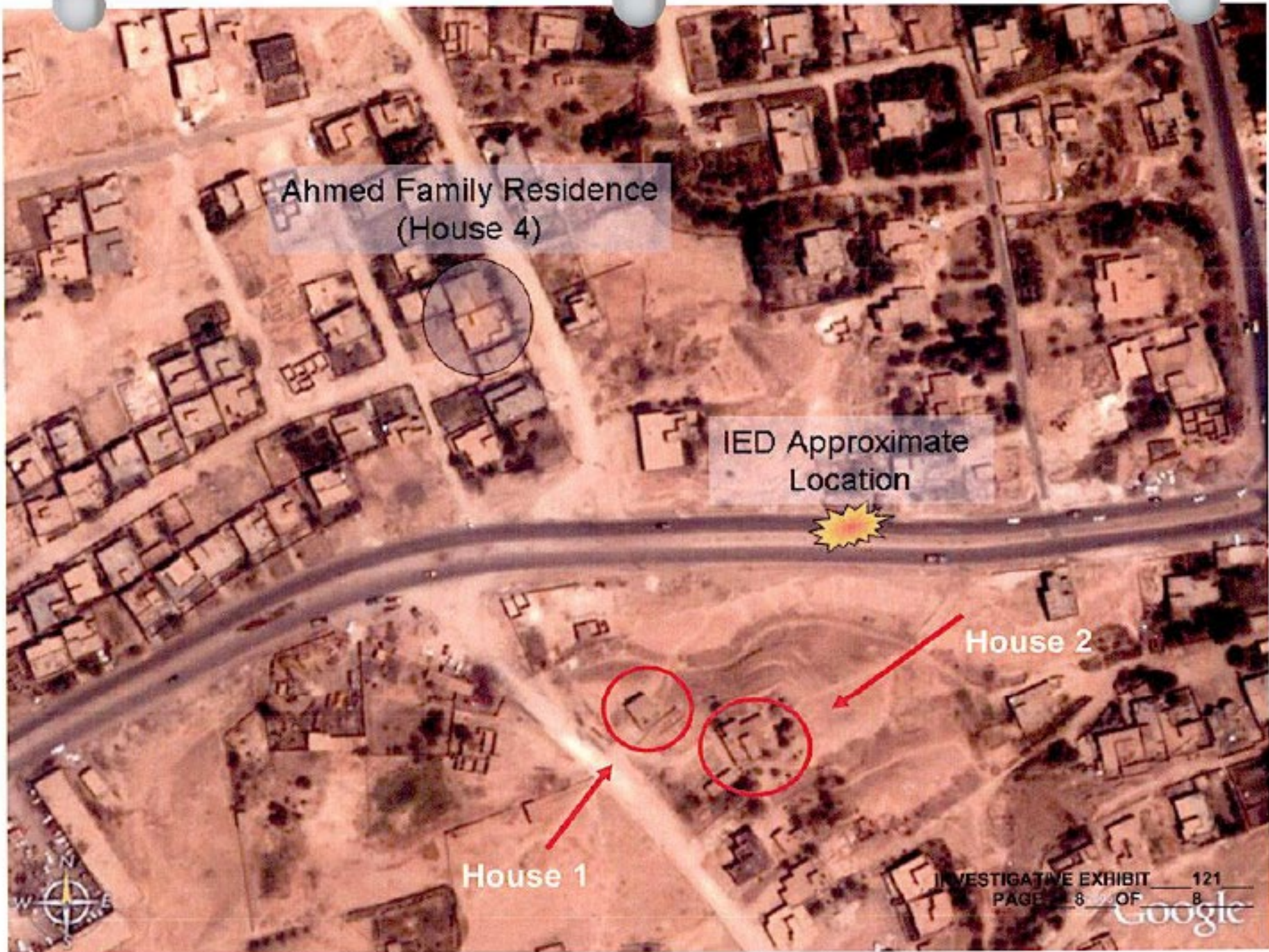
IED Approximate
Location

House 2

House 1

INVESTIGATIVE EXHIBIT 121
PAGE 8 OF 8

Google



ALLEGATIONS

- Marines violated the rules of engagement by assaulting houses and engaging the people inside because they had no reason to perceive a hostile threat & because they either deliberately targeted unarmed civilians or recklessly failed to determine whether they were a threat before engaging them.
- 4 Charged with unpremeditated murder.
 - SSgt Wuterich – 13 murder charges

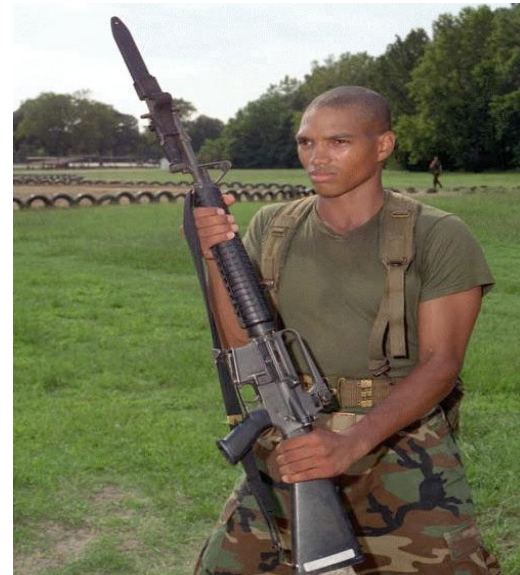
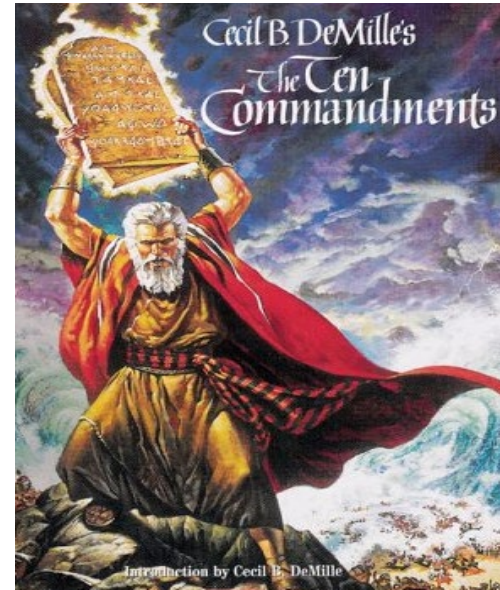
CONCEPT: “Rules” of Engagement

- Not Just a Movie With Samuel L. Jackson and Tommy Lee Jones (but highly recommended it if you are interested in how it applies in a criminal law context)
- Training and limits of use of force



Rules vs. Training and Reality

- Rules: Can't use deadly force unless you perceive a hostile act or hostile intent – can always use if defending self or others.
- Training:
 - Declared Hostile
 - How to clear a room
 - How the enemy operates (history of Haditha area, enemy tactics – 3/25 example)
 - How to apply “Rules” – next slides





Situation 12

You are in the lead armored HMMWV escorting a four vehicle convoy along HWY 1. There is a flash behind you followed by a loud explosion as one of the NTVs in the convoy disappears in a cloud of dust and smoke.

You see two males 200m away from you mount a motorcycle and speed away.

You also see an orange sedan back out of a driveway 150 m south of your position and speed away.

Three males in a roadside stand 100m up the road run into a nearby house, but you start taking small arms fire from a different house 150 m west of your position. What do you do?



Answer

- A.** You should respond with deadly force to the hostile fire coming from the house, remaining vigilant to the other possible threats in the area.
- B.** You should engage the fleeing men on the motorcycle first because they'll be beyond effective range if you wait.
- C.** Engage everywhere you see movement because there's no telling who detonated the IED.



Situation 13

The convoy you are in suffers an IED attack on the unpopulated outskirts of Baghdad. As you focus your attention on the location of the IED, you notice two individuals in civilian clothes and no weapons jump up out of fighting hole about 40 meters away from where the IED exploded and run away from you. You quickly ascertain the individuals were within command-detonation range of the IED. What can you do?



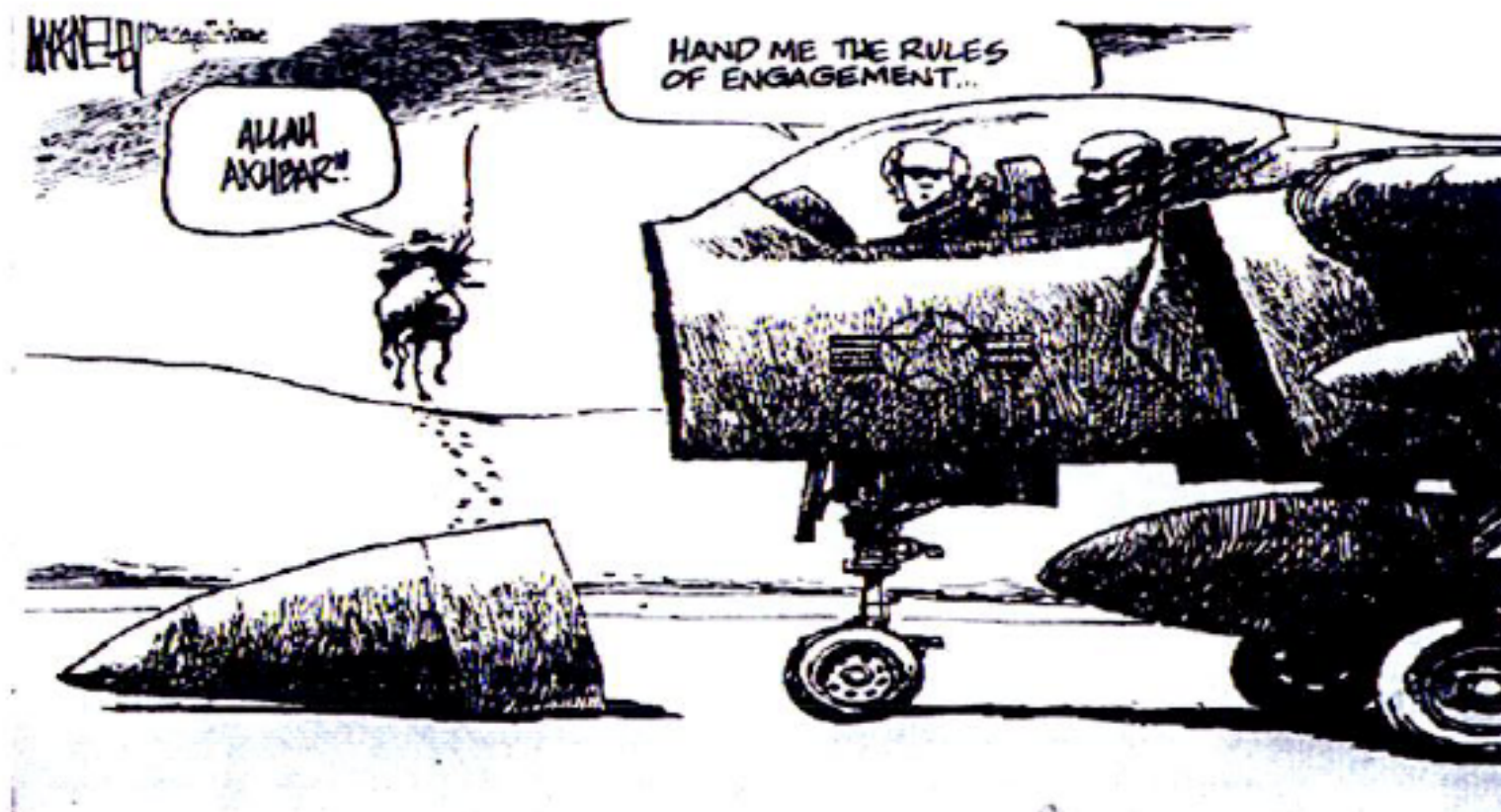
Answer

- A. Nothing because you don't have enough information to know for certain that the fleeing men detonated the IED.**
- B. You can engage with deadly force, ONLY after you fire a warning shot first.**
- C. You may engage the individuals with the necessary force, including deadly force, to prevent their escape.**
- D. Detain, but do not kill the fleeing men. Running away is just like surrender and prevents us from killing him.**

FOUO



US ROE TRAINING



REALITY



Unlawful Command Influence



- What is it and Why is it Important?
 - Consider difference between civilian DA and Convening Authority, difference between civilian jury and military court member, and realities of military.
 - What Happened in Haditha Cases that raised the issue?

Said this multiple times in the press for weeks - - BEFORE investigation complete and claimed he was given the info from Marine Corps Commandant and “High Level” Officials



- What is the Danger?
- Any Civilian Similarity?
- How would YOU feel if you were one of the Marines under investigation?
- Perception of Unfairness?

REP. JOHN MURTHA (D), PENNSYLVANIA:

There was no IED that killed these innocent people. Our troops overreacted because of the pressure on them, and they killed innocent civilians in cold blood. And that's what the report is going to tell.

ORDERS, OBEDIENCE & REASONABLE RELIANCE

- Obedience to Orders – a complete defense
BUT...It must be a “lawful” order (Nuremburg)
- Reasonable Reliance Upon the Judgment and Knowledge of Others:
 - **Hypo:** Your Sgt. runs up to you and says “We just took an RPG hit from that Van – light it up!” YOU didn’t see the RPG attack – what should you do? What could happen if you fire? If you don’t? If the Sgt. Was mistaken and the van was full of kids, should YOU go to jail? Should the Sgt?
 - What factors should be used in determining whether your reliance was “reasonable?”



RULES OF ENGAGEMENT

A Social Anatomy of
an
American War Crime

—
Operation
Iron Triangle, Iraq

Stjepan G. Mestrovic

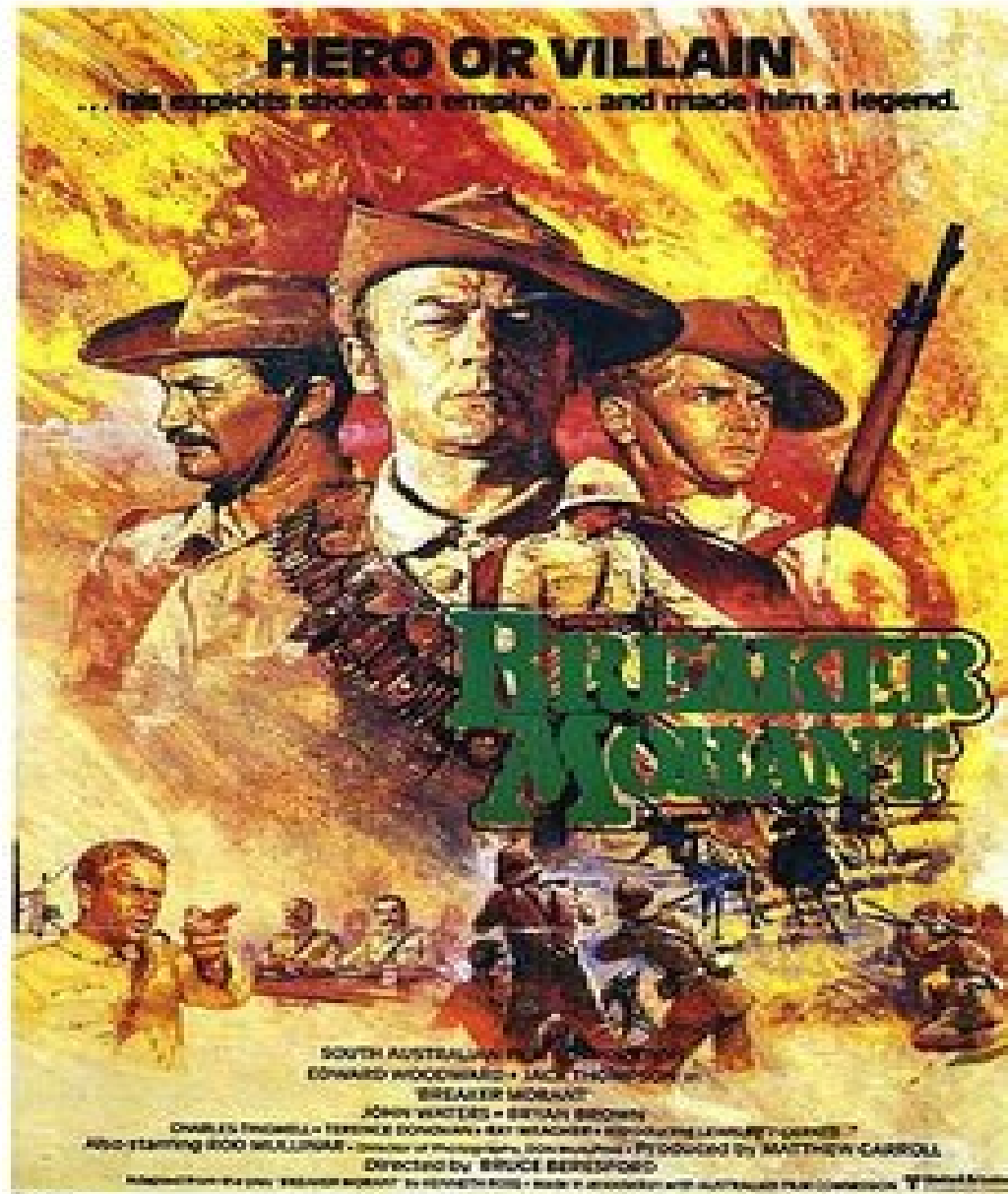
Algora



US v. PFC Corey Clagett, USA

- Unit conducts helicopter raid onto Iraqi island
 - Operation Iron Triangle
- Before assault, told all MAMs are lawful targets
- Squad captures 3 insurgents
- Squad leader radios to HQ, what to do with detainees
- Answer – we can't handle detainees
- Squad Leader – orders Clagett and other PFC to cut them loose and shoot them after they run away
- All three are charged with premeditated murder
 - Clagett pleaded guilty, given 18 years & Dishonorable Discharge
 - Squad Leader – found guilty of lesser offense, conviction overturned, leaves Army under honorable conditions.

Justification & Necessity



- **Justification:** You did something that violates the law, but you had a reason to do so that outweighs the illegality
 - Hypo: You drive drunk, but only to get a seriously injured person to the hospital
- **Necessity:** You did something illegal, but you had to commit that crime in order to prevent something worse
 - Hypo: San Francisco Fire

Justification & Necessity Applied

- **Marines at Hamdania:** Why did they feel the killing was justified or necessary?
 - Enough to make them not guilty?
 - What did their juries say?
- **SGT Michael Williams, USA:** Why did he feel using force on non-threatening insurgents was justified or necessary?
 - Result?

Difficulties With Fighting An Insurgency

- Rules say you can't intentionally kill or recklessly endanger civilians BUT...
 - Who are civilians? How do you tell when: The enemy dresses and looks like civilians and fights from in and around civilian areas? Respond or just be a target?
 - You know you can stop attacks and save lives, but might have to violate rules to do it – if you do, are you a “Hero or Villain?”



Lessons Learned in War Crimes Cases

- Study your history – My Lai, Son Thang & Haditha
- Pleading is bad (but see mandatory min)
- Joint defense
- Witness issues/ statements/ conspiracy
- Difficult to investigate
- Don't ignore media
- Lawful intent to kill vs. premeditation

Recent Cases

- 1LT Clint Lorance
- MAJ Golsteyn
- SOC Eddie Gallagher
- SFC Rob Nichoson (April 2021)

Navy SEALs, a Beating Death and Claims of a Cover-Up

By NICHOLAS KULISH, CHRISTOPHER DREW and MATTHEW ROSENBERG DEC. 17, 2015

The three Navy SEALs stomped on the bound Afghan detainees and dropped heavy stones on their chests, the witnesses recalled. They stood on the prisoners' heads and poured bottles of water on some of their faces in what, to a pair of Army soldiers, appeared to be an improvised form of waterboarding.

A few hours earlier, shortly after dawn on May 31, 2012, a bomb had exploded at a checkpoint manned by an Afghan Local Police unit that the SEALs were training. Angered by the death of one of their comrades in the blast, the police militiamen had rounded up half a dozen or more suspects from a market in the village of Kalach and forced them to a nearby American outpost. Along the way, they beat them with rifle butts and car antennas.

A United States Army medic standing guard at the base, Specialist David Walker, had expected the men from SEAL Team 2 to put a stop to the abuse. Instead, he said, one of them “jump-kicked this guy kneeling on the ground.” Two others joined in, Specialist Walker and several other soldiers recounted, and along with the Afghan militiamen, they beat the detainees so badly that by dusk, one would die.

QUESTIONS?

