

2011

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Recommended Citation

Davidson, Michael J. (2011) "Friendly Fire and the Limits of the Military Justice System.," *Naval War College Review*: Vol. 64 : No. 1 , Article 8.

Available at: <https://digital-commons.usnwc.edu/nwc-review/vol64/iss1/8>

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FRIENDLY FIRE AND THE LIMITS OF THE MILITARY JUSTICE SYSTEM

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On 22 April 2004, Corporal Patrick Tillman was killed in action in Afghanistan as a result of friendly fire. The controversial death of the Army Ranger, who had given up a lucrative career in professional football to join the Army, generated widespread media interest, military and congressional investigations, books, and most recently a documentary.

Earlier in the day, Corporal Tillman's Ranger platoon had split into two groups, with Tillman and his platoon leader in the first group. Due to dangerous terrain, the second group, led by the platoon sergeant, abandoned its planned route and instead followed the first group's route in vehicles down a canyon road late in the day toward the village of Manah, where Tillman and the remainder of the platoon waited. The second group came under attack and immediately began suppressive fire. Tillman, accompanied by an Afghan Military Forces (AMF) soldier carrying an AK-47 and the remainder of the platoon, took up supporting

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positions in the village and along an elevated area overlooking the road. As it moved forward under fire, the first vehicle in the second group saw muzzle flashes coming from the elevated area and directed fire against it, killing Corporal Tillman and the Afghan soldier with him. Continuing to fire as they moved forward, the Rangers in the first vehicle also wounded their own platoon leader and his radio operator.¹ Reportedly, before he was shot Tillman had thrown a smoke grenade, and he and other Rangers

Naval War College Review, Winter 2011, Vol. 64, No. 1

had shouted and waved in an unsuccessful attempt to stop the second group's attack; instead the movement only attracted additional fire.²

The Army handled the aftermath of the friendly-fire incident poorly. Initial investigations of the shootings were inadequate, Tillman's uniform and equipment were not preserved, initial reports of Tillman's death and his recommendation for the Silver Star contained factual inaccuracies, and the Tillman family was not informed about the true circumstances surrounding Corporal Tillman's death for thirty-five days.³

However, more germane to this article, in March 2006 the Army Criminal Investigation Division (CID) began an extensive criminal investigation into the friendly-fire shootings, concluding that those Rangers in the second group "did not commit the offenses of Negligent Homicide or Aggravated Assault."⁴ The CID report found that the Rangers had been under enemy fire and had reasonably believed that they were defending themselves and firing at the enemy.⁵ Additionally, as contributing factors to the accidental shooting the CID noted poor visibility, communications problems between the two groups, and the presence of the AMF soldier.⁶ Ultimately, "seven Rangers were either reprimanded or received nonjudicial punishment as a result of the incident," including some soldiers receiving nonjudicial punishment for "dereliction of duty," but none of the soldiers who were involved in the Tillman shooting were deemed criminally culpable.⁷

In the wake of a friendly-fire incident, particularly when it draws the attention of the media, there is a call for accountability. Someone needs to be held responsible. Someone needs to go to jail. Indeed, in some cases the facts seem so egregious that the need to subject to courts-martial the individual or individuals responsible is compelling.

However, the military has rarely used its justice system as a response to friendly-fire incidents, and when it has, prosecutions have rarely been successful. Further, the use of the military justice system raises significant collateral issues, among them concerns about second-guessing the actions of members of the armed forces in combat, encouraging hesitancy and timidity, overreacting to complex systemic problems by punishing individual manifestations of those problems, and fairness in determining who should be held accountable. As one commentator who has studied the history of friendly fire notes, "In the confusion of battle, accidents occur. They are tragic, but who can take responsibility for chaos?"⁸

This article will define friendly fire and distinguish it from other forms of battlefield killings. It will review the history of friendly fire, its causes, and its pervasiveness. Further, although there exist few reported cases, the article will discuss the often ill-fated attempts to address the problem through the American military justice system. Finally, although conceding the many difficulties

involved with achieving a successful court-martial prosecution, the article posits that there remains an important, albeit difficult, role for the military justice system in response to such incidents.

FRIENDLY FIRE DEFINED

Friendly fire involves the accidental killing in a combat setting of one soldier by another of the same or an allied force. The Department of Defense defines the term as “a circumstance in which members of a U.S. or friendly military force are mistakenly or accidentally killed or injured in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force.”⁹ Friendly fire differs considerably from the deliberate killing of another, sometimes called “fraggings,” which is simply premeditated murder and readily addressable under article 118 of the Uniform Code of Military Justice, when capable of proof. As one Marine Corps lawyer and scholar has noted, fragging is “Friendly Fire with Malice.”¹⁰

The first documented case of an American fragging dates to a deliberate killing in 1781 of an officer by Continental Army soldiers.¹¹ During the Vietnam conflict the number of fragging incidents became a noticeable problem as the discipline of American forces declined. The Marine Corps estimated between a hundred and 150 such incidents during the course of the war, and unofficial Army estimates were as high as 527 between 1969 and 1971.¹² One academic found most Vietnam-era fraggings to be attempts to intimidate officers and noncommissioned officers, particularly those who refused to countenance efforts to avoid combat.¹³

The concept of friendly fire is similar in many respects to the accidental killing of civilians, but such accidental killings appear to be treated differently and are often referred to as “civilian casualties” or by more sterile terms like “collateral damage.” Reported cases of courts-martial involving the accidental deaths of civilians are rare. The most famous court-martial involving an accidental attack on civilians occurred during World War II, and its fame was generated less by the nature of the alleged misconduct than by the identity of the president of the court—a movie star, Colonel Jimmy Stewart.

In that case, in March 1945 seven B-24 Liberators on a bombing run to Aschaffenburg, Germany, became lost, allegedly due to bad weather and improperly working navigational equipment, and unintentionally bombed Zurich, Switzerland.¹⁴ Zurich was deep in Swiss territory, near a large body of water, and the bombings generated a strong reaction from the Swiss government. Ultimately the lead plane’s pilot and navigator were tried but acquitted of the charge that they had “wrongfully and negligently” bombed friendly territory.¹⁵

NORMAL RATHER THAN EXCEPTIONAL

Friendly fire, also called “amicide,” “fratricide,” or “blue on blue,” has been a constant problem in warfare since the beginning of recorded time. In his comprehensive study of the subject, Geoffrey Regan traces such incidents from the Greek hoplites to modern times. Regan opines that these types of accidental killings were so common from antiquity through at least medieval times that “they were scarcely worthy of comment unless they related to a leader of note struck down by mischance.”¹⁶

Friendly fire has occurred in battles in which only one force was on the battlefield. For example, during a night march in 1788 the rear of an Austrian column near Karansebes, Transylvania, thought the shots and shouts from drunken soldiers at the head of the column indicated a Turkish attack; the soldiers panicked and started firing, causing an all-Austrian battle that resulted in thousands of casualties.¹⁷ The American military has suffered from equally embarrassing incidents. During the 1943 American and Canadian invasion of the Aleutian island of Kiska, twenty-eight Americans were killed and another fifty wounded on the first day despite the previous departure of all Japanese forces.¹⁸

Not only are historical examples of friendly fire so prevalent as to be characterized as normal rather than exceptional, but the causes of these incidents are so numerous as to preclude easy explanation. In some cases, friendly fire was the result of inexperience and inadequate training. For example, in 1643, during the English Civil War, poorly trained and inexperienced parliamentary infantry organized in three lines attacked a heavily fortified building held by royalist troops. Instead of the forward line firing first and then retiring to the rear to reload while the next line in turn fired, all three fired simultaneously, effectively eliminating the front rank.¹⁹

A plethora of other causes have been suggested as well: stress, inadequate coordination, faulty information, reduced visibility, inadequate training, chaotic conditions, inexperience, psychological warfare, low morale, panic and carelessness, misidentification, and the necessity for split-second decisions.²⁰ The one constant in these incidents has been human error. At some point in the chain of events leading to friendly-fire death, someone misidentified friend for foe, failed to provide critical information in an accurate or timely way, failed to determine accurately a location, misinterpreted an order, or the like.

Further, the number of casualties associated with friendly fire has often been stunning. One French general estimated that approximately seventy-five thousand French casualties in World War I were caused by French artillery fire.²¹ An estimated 5 percent of Vietnam casualties were attributed to friendly fire.²² During the first Persian Gulf War, Operation DESERT STORM, 23–24 percent of U.S. fatalities and 77 percent of American vehicle losses were attributed to friendly

fire.²³ One military scholar opines that 10–15 percent of U.S. casualties during the twentieth century were caused by friendly fire, which equates to between 177,000 and 250,000 casualties.²⁴

As discussed in this article, the lion's share of U.S. friendly-fire incidents appear to involve the Air Force (and its predecessor Army Air Corps) and Army and Marine Corps ground forces. However, the Navy has not been immune to this problem, being both the victim and perpetrator of such incidents. A 1995 *Naval War College Review* article reports fifty-three World War II incidents in which "U.S. vessels were damaged or sunk by Allied weapons," resulting in over six hundred casualties, in addition to the "many instances of naval aircraft losses due to friendly fire."²⁵ The article further identifies U.S. naval vessels that were the victims of friendly fire during the Korean War, Vietnam, and DESERT STORM.²⁶

Nor has friendly fire discriminated in terms of rank. In the wake of the Normandy landings in World War II, Allied bombers accidentally attacked the U.S. 30th Infantry Division, causing 814 casualties, including Lieutenant General Lesley McNair, who was killed.²⁷

Interesting from the legal standpoint (in terms of self-defense and justification defenses) are the unusual, but not completely unheard-of, instances of friendly-fire recipients defending themselves though knowing their attackers to be friendly forces. During the invasion of Kiska, where there was no enemy resistance, "one American soldier, convinced he was attacking a Japanese unit, had to be deliberately shot down by his comrades as he insisted on charging and flinging grenades as he ran, even though they shouted at him to stop in English."²⁸ Further, during the Sicily campaign, American ground forces were frequently attacked by American air forces. Indeed, General Omar Bradley was strafed (unsuccessfully) three times in a single day.²⁹ During one such incident, a U.S. tank column shot down the American plane and captured its pilot.³⁰

During World War II, American patrol torpedo (PT) boats and aircraft in the South Pacific frequently inflicted casualties on each other. In one incident in July 1943, four Army B-25s attacked two Navy PT boats, sinking one. In turn, the remaining PT boat shot down one of the Army aircraft, killing three of the crew.³¹

In one particularly bizarre incident during World War II, an American tank-destroyer platoon opened fire on a tank column; it ceased firing when it realized the tanks were Americans, but the tanks continued to return fire even after they had come close enough to identify the tank-destroyer unit positively as American. The tanks passed through the first American unit and proceeded to attack an adjoining American unit. As soon as they took up position on a nearby hill, the tanks in turn were attacked by American aircraft.³²

FRIENDLY FIRE THROUGH THE PRISM OF MILITARY LAW

When examining the efficacy of the military justice system in the friendly-fire context, one should start by looking through the prism of the applicable criminal standard. Since 1951 members of the armed forces have been subject to the Uniform Code of Military Justice (UCMJ). Prior to the UCMJ, the Army followed the Articles of War, and the Navy was subject to the Articles for the Government of the Navy, which made similar punitive articles available to prosecute friendly-fire deaths. The following are common friendly-fire-related offenses.

The UCMJ contains a hierarchy of homicide offenses, ranging from premeditated murder (article 118) to negligent homicide (article 134). Premeditated murder imposes the heaviest burden on the government but also authorizes the greatest level of punishment—death. To achieve a conviction for premeditated murder, the trial counsel (prosecutor) must prove that the accused (defendant) acted with a “premeditated design to kill”—that is, a specific intent to kill, with consideration of the act intended.³³ By comparison, a conviction for negligent homicide requires only proof that the accused’s action or failure to act constituted simple negligence (lack of due care); no specific intent to kill need be proven.³⁴ The maximum punishment for a negligent homicide conviction comprises a dishonorable discharge, forfeiture of all pay and allowances, and three years’ confinement. However, regardless of the offense charged, the UCMJ requires that all offenses be proven beyond reasonable doubt, the highest level of proof known to the law.³⁵

Two offenses likely to be charged under the UCMJ in a friendly-fire incident are involuntary manslaughter, under article 119, and the lesser included offense of negligent homicide. Involuntary manslaughter is on the low end of the hierarchy of homicide offenses and requires proof of culpable negligence, which is defined in part as “a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission.”³⁶ It is further defined as “a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.”³⁷ The basis of such a charge “may be a negligent act or omission that, when viewed in the light of human experience, might foreseeably result in the death of another, even though the death would not necessarily be a natural and probable consequence of the act or omission.”³⁸ As examples of culpable negligence, the *Manual for Courts-Martial* offers “negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.”³⁹

Negligent homicide is similar to involuntary manslaughter but requires a lower degree of carelessness or negligence. The accused's action or failure to act that resulted in the death need rise only to the level of "simple" negligence: "the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances."⁴⁰

Another likely charge is dereliction of duty, which is punishable under UCMJ article 92(3). This punitive article requires proof that the accused had certain duties that he or she knew of, or reasonably should have known of, and that the accused was either willfully (i.e., intentionally) or through neglect or culpable inefficiency derelict in performing those duties.⁴¹ Individuals perform duties "negligently" when, it being their duty to use due care, they act in a way "which exhibits a lack of degree of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." Culpable inefficiency is defined as "inefficiency for which there is no reasonable or just excuse."⁴² Mere ineptitude as a reason for failure to perform a duty serves as a defense against this charge.⁴³

The "duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."⁴⁴ The punitive article is broad enough to encompass a duty imposed by rules of engagement. Although the courts have determined that they will not require a higher standard to establish the "criminality of tactical-nonperformance decisions by military line officers," they will "not substitute hindsight for foresight" when determining whether the accused acted negligently.⁴⁵ In comparison to other offenses under the UCMJ, the burden on the prosecution is not particularly onerous, a fact reflected in the maximum sentence. Dereliction of duty through neglect or culpable inefficiency subjects the accused to a maximum sentence of only three months' confinement and forfeiture of two-thirds pay per month for three months.⁴⁶

Convictions under article 92(3) have encompassed a wide range of misconduct. To illustrate, service members have been convicted of dereliction of duty for failing to post road guides in pairs and maintain a roster of posted guides, resulting in the death of a guide by exposure during a desert exercise; willfully permitting a subordinate to sign falsely an official report; failing to use other available radar ranges while navigating a ship through a narrow passage at night after receiving conflicting information concerning the ship's position; and failing to maintain "an alert and responsible watch."⁴⁷

APPLICATION OF THE MILITARY JUSTICE SYSTEM TO FRIENDLY-FIRE INCIDENTS

Throughout American military history, reported instances of use of the military justice system in response to friendly-fire incidents have been exceedingly rare. However, several historical cases do exist and warrant review.

The American Civil War and the Death of Stonewall Jackson

One of the best known friendly-fire incidents in American military history involved the shooting of Confederate general Thomas J. “Stonewall” Jackson. On 2 May 1863, during the battle of Chancellorsville, Virginia, Jackson was mortally wounded by his own men. While Jackson was conducting a mounted nighttime reconnaissance of his forward lines, soldiers of the 7th North Carolina Regiment fired on him and his staff, believing them to be Union soldiers.⁴⁸ Jackson and his party rode on through the pitch-black forest toward the 18th North Carolina Regiment, whose soldiers also started shooting at them, also believing them to be attacking Union soldiers. One of Jackson’s aides yelled, “Cease firing! You are firing into your own men!”⁴⁹ Major John D. Barry of the 18th North Carolina responded, “It’s a lie! Pour it to them, boys!” The regiment fired into the group, hitting Jackson in the left shoulder, the left forearm, and right palm.⁵⁰ In addition to Jackson, four members of his staff were killed and three wounded.⁵¹ Jackson initially survived his wounds, but his left arm was amputated the following day, and he died of wound-related pneumonia on 10 May.⁵²

Although the Confederacy had a functioning military justice system, there is no record of any courts-martial involving the Jackson shooting.⁵³ Indeed, Major Barry was promoted to colonel after the battle. A veteran of several battles, Barry commanded the 18th North Carolina at the battle of Gettysburg and eventually rose to the rank of brigadier general.⁵⁴

World War II: The Sicily Invasion

Another significant friendly-fire incident in which no courts-martial resulted, although such action was seriously considered, occurred during the World War II invasion of Sicily. On the third day of the invasion, in July 1943, three battalions and an engineer company of the 82nd Airborne Division, some 1,092 men, were ordered to make a night parachute jump into Sicily.⁵⁵ Despite extensive coordination with Army and Navy units in the area, the paratroopers flew into a wall of anti-aircraft fire near the American beachhead. The airborne force suffered severe damage to or total loss of sixty of 145 aircraft; approximately sixty airmen were casualties, and 229 paratroopers were killed, wounded, or missing.⁵⁶ General Dwight D. Eisenhower, commanding the European Theater of Operations, was livid, ordering Seventh Army commander George Patton, who feared being relieved himself, to conduct an immediate investigation into what

Eisenhower assumed to have been “inexcusable carelessness and negligence on the part of someone,” to fix responsibility, and to take disciplinary action.⁵⁷

Eventually three reports were submitted to Eisenhower. The senior airborne adviser, Brigadier Frederick “Boy” Browning of the British army, blamed inadequately trained aviators. An American general, Joe Swing, blamed the disaster on a combination of five errors: inadequate coordination of air routes with nonairborne forces; inability of the insufficiently trained airmen to follow the complex air routes; the Navy’s rigid policy of firing on all aircraft; scheduling the airborne operation in the aftermath of sustained Axis aerial attacks on the fleet, including twenty-three separate attacks the day of the jump; and failure to warn Army antiaircraft units adequately of the pending operation.⁵⁸ In his report to Eisenhower, the 82nd’s commanding general, Matthew Ridgway, forestalled future disciplinary action by Eisenhower by concluding that “the responsibility for loss of life and material resulting from this operation is so divided, so difficult to fix with impartial justice, and so questionable of ultimate value to the service because of the acrimonious debates which would follow efforts to hold responsible persons or services to account, that disciplinary action is of doubtful wisdom.”⁵⁹

The Korean War: A Rare Court-Martial Conviction

The Korean War saw one of the few successful friendly-fire prosecutions. In *United States v. Perruccio*, an Army private was convicted of negligent homicide after shooting another American soldier whom the accused alleged he had mistaken for an enemy infiltrator.⁶⁰ The two soldiers had been in a five-man half-track crew approximately one mile from the enemy lines, with friendly infantry between them and the enemy.⁶¹ At night, one soldier, relieved every two hours, would stand guard while the remaining four slept in a nearby bunker. The guard habitually entered the bunker to check the fire in the stove, the bunker’s only source of light. Although the bunker had received no small-arms fire, the unit was under a two-week-long alert against infiltrators and guerrilla attacks.⁶²

Approximately fifty minutes after taking over, the guard entered the bunker to check the stove. Private Perruccio, whom he had just relieved, grabbed his carbine and fired several rounds at the guard, killing him. Neither man said a word.⁶³ Perruccio later argued that the killing was justified because he had reasonably believed the victim to be an enemy infiltrator, but his defense failed; he was deemed negligent in not attempting to determine the identity of the victim before firing.⁶⁴ He was sentenced to receive a bad-conduct discharge, forfeit all pay and allowances, and be confined for a year, but ultimately his sentence was remitted.⁶⁵

By way of comparison, a second court-martial conviction in that war for involuntary manslaughter was reversed on appeal. In *United States v. Tigert*, Corporal

Tigert had gone to sleep in a sleeping bag on a cot when the victim—"drunk, staggering and boisterous"—sat on him, pushed him partially off the cot, twisted his arm, and demanded whiskey.⁶⁶ Because his unit was in close proximity to the front lines, Tigert, who was characterized as an "excellent" soldier, had a loaded pistol within reach and now reacted instinctively, "without any particular thought running through his mind unless it was 'maybe infiltrators or something.'"⁶⁷ He woke quickly out of a sound sleep, swinging his pistol, which discharged, killing the drunken soldier.⁶⁸

Placing particular emphasis on the combat setting, the Army Board of Review posited that the evidence was insufficient to sustain an involuntary manslaughter conviction or even the lesser included offense of negligent homicide.⁶⁹ The board found it "highly probable that any person being so aroused in similar surroundings would first think of 'infiltrators' and act on the spur of the moment as did the accused."⁷⁰ Significantly for purposes of this article, the board further emphasized the context in which the accused was to be judged: "It must be conceded that soldiers injected into such a situation where hardship and danger to life and limb are ever present can be expected to act in furtherance of self-preservation somewhat differently than their comrades engaged in garrison duty. We have no reason to believe that this accused is any different than other soldiers in their reaction to the stress of armed combat."⁷¹

Vietnam: An Unsuccessful Court-Martial

During the Vietnam War, friendly-fire incidents were investigated, but (at least within the Army) findings of actionable negligence were punished under article 15 of the UCMJ (i.e., as nonjudicial punishment).⁷² However, at least one friendly-fire incident generated a court-martial, ultimately resulting in an acquittal. On 17 August 1970 a Marine mortar squad supporting its parent company fired at a tree line that had previously produced sniper fire.⁷³ The rounds at first struck the tree line but then began to land at the base of a hill occupied by the parent company and then to "walk" back into its position, killing three Marines and a Vietnamese prisoner and wounding an additional thirty Marines.⁷⁴ An initial investigation indicated that the later rounds had been fired at a high angle, virtually straight up into the air.⁷⁵ Further, the investigation opined that the Marine mortar squad "had fired more rounds than necessary in order to avoid having to carry them back to [the landing zone] and had simply been careless in the control of its fire."⁷⁶

The Marine Corps charged the squad leader and his assistant with negligent homicide, and it also charged the squad leader "with negligence in instructing and supervising his mortar squad."⁷⁷ A third Marine gunner was also charged, but the charges were dropped after he accepted immunity in exchange for his testimony.⁷⁸

The Marine Corps defense attorneys investigated and prepared for the trial extensively. They gathered witnesses to put on a “good soldier” defense and also collected sufficient evidence for an alternative explanation—that the casualties had actually been inflicted by enemy mortars using recovered American rounds and taking advantage of the Marine squad’s fire to mask their attack.⁷⁹ After a ten-day trial, the panel of officers deliberated for five minutes and acquitted the assistant squad leader; a second five-day trial of the squad leader also resulted in acquittal.⁸⁰

Operation DESERT STORM

As noted earlier, approximately a quarter of all U.S. fatalities during Operation DESERT STORM were caused by friendly fire. One of the most publicized friendly-fire incidents involved the 27 February 1991 death of Corporal Douglas Fielder, assigned to the 54th Engineer Battalion, 1st Armor Division (1st AD), which was part of the U.S. Army VII Corps.

On the afternoon of 26 February, the M548 ammunition carrier crewed by Corporal Fielder and a second soldier became disabled. The engineer company commander ordered his executive officer and the crew of two other vehicles to remain with the M548 until it could be recovered the following day. The three vehicles were marked with an inverted V, an antifratricide recognition symbol. A second antifratricide nighttime device, a blackout light mounted on a pole on the M548, was inoperable.⁸¹

At approximately 2:30 AM, a troop from the 3rd Armored Cavalry Regiment (3rd ACR), having passed through its objective, an Iraqi airfield, crossed a nearby VII Corps/XVIII Airborne Corps boundary line into an area controlled by the 1st AD. The 3rd ACR served as a screening force to protect the XVIII Airborne Corps’s right flank. By now, however, coordination along the corps boundary had “disintegrated.”⁸² Further, approximately two hours before the incident, the 3rd ACR’s rules of engagement were changed, the new rules including an order not to cross the boundary line and not to “fire unless fired upon.”⁸³

As elements of the 3rd ACR moved forward, one of its troop commanders in an Abrams tank detected two of the engineers in his thermal sights and mistakenly believed them to be enemy soldiers; he further mistakenly identified the engineer vehicles as buildings. The troop commander received permission to fire warning shots, which, he and his gunner believed, produced return fire. He engaged the target area until his squadron commander radioed a cease-fire. One of the engineers was wounded in the leg.⁸⁴ The engineers had not seen any warning shots and later denied returning fire.⁸⁵

Within minutes of the incident, the squadron commander arrived with five vehicles and dismounted two soldiers from a Bradley Fighting Vehicle to approach

the suspected enemy soldiers but failed to obtain the troop commander's situational assessment. The squadron commander and his gunner observed at least one of the engineer vehicles on fire and figures running from them. Concerned that the fleeing figures were escaping enemy, the squadron commander granted his gunner's request to fire into the ground immediately in front of them. By this time, other 3rd ACR soldiers had identified the engineer vehicles as American. At this point the engineer executive officer fired a green star cluster, which was a day-time antifratricide signal. (A white star cluster was the nighttime antifratricide recognition signal.) The squadron commander's gunner then fired, killing Corporal Fielder. The engineer executive officer approached the 3rd ACR vehicles with a flashlight and his hands raised. Once he was identified as an American, a cease-fire order was relayed to the remaining 3rd ACR vehicles.⁸⁶

The fratricide was immediately reported to the 3rd ACR commander and then to the division and corps levels. Subsequent investigations by a judge advocate captain from the 3rd ACR and later by an XVIII Airborne Corps investigating officer determined that the soldiers involved in the shooting had "acted responsibly."⁸⁷ However, a third review, by Forces Command (FORSCOM), disagreed; the "FORSCOM staff judge advocate concluded that four of the officers involved in the fratricide were negligent and derelict in performing their duties."⁸⁸ The FORSCOM staff judge advocate recommended that the 3rd ACR, squadron, and troop commanders receive letters of reprimand and that the engineer executive officer receive a letter of admonishment for not having taken sufficient defensive measures beforehand or doing more to protect his men during the incident.⁸⁹ Finally, unsatisfied with the Army's efforts, Fielder's parents, who had initially been informed that the Iraqis had killed their son, contacted Senators Jim Sasser (D-Tenn.) and Fred Thompson (R-Tenn.), who in turn initiated a more comprehensive review by the General Accounting Office.⁹⁰

No courts-martial resulted from the friendly-fire incident. Ultimately, the FORSCOM commander ordered that the troop commanders' reprimand be withdrawn, that the engineer officer's letter of admonition remain in place, and that the squadron and 3rd ACR commander's letters of reprimand not be placed in their official personnel records. However, the troop commander received an adverse Officer Evaluation Report.⁹¹ Also, the Army revoked seven awards for valor given to soldiers assigned to or attached to the 3rd ACR for actions related to the incident, because the award documentation indicated that the soldiers had received hostile fire from the enemy.⁹²

Operation PROVIDE COMFORT

One of the most puzzling and seemingly avoidable friendly-fire incidents occurred during the American enforcement of a "no-fly zone" in northern Iraq as

part of Operation PROVIDE COMFORT. On 14 April 1994, two Air Force F-15s, piloted by experienced and well trained pilots, shot down two Army Black Hawk UH-60 helicopters, carrying sixteen United Nations coalition personnel, in the no-fly zone. The helicopters, which were using operational Identification, Friend or Foe (IFF) systems, had been flying in broad daylight, in excellent visibility, in an area devoid of significant Iraqi action for over a year; an Air Force Airborne Warning and Control System (AWACS) controller who had contact with all four aircraft failed to intervene.⁹³ Twenty-six people died as a result.

The Air Force pilots entered the no-fly zone expecting to be the only friendly aircraft in the area, not having been informed of the presence of the Army helicopters either by the AWACS or in their preflight briefing.⁹⁴ Detecting the helicopters and failing to obtain a friendly IFF signal, the first pilot made a visual-identification pass and mistook the Army Black Hawks as Iraqi Hind gunships. His wingman, asked to confirm the Hinds, also made a pass and reported “Tally two,” meaning that he only could confirm the existence of two helicopters. But the lead pilot interpreted the report as a confirmation of his identification of the aircraft as Iraqi Hinds.⁹⁵ Although the helicopters posed no serious threat to the F-15s and could not have escaped the much faster jets, the pilots did not make further visual-identification passes.⁹⁶

The Black Hawks bore dark forest-green camouflage patterns and had six American flags painted on various parts of their airframes, while the Soviet-made Iraqi Hind used a light tan and brown camouflage.⁹⁷ Nevertheless, accurate visual identification of the American helicopters was difficult. The lead pilot conducted his visual confirmation “at a speed of about 450 knots (522 mph), on a glide path approximately 500 feet above and 1,000 feet to the left of the helicopters.”⁹⁸ When the wingman passed by the helicopters “at fifteen hundred to two thousand feet to their right, he saw two helicopters and pulled up quickly calling, “Tally two.”⁹⁹

The two Black Hawks contacted the AWACS at least three times before the shoot-down but had no knowledge of, or radio contact with, the F-15s.¹⁰⁰ Further, unlike the F-15s, the Army helicopters did not have HAVE QUICK II frequency-hopping radios and communicated with the AWACS on a different radio frequency than the fighters used.¹⁰¹ In any case, although both the F-15s and Black Hawks were under the control of the same AWACS aircraft (an E-3 Sentry, adapted from the Boeing 707 design), they communicated with different controllers, who were physically separated.¹⁰² Further, the Black Hawks were using a different IFF Mode I code than the Air Force used in the no-fly airspace over northern Iraq, referred to as the tactical area of responsibility (TAOR); the Black Hawks had observed that practice for over a year but had never been informed of

the need to switch to a different IFF code.¹⁰³ The AWACS's duties included controlling coalition aircraft flying in the TAOR, and providing "airborne threat warning and air control for all Operation Provide Comfort aircraft."¹⁰⁴

Minutes before the F-15s entered the TAOR, the Black Hawks entered a mountainous valley, causing radar and IFF contacts to fade.¹⁰⁵ The AWACS, which unlike the fighters monitored the Black Hawks' IFF code, still received intermittent IFF signals from them, and IFF returns were visible on its radar scopes.¹⁰⁶

The AWACS, which was flying with a crew of nineteen, had had earlier radio contact with the only four aircraft in the TAOR—the two F-15s and the two Army UH-60s.¹⁰⁷ Although the AWACS's crew members were all individually well trained and experienced, this was its first flight as a crew in the TAOR, and two instructors had been added.¹⁰⁸ Unfortunately, at the time of the shoot-down one instructor was in the galley on break, and the second was taking a nap.¹⁰⁹ Also, two other members of the crew were reading books, one was asleep, and another was monitoring radios with his eyes closed.¹¹⁰ Further, the AWACS crew was laboring under some confusion as to its helicopter-tracking responsibilities.¹¹¹

Ultimately, after an exhaustive investigation, an Air Force investigation board found that the incident "was 'caused by a chain of events,'" which was ultimately summarized by the secretary of defense as comprising four factors:

- The F-15 pilots misidentified the Black Hawks.
- The AWACS crew failed to intervene.
- Eagle flight [the Army Black Hawks] and their operations were not integrated into the Task Force.
- The Identification Friend or Foe (IFF) systems failed.¹¹²

The Air Force preferred (i.e., formally initiated) dereliction-of-duty charges against five members of the AWACS crew, preferred negligent-homicide and dereliction-of-duty charges against the second (wingman) pilot, and granted immunity to the lead pilot in exchange for his testimony.¹¹³ However, the article 32 hearing, the military's functional equivalent of a grand-jury proceeding, referred only one individual to a court-martial (i.e., ordered the charges prosecuted). The AWACS senior director, an Air Force captain, was tried for dereliction of duty, for "allegedly failing to adequately supervise the AWACS crew and not notifying the fighters of the Army helicopters' presence."¹¹⁴ The captain was acquitted. In response, the Chief of Staff of the Air Force grounded the two pilots and three AWACS crew members and issued career-ending letters of disapproval to those five, as well as two supervisory general officers.¹¹⁵

The entire court-martial process proved controversial and ultimately unsatisfying to the families of the victims and to many in the Air Force. Several of the victims' families and some within the uniformed Air Force leadership were upset that no one was held publicly accountable through the military justice system, while some in the AWACS community complained that singling out the senior director was an unfair and morale-degrading effort to blame the AWACS crew and reflected an institutional bias in favor of pilots.¹¹⁶ Indeed, responding to criticism that the accused had been unfairly singled out for prosecution, Secretary of the Air Force Sheila Widnall took the unusual, and ultimately unsuccessful, step of asking Secretary of Defense William Perry to halt the proceedings, although she also possessed such authority.¹¹⁷

Afghanistan and the Accidental Bombing of Canadian Troops

On 12 April 2002, an Air National Guard F-16 flying over Afghanistan dropped a five-hundred-pound laser-guided bomb on Canadian forces participating in a nighttime live-fire exercise in a training area used regularly by coalition forces for such purposes.¹¹⁸ The bomb wounded eight Canadian soldiers and killed four, the first Canadian soldiers to die in combat since the Korean War.¹¹⁹

The two F-16s had been flying at approximately fifteen thousand feet, at the end of a ten-hour patrol, when they saw ground fire and thought they were being shot at by ground forces and "a piece of artillery."¹²⁰ The wingman contacted an Air Force AWACS and requested permission to engage the targets with 20-mm fire, but the AWACS replied, "Hold fire. I need details on safire [surface-to-air fire]."¹²¹ The lead pilot too noted that they needed to "make sure it's not friendlies."¹²² After the pilots' evasive maneuvers to avoid the perceived attack, the wingman announced that he was "rolling in in self-defense," to which the AWACS replied, "Boss man copies."¹²³ Both pilots then used lasers to pinpoint the target, and the wingman released the bomb.¹²⁴ Afterward, the wingman asked, "Can you confirm they were shooting us?" to which the AWACS replied, "You're cleared. Self-defense."¹²⁵

A U.S.-Canadian investigation and a separate Canadian investigation found the two pilots to be at fault, although the Canadian report noted that the pilots had not been informed of the training exercise.¹²⁶ When the Air Force preferred charges against the two pilots for manslaughter, aggravated assault, and dereliction of duty, the article 32 officer recommended against a court-martial, despite opining that sufficient evidence existed, in favor of nonjudicial punishment.¹²⁷ The Eighth Air Force commander intended to drop all charges against the lead pilot, issue him a letter of reprimand, and remove him from the promotion list but permit him to retire; he accepted the article 32 officer's recommendation that the pilot who had actually dropped the bomb face nonjudicial punishment

under article 15.¹²⁸ Defense attorneys had suggested that the pilots' error might have been attributable to amphetamines, known as "go pills," which the Air Force issued to pilots for long missions.¹²⁹

The wingman initially rejected the article 15 offer and elected to go to court-martial but changed his mind after being assured that he would be allowed to serve until he was eligible for retirement.¹³⁰ Ultimately, the Eighth Air Force commander rejected a self-defense argument, issued the pilot a harshly worded reprimand, and fined him \$5,672.¹³¹

The application of the military justice system to this friendly-fire incident again proved controversial. The two pilots, members of the Illinois National Guard, enjoyed local support during the military proceedings, including a fund-raiser by the governor of Illinois to pay for their legal fees.¹³² Air Force officers voiced opinions both supportive and critical of the two pilots;¹³³ one Air Force colonel was reprimanded for alleging that the Air Force investigative board was simply "looking for someone to blame."¹³⁴ Many Canadians harbored bitter feelings about the incident.¹³⁵

THERE BUT FOR THE GRACE OF GOD . . .

Some friendly-fire incidents, while tragic, are also understandable and should not rise to the level of court-martial offenses. Indeed, they may warrant no punishment of any kind. Combatants must often make split-second decisions concerning when and whom to shoot. Their judgment may be clouded by reduced visibility, fatigue, or fear. These are the oft-described "fog of war" scenarios. One obvious example is the shooting of Stonewall Jackson by his own troops: Jackson and his party came from the direction of the enemy lines, at night, in a pause after an extended period of combat, while the Confederates were still in contact with Union forces. Other incidents are infinitely more difficult to understand. The 1994 shoot-down of the Army Black Hawk helicopters stands out as one such example.

Equally puzzling, given the relative historical frequency of such accidental killings, is the almost complete dearth of friendly-fire courts-martial. Further, when the rare friendly-fire incident is referred to trial, the result appears to be almost invariably acquittal. Not having made the referral decisions, heard the evidence, or voted to acquit, one can only guess at the causes of this anomaly.

Perhaps one is the frequency of these incidents, leading the military community to accept them as the unfortunate norm in combat—"There but for the grace of God go I." Perhaps it is the difficulty of fixing legal accountability in a chaotic environment, or isolating the actionable mistake in a series of errors, or of attempting to focus responsibility on an otherwise good—perhaps stellar—soldier who has made a horrible, but not malicious, mistake. One

powerful argument often raised against such courts-martial is the potentially adverse effect on the morale and fighting abilities of those in combat, that it might make them hesitant. Further, one commentator suggests there may exist an institutional cultural impediment—“the military’s long unspoken ‘non-legal’ response to fratricide.”¹³⁶

The apparent lack of success of the military’s criminal justice system does not appear to be a function of how the law is written but rather of how it is applied. For some the failure of the military justice system to hold criminally accountable those responsible for friendly-fire deaths is a travesty of justice, the product of a system that places too much authority in the hands of commanders and of an institutional culture of self-protection and unaccountability. However, it is more likely that the selective use of the military’s justice system, and its even less frequent successes, simply reflects the repeated judgment of a military society, with its unique culture, values, and mores, balancing concepts of justice and discipline as it applies a criminal system to conduct under the stress of combat. Service members who make decisions to pursue courts-martial or determine innocence and guilt are in the same community as those who must make the split-second, life-and-death decisions in chaotic combat situations. When a service member is referred for court-martial and subsequently convicted of a fratricide-related offense, those decisions will have been made by members of a military community particularly sensitive to the collateral effects of such proceedings and to the circumstances within which the challenged decisions are made. In any case, even when those responsible for friendly-fire deaths are not held criminally responsible, they remain subject to other forms of punishment, a less severe but often career-ending regime of nonjudicial punishment, reprimands, and adverse evaluations.

Regardless, some things appear certain. First, there will continue to be friendly-fire incidents. If history is an accurate gauge, they are inevitable. Second, regardless of the cause or circumstances, friendly-fire charges will remain controversial and difficult to prove beyond a reasonable doubt in courts-martial. While the prosecution attempts to second-guess the decisions of combatants, others will second-guess the decision to pursue court-martial, and still others will question the military’s failure to hold someone criminally responsible for friendly-fire deaths. Given the frequency of multiservice and multinational incidents, greater transparency in the military justice decision-making process may be required.

Despite significant handicaps, there remains an important role for the military justice system. There will be occasions when the facts are so egregious, the culpability so pronounced, or the dereliction of duty so manifest that the military community will hold its own criminally accountable.

NOTES

The opinions expressed in this article are those of the author and do not represent the position of any federal agency.

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