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The Colonel's Moral Compass

'What are we willing to tolerate as Americans?'

By Jan Pudlow

Senior Editor

Witnessing the baptism of a baby became the breaking point for Lt. Col. Stuart Couch, embroiled in prosecuting a Guantanamo Bay prisoner linked to the 9/11 attacks.



Couch stood to participate in the liturgy, among 1,500 Anglican congregants at Falls Church in Virginia. While water was sprinkled on the crying baby's head, the rector asked the congregation: "Will you seek justice on Earth and respect the dignity of every human being?"

Instead of automatically responding with the routine chorus of, "I will," the rector's question zoomed to the collision between Couch's job and his ethics.

"When I heard that, I could have been the only dude standing in that place of 1,500 people. I mean, it got real small real quick," Couch recalled.

One of two attorneys in the Marines selected to be a prosecutor in the Office of Military Commissions, Couch said it was no less than the voice of God asking: "All right, Couch, what are you going to do?"

"By that point, I had seen enough, I had read enough, I had heard enough. And it was just: Enough is enough."

How could he fairly prosecute a defendant he was sure had been tortured?

Wrestling with his conscience, Couch faced the most difficult decision of his military career. The government's goals of national security clashed head-on with his moral compass in doing the

right thing as an attorney committed to fair play, open discovery, and the rule of law.

Two days later, in May 2004, Couch told then-chief prosecutor, Army Col. Bob Swann, that he would no longer prosecute Mohamedou Ould Slahi, fingered by a senior al Qaeda operative for helping assemble the "Hamburg cell," which included the hijacker who piloted United 175 into the south tower of the World Trade Center on Sept. 11, 2001.

The reason, Couch told his boss, was that evidence against Slahi, consisting mostly of the defendant's own statements, was tainted because he had only begun "singing like a canary" after been tortured during "special projects" interrogations at Guantanamo.

"I think what's been done to this individual is reprehensible. And for that reason alone, I am not going to have anything further to do with this case," Couch told Col. Swann in the spring of 2004.

"We kind of had a little verbal shootout. I will just leave it at that. I followed it up with a written memorandum. I was told, 'OK, get back to work.'"

A year later, Couch was assigned as lead counsel in the case of Salim Ahmed Hamdan, Osama bin Laden's former driver, who was recently sentenced to five and a half years in prison after the first trial of a terror suspect by a special military commission at Guantanamo.

When Couch was working that case, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* and struck down the military commission process, and Couch was reassigned to his current duties as military judge on the Navy-Marine Corps Court of Criminal Appeals.

Couch, a Duke graduate who this year received his LL.M. degree from The George Washington University School of Law, was the 2007 recipient of the ABA's Norm Maleng Minister of Justice Award, after his moral dilemma was chronicled in the *Wall Street Journal*. He shares his story at law schools, including recently giving a speech at Florida State and an interview with the *News*.

Stressing his message is nonpartisan and his own personal opinion, he said it can be applied to any lawyer, in any kind of case, who must follow a code of ethics in making righteous decisions.

"The necessity of a moral compass applies to any attorney in any dispute. Sometimes, people might be squeamish expressing that sentiment because of separation of church and state and sensitivity attorneys have to matters of faith," Couch said.

"But under the ABA model code of ethics, there is one about the attorney as advisor. And when you are advising a client, according to the model ethics code, you can have considerations of moral, ethical, or economic considerations. That is my position and the way I tried to handle it."

At FSU's law school rotunda, a crowd of students, faculty, judges, legislative staff, and others gathered to hear Couch's story.

"U.S. Marine Corps Lt. Col. Stuart Couch's actions exemplify a military officer's duty to both protect and defend the Constitution and the people of this nation and also underscores some of the tensions that can result between human rights interests and national security imperatives within the context of the U.S.-led 'War on Terror,'" said Mark Schlakman, senior program director at FSU's Center for the Advancement of Human Rights and coordinator of FSU's "Human Rights & National Security in the 21st Century" lecture series.

"Moreover, Couch's experience provides extraordinary insight into a lawyer's resolve to respect the rule of law under exceedingly difficult circumstances."

Heavy Metal Special Interrogation

Prosecuting Slahi took on personal proportions for Couch. The co-pilot of United 175, the plane that crashed

into the second tower on 9/11, was Michael Horrocks, an old Marine buddy from the squadron where Couch trained to become a KC-130 pilot.

Two days after 9/11, Couch learned that Horrocks was on that fateful plane and likely had had his throat slit with a box cutter and was dead on the flight deck when the crash into the World Trade Center shook the world.

In 1999, Couch had prosecuted an American marine pilot from the U.S. Base at Aviano, who was acquitted of involuntary homicide and manslaughter for flying too low and cutting through a cable car line at an Italian ski resort that resulted in the death of 20 people.

Because of that high-profile case experience, Couch said, in August 2003, he was chosen for a front row seat in the military commissions, Article 2 courts derived from the president's authority as commander in chief.

As one of the senior prosecutors in the office, Couch was put in charge of "planners and financiers."

"I was dealing with detainees who had a closer relationship with what I call the 'headquarters element' of al Qaeda," Couch said.

The Slahi case jumped out as directly connected to 9/11, Couch said, therefore, making it a potential capital case. Ramzi Binalshibh, a top al Qaeda operative, was captured in Pakistan and told the CIA that in 1999 Slahi sent him and three future 9/11 hijackers from Germany to Pakistan and then to Afghanistan's al Qaeda headquarters, where bin Laden assigned them to the 9/11 attacks, Couch said.

Couch had little to work with beyond Binalshibh's uncorroborated statements. Approaching the prosecution as military justice practitioners, Couch said, "We have a huge devotion of equal access to the evidence. . . . Unless it's privileged as a military prosecutor, the defense gets everything in my case file. That was the way we did business."

In October 2003, Couch first visited Guantanamo to get the lay of the land, and soon learned business was being conducted in a bizarre way. Waiting to watch an interview with another detainee through a two-way mirror, Couch heard what he called "ear-splitting heavy-metal, razor-blade rock" coming from down the hall. Couch ran toward the music, and found a room lit only by a flashing strobe light. A detainee was shackled to the floor, rocking back and forth and praying.

"These two civilian dudes came out and backed me up and pulled the door behind them. I said, 'What's going on here?' They really wouldn't answer my questions. To the guy who was escorting me around, an Air Force JAG, I said, 'What the heck is this about?' And he goes, 'That's approved.'"

While watching the treatment of that detainee, Couch said he had a flashback to his stint in the Survival, Evasion, Resistance, and Escape (SERE) School, where air crew and special operations people learn how to handle themselves if captured.

"They give you lessons about the Geneva Conventions and it culminates in spending a period of time in a mock prisoner of war camp. They interrogate you. It's the only school I am aware of in the Department of Defense where they are allowed to assault you legally," he said.

"I'm not going to go into a lot of the detail, because at least at the time I was told it was classified. But I will tell you that what I saw happening to that detainee, right then I had a flashback. It immediately became clear to me they were interrogating these people using SERE School techniques."

As an attorney, his immediate thought was: "If that is what is going on, and that is how some of these statements are being obtained, they are not going to be credible."

Suddenly Slahi Sings

Calling it "a watershed event for me," Couch returned to Washington, and after many sleepless nights sought counsel of a senior Marine lawyer, now a retired brigadier general.

His mentor told Couch: "There are some weird things going on right now, and we are in the middle of a war. You might not be wearing a flak jacket and shooting at people in Iraq or Afghanistan. But you are fighting a war. You are a judge advocate. You need to figure out what you are going to be about — what's right and what's wrong. If there is something right, you go with it. If there is something wrong, you speak up about it."

Couch went back to working the Slahi case. It wasn't easy. When Couch first got the Slahi case in August 2003, Slahi wasn't talking.

"But in the fall of 2003, literally overnight he started singing like a canary," Couch said, adding intelligence reports had a lot of information about al Qaeda and its organization in Europe. Wanting to gauge the credibility of the evidence and the circumstances of the interrogation that made Slahi suddenly start talking, Couch ran into a brick wall.

"Here I was with top secret clearance, and there was a lot of information out, particularly on this detainee named Slahi, and I was told, 'You are not going to be provided that information.'"

But Couch had help from a criminal investigator, a former Marine with friends on the intelligence side.

"He starts feeding me under the table the stuff he's getting from the intelligence side. Through government documents, we started getting an idea of what type of interrogation techniques they were using."

In the spring of 2004, Couch was nearing his decision point.

"In essence, the military investigator at Guantanamo in charge of interrogations was described as being a zealot. They had the detainee Slahi believe he was going to be taken out and executed and buried at Guantanamo. The detainee Slahi was shown a letter on State Department letterhead that indicated his mother and his brother had been picked up and his mother was going to be brought to Guantanamo. The letter was expressing out loud concerns about what they were going to do, because she was going to be the only female at Guantanamo and they were concerned about her safety. The implication being: 'Hey, we're going to bring your mom to Guantanamo, and she's probably going to get raped,'" he said.

Focused solely on what he saw in government documents about Slahi's treatment, Couch said, "Enough is enough."

"Torture of a human being is wrong. It's a violation of our domestic law. It violates our own values as Americans. It's a violation of international norms and international law," Couch said. "The debatable thing right now is whether the cruel, inhumane, or degrading treatment of a particular detainee falls in the same category. Therein lies the debate.

"Now, I think there is a legitimate tension between human rights and national security. That's the very foundation of this debate. I would say to you: You might think those things might be mutually exclusive, that some things done in the name of national security can trump human rights.

"But I would tell you, ultimately, they do intersect" when trying to prosecute a torture-tainted case.

"And I think they do intersect on a much larger level, and that is: What are we willing to tolerate as Americans? Because some of this stuff gets to the point it really tears at the fabric of what we are as Americans and our American values. We will win this global war on terrorism because we are better than our enemy, and not because we are more inhumane."

Couch offered insight on broader policy implications.

"After three years of studying these knuckleheads, I'll tell you about al Qaeda. They couldn't care less about our territory or natural resources. What they care about is ideas. They want a pan Muslim world, a caliphate. . . . This is not an expression of what the Muslim world as a whole believes. This is a very narrow band of extremists. They want to go back to the Crusades. So this is a war of ideas," Couch said.

"Unfortunately, when we have stuff like Abu Ghraib and the abuses of Guantanamo in our global war on terrorism, we are basically proving bin Laden's point."

As Abu Ghraib showed, "When you adopt a policy that allowed one human to treat inhumanely another, it's hard to keep that inside Pandora's Box. That is an evil that is hard to keep inside the box. It's a slippery slope," Couch said.

From a legal perspective, Couch said, inhumane treatment of prisoners renders information lacking in credibility and, therefore, useless to prosecutors.

"John McCain tells the story when he was hung up in the Hanoi Hilton for days on end, he wouldn't give up the chain of command of his squadron. After pulling his shoulders out of the socket and beating on him, he finally got to his breaking point. He gave up the names of his quote unquote squadron chain of command. Who were the names he gave them? The starting offensive line of the Green Bay Packers," Couch said.

"I believe that is what we are dealing with with these interrogations. If what we are doing is right and correct, we ought not to be afraid to be seen doing it. It's a corollary to the Golden Rule. We don't want to treat any of these guys if we would be offended by it if it were an American being treated the same way."

Couch was invited to testify in November before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. But the day before, the order not to testify before Congress came from the Department of Defense General Counsel's Office, with the reported rationale that "as a sitting judge and former prosecutor, it would be improper to testify about matters pending in the military court system."

Being a member of active military, Couch said it's "big-time verboten" to delve into partisan politics.

"But I would say this. I think definitely in Congress right now there is this tension between the two parties, as to how much or how little the decision-making matrix is going to be investigated. Having grown up in the South, I'm a big believer that when you've got a lot of mold around, the best two things for that are bleach and a bunch of sunlight."

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