

DEFEND OUR MARINES

FALLUJAH CASE: US Attorney Seeks Marine Corps Legal Aid in Prosecution of Nazario

by Nathaniel R. Helms | August 7, 2008 | [pdf](#)

The Marine Corps is considering the unprecedented step of appointing a reserve lawyer to assist the US Attorney for Central California in prosecuting former Marine Sgt. Jose L. Nazario in US District Court in Riverside, California, *Defend Our Marines* has learned.

A Marine Corps spokesman at Headquarters Marine Corps in Washington, D.C. confirmed Thursday that a request for an SJA to assist in the prosecution of Nazario was received at HQMC from the US Attorneys Office for Central California.

Nazario was indicted by a federal Grand Jury last August 17 for allegedly executing two prisoners of war at Fallujah. In a [superseding indictment](#) handed up in July he was additionally charged with encouraging two subordinates to dispatch two other prisoners and unlawfully using his M-16 rifle in the commission of a crime.

Inseparable from Nazario's trial is the remarkable legacy of 3rd Platoon, Kilo Company, 3rd Battalion, 1st Marines – the once vaunted Thundering Third. Nazario and seven other enlisted men from the haunted platoon have been charged with murder, assault, and other heinous war crimes in three separate incidents that started in Fallujah, Iraq on November 9, 2004.

Nazario's trial is scheduled to begin on August 19.

Although military lawyers are routinely appointed "Special" Assistant US Attorneys to represent minor civilian matters on military facilities, the appointment of a serving officer to help prosecute a former Marine charged with war crimes in a civilian court room is another anomalous wrinkle in a bizarre case, several involved lawyers noted.

"The US Attorneys Office here has 240 Assistant US Attorneys representing five counties," explained Christopher B. Johnson, the public defender representing one of Nazario's co-defendants in the case. "I don't know what they would need him to do."

Major Thaddeus Coakley, likeliest candidate

If the Marine Corps gets its way Major Thaddeus Coakley or some other reserve Marine Corps lawyer will presumably assist his civilian counterparts by advising them on the best way to convict Nazario for two counts of involuntary manslaughter, encouraging two subordinate Marines to commit murder, and unlawfully using his weapon in the commission of a crime.

Coakley, the reservist identified as the likely candidate, is currently working for a defense contractor in Palm Dale, California. He had not returned a telephone inquiry at the time of this report.

He is considered an expert on the rules of engagement and the use of force in combat zones. Coakley has said he helped establish the Marine Corps system that assigns lawyers to combat battalions in war zones.

Public records show Coakley was mobilized in January 2002 and spent nine months lawyering with the First and Second Marine Expeditionary Forces in Africa, Kuwait and Iraq. He did a second tour in Iraq from August 2004 to March 2005 as a staff judge advocate of the 1st Battalion,



23rd Marines.

The multitude of military critics skeptical of the system Coakley helped devise compare the lawyers' unwelcome role to that of political commissars the former Soviet Union deployed to make sure Red Army line officers made politically correct decisions during combat. Their dismal record during the Communists' horrific defeats by Nazis in the early days of the "Great Patriotic War" led Stalin to revamp the archaic system so combat officers regained control of the battlefield.

"There has been a request from the U.S. Attorney, and we are in the process of determining the scope of this request, which we intend to support at some level. Major Coakley is a possible candidate, but we have not yet worked through the details," wrote Major Eric R. Dent in two e-mails today. "It may end up being support by phone on specific questions in which a Marine SJA might have some particular level of expertise, etc. In other words, until we determine what level of support is required, we cannot tell the US Attorney what we are going to provide."

Participants in alleged incident to be tried in civilian and military courts

MARCENT Commanding General Lt. Gen. Samuel T. Helland, not Headquarters Marine Corps, is the convening authority in the impending general court-martials of Sergeants Ryan Weemer and Jermaine Nelson, co-defendants who were both corporals under Nazario's command at Fallujah. Because the inquiry was directed to HQMC, it is unclear whether Helland was involved in the decision to entertain the federal government's request.

Government prosecutors claim that Nazario ordered his two subordinates to help him execute four unknown armed enemy combatants they allegedly captured during a firefight on November 9 in the opening hours of the month-long battle. They told the Grand Jury Nazario received the order to execute the prisoners by radio from unknown higher-ups at either the platoon or company level.

Before obtaining legal counsel both Marines gave conflicting, incriminating statements to the Naval Criminal Investigative Service implicating Nazario. After obtaining legal counsel they refused to testify before a federal Grand Jury weighing the charges against him, leaving their unsupported statements in judicial limbo, one lawyer said.

Even since then the government has been trying to find a way to compel them to testify.

After Weemer and Nelson refused to talk in May and June they were jailed for civil contempt in a civilian lockup by two federal judges presiding over the case. Although freed after a few weeks, they are still menaced by the civil contempt citations the judges never lifted.

“The only reason for jailing a witness is to coerce a reluctant witness to testify,” explained Johnson. Johnson is Weemer’s court-appointed public defender. “When it is obvious the witness won’t cooperate there is no longer any reason to keep them in jail.”

Before entering private practice in Woodland Hill, California, Johnson spent more than six years as a Navy JAG officer and 14 years as an Assistant US Attorney in the same federal judicial district Nazario is charged in, he said.

He has never handled another case like the one currently before him, he said, one in which there is no physical evidence confirming the alleged victim even existed.

In fact, defense attorneys like to point out, the government acknowledges there are no bodies, discernable crime scene, physical evidence, or reports of missing persons to authenticate the existence of the alleged victims or corroborate a crime.

Nazario maintains the alleged incident is pure fiction.

New threats of imprisonment for failing to cooperate

The government hopes to minimize its prosecutorial deficiencies by coercing Nazario’s co-defendants into testifying otherwise with new threats of imprisonment for refusing to cooperate, McDermott said.

Because Weemer has now been subpoenaed to testify at Nazario’s trial he also faces criminal contempt charges for refusing to talk and it could land him in jail again.

Worse, the former Marine lawyer said, the fact that a serving Marine Corps officer may be present at a civilian criminal trial is a billboard-sized endorsement for command bias.

In June the government case against the former 3/1 battalion commander during the Haditha affair was dismissed by a military judge because of the presence of unlawful command influence. The government is currently appealing that decision.

Regardless, the court room will be a tough place for either Marine to be, McDermott conceded. If they cooperate with the government without immunity from Marine Corps retribution they could further incriminate themselves. If either Marine refuses to testify they face jail time for criminal contempt, McDermott said.

So far the Marine Corps is not offering Weemer any deals, Johnson said.

Nelson’s attorney Joseph Low, however, has received an undisclosed deal from Marine Corps prosecutors for Nelson’s erratic testimony. So far the government has not made an offer that will compel Nelson to cooperate, the source said.

In the meantime it is not certain that Nelson was actually subpoenaed along with Weemer, who was served Wednesday.

Low did not return telephone calls Thursday.

Witness list growing

In addition to Weemer and Nelson, subpoenas have gone out to a roomful of potential witnesses expected to be called by the prosecution. Included on the laudable list of Marine Corps warriors is Navy Cross recipient R.J. Mitchell, another squad leader in 3rd Platoon at Fallujah, and



**Former Sgt.
Jose Nazario**



**Sgt.
Jermaine Nelson**



**Sgt.
Ryan Weemer**

Nazario's superiors and subordinates who were there.

Another source close to the investigation reported that 1st Lt Jesse Grapes, Nazario's platoon leader and an undisputed hero at Fallujah, is now considering a government offer of testimonial immunity to cooperate. Last year Grapes was briefly recalled to active duty as a captain and then discharged after refusing to talk to government investigators about his role at Fallujah.

In a recorded statement he made in February 2007 Grapes told NCIS Special Agent Mark Fox that he had no recollection of either speaking to, or hearing Nazario refer to captured enemy combatants on either his command radio or the inter-squad radio the platoon leadership was issued. With 12 minutes left in the 72-minute interview Fox advised Grapes of his Miranda rights against self incrimination and asked him to take a polygraph examination.

Grapes refused.

"My character and reputation speak for themselves," he told Fox.

Defense attorneys say that government tactics such as trying to coerce witnesses and playing Marines' fears against each other to curry legal advantage is shaping the courtroom to be an explosive battlefield.

Marine tactics to be closely examined

The defense intends to make the trial an examination of Marine Corps' aggressive tactics in Al Anbar Province that the vociferous press so desperately hoped would explode on to the headlines during the tumultuous days of the specious Haditha Massacre affair.

The brutal battle that broke the back of the al Qaeda led insurgency in Al Anbar Province was the most destructive engagement the United States has been involved in since the Vietnam War.

The no-holds-barred tactics Marine commanders engaged in at Fallujah were the toast of the otherwise floundering war effort until their battlefield successes failed to produce a quick, clear political victory. A year later press reports about murder and massacre by out-of-control Marines in al Anbar had replaced stories of heroes and heroics that filled headlines the year before.

During the month long siege at Fallujah more than 60 percent of the ancient city was flattened and at least 3,000 insurgents were killed, according to the Marine Corps. Thirty-three Marines from 3/1 died as well. Those that survived were regaled as true American heroes in the finest tradition of the Marine Corps.

The carefully choreographed rules of engagement prepared before the battle was joined were repeatedly modified after November 9 until they ceased to exist in all but name. After 3/1 Marines encountered fierce resistance and suffered heavy casualties from al Qaeda paid terrorists all restraints were removed, the defendants say.

Foreign fighters from at least 17 countries were identified as opposing 3/1 during its stunning attack, the Marine Corps says.

"Never enter a room without throwing in something that goes boom," 3rd Platoon Commander 1st Lt. Jesse Grapes told his Marines at the time.

At the Hell House Grapes shed his body armor in order to slip through a barricaded window to use his rifle to pin down insurgents pouring murderous fire onto his men.

During the Marines' assault on the city 3/1 Marines directed more than 300 airstrikes against entrenched enemy positions. Its Marines used every weapon in their considerable arsenal to root out an enemy that dropped its weapons and disappeared, only to reappear in another position prepared to attack the Marines.

Post-battle interrogations of insurgents captured at Fallujah revealed the enemy was briefed to anticipate magnanimous rules of engagement that prevented attacking Marines from shooting unarmed men in civilian dress even when encountered in firefights. The insurgents quickly learned to drop their weapons and flee to other prepared fighting positions when threatened by romping Marines, the prisoners reported.

When 3/1's officers realized the limitations the ROE imposed, they asked for and received "modifications" to the ROE from 1st Regiment SJA Major Keith Forkin. He ruled that Marines could wipe out suspected enemy positions whether or not they actually observed the enemy engaged in hostile acts.

Taking advantage of the liberalized rules the Thundering Third began blowing apart suspected enemy positions with rockets, satchel charges, airstrikes, and artillery before crushing them to bits under armored bulldozers purchased from the Israelis. The corpses were left for the starving dogs and cats to feast upon.

Commanders on the ground quit ordering their Marines to identify their enemies before killing them, instead authorizing them to use every

weapon at their disposal to eliminate the threats, their After Action Reports show.

After the battle the Marine brass toned down its aggressive rhetoric to accommodate the new attitude of reconciliation that emerged after Iraq seated a new government and Central Command installed a new set of generals.

Coakley testified for the prosecution in the Article 32 pre-trial investigation of Capt. Randy W. Stone, 3/1's SJA charged with dereliction of duty in the Haditha affair for failing to vigorously investigate the deaths of 24 civilians there. Stone was eventually exonerated.

Kilo's Marines gained initial fame when an iconoclastic photograph of 1st Sgt. Bradley Kasal coming out of the Hell House covered with blood, his pistol still at the ready showed up around the world. The former 1st Sergeant of Kilo earned the Navy Cross in the Hell House while being shot seven times and peppered with grenades fragments when he draped his body over a fallen Marine to save him from a grenade blast.

Nazario was trapped in the next room and didn't even know Kasal was there until the fight was over, he says.

Weemer was shot three times upon entering the house in the opening gambit before Kasal arrived. Nelson, an assaultman attached to the platoon, was outside on overwatch when the engagement erupted four days after the alleged killings occurred.

Two years later they were ordered to account for their actions in the days preceding the action.

“Fallujah was where the bad guys were.”

Nazario is being prosecuted under the Military Extraterritorial Jurisdiction Act or MEJA. The untested law was passed by Congress in 2000 to give the federal government a vehicle to charge US citizens who worked for the armed forces overseas with crimes they allegedly committed where the American government lacks prosecutorial jurisdiction.

The decorated squad leader says he never considered that part of being a Marine was facing trial in a civilian court full of soccer moms and unaffected dads asked to judge him for allegedly committing crimes in Iraq. Neither did the authors of the law he is charged under, his defense attorney says.

“Fallujah was where the bad guys were,” Nazario said Wednesday from his temporary home in Rock Hill, a quiet town in at Catskills about 90 minutes from Brooklyn. “About 90 percent of the battalion wanted to get in there and get them. Our orders were to kill everybody we saw moving.”

Nazario is an unlikely killer. He is a quiet, earnest fellow of Puerto Rican heritage who talks with a pronounced Brooklyn accent. He grew up Spanish Harlem in dire straits before moving to upscale Brooklyn in his junior year of high school.

Life was tough for a fatherless kid in a place with a lot of hopelessness, but not as tough as where he wanted to go. A few weeks after Nazario graduated from high school in 1997 he was in boot camp learning to be a Marine.

Nazario says his peculiar situation is reminiscent of an unlikely story in television's long running series *JAG* except some totally hot Marine Corps lawyer who does wonders for the position of attention isn't there to bail him out.

Instead of a hot babe Nazario has an Orange County defense attorney from Pittsburgh with wild hair, he said.

McDermott is candid about the situation confronting his client. Nazario doesn't have any money, the weight of the entire government is leaning on him, and somebody for some inexplicable reason wants to make his client pay.

He admits he is in uncharted waters defending Nazario against charges brought by a new law. His first attempt to get it dismissed for lack of jurisdiction last spring fell flatter than President George W. Bush's war policies.

The district judge hearing the case ruled that it was clearly within the scope of a US District Court to try a Marine accused of killing enemy prisoners during combat.

It is also the first time an American service member will be tried for killing people in combat that don't officially exist, McDermott said.

Nazario, 28, says he recently received a morale boost from HBO's adaptation of the Evan Wright's book *Generation Kill* about combat crazed Marines burdened by death-induced angst in a worthless, ugly place.

“It was kind of like that at Fallujah,” Nazario said. “The language is right, the ways things were always screwed up is right. It's what Marines do.”

Nazario finds it somewhat ironic that the battle was planned by Brig. Gen. John Toolan, another of Brooklyn's sons and an august Marine who earned high honors for helping to eradicate 3,000 other enemy combatants at Fallujah.

Toolan grew up about 20 blocks from Nazario's Brooklyn home. Occasionally in Iraq they used to get together for a few minutes to talk about the

'hood. Their unlikely relationship is just another of the curious coincidences that mark the entire affair.

Until September 2004 Toolan was Nazario's regimental commander and the officer credited with developing the operational plan called Al Fajr that left the ancient city in ruins. He went home to a general's star and a cushy billet in the Pentagon.

"His job wasn't to talk down to us. None of the officers did that," Nazario said. "We were past all that. Their job was making us believe we were the bad asses, the guys who knew what was going on. They were the guys telling us to kill everybody we saw moving."

Nazario isn't bitter at the strange twist of fate that left the two Marines potential adversaries. He says Toolan is a good Marine officer and a cool customer. He was at a checkpoint with Toolan when the insurgents started shooting at them both.

It is always good for morale to see a high ranking officer getting shot at, Nazario says.

"That's what Marine officers are supposed to do."

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Note: Nat Helms is a Contributing Editor to Defend Our Marines. He is a Vietnam veteran, a former police officer, war correspondent, and author of [My Men Are My Heroes: The Brad Kasal Story](#).

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