

*Jack Zimmermann
Sees Larger Cause
In His Defense of Marine
Charged With Iraq Killings*

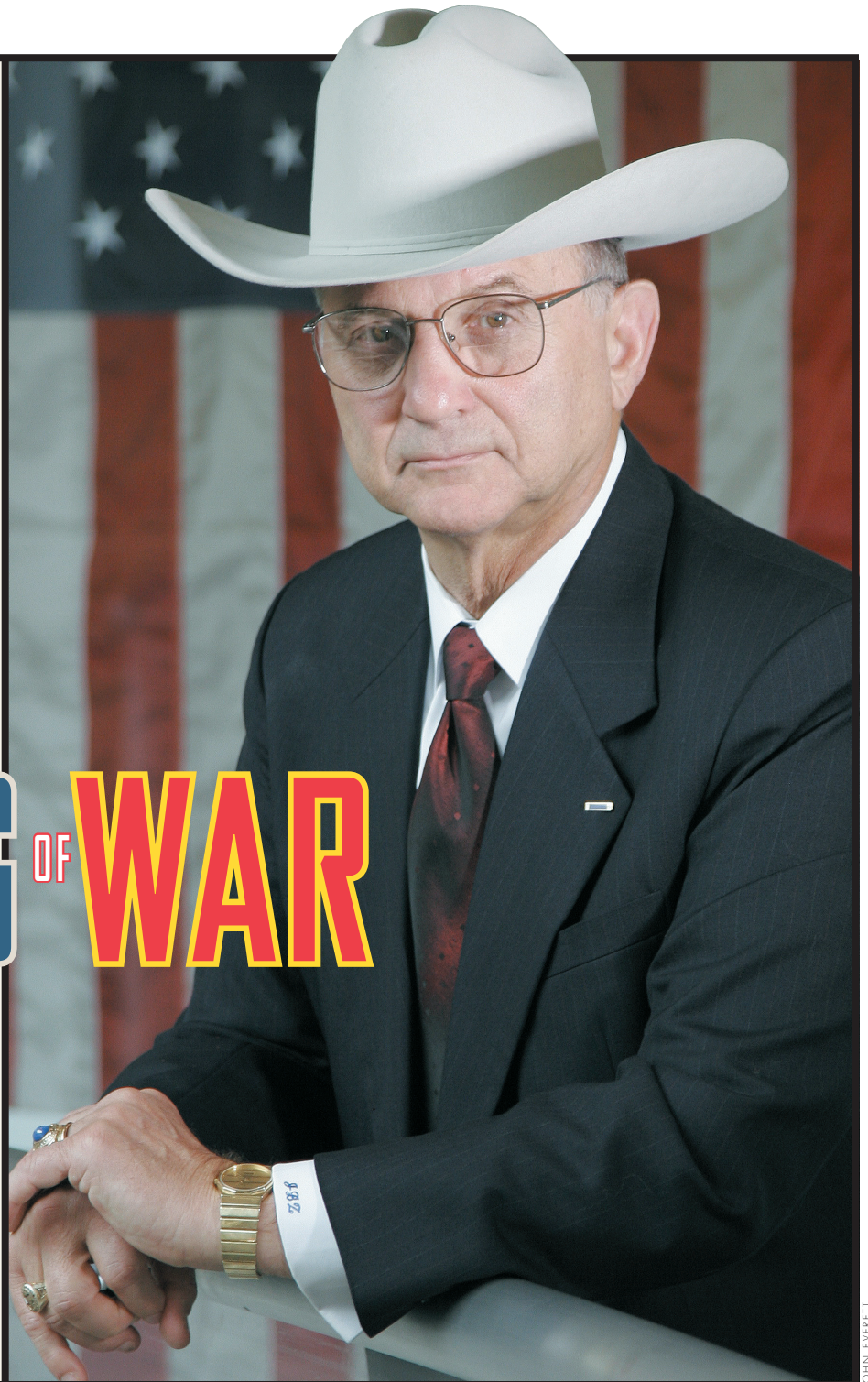
by MARK DONALD

The small courtroom tucked into the northern tip of Camp Pendleton, a sprawling Marine base near San Diego, looked brand new. Its white walls smelled of fresh paint, its oak benches were at high gloss, its overactive air conditioner kept lawyers chilled and awake. Yet despite the newness of the setting, the alleged crime the U.S. government was prosecuting on July 16 was as old as war itself.

The government had “preferred charges” against Lance Cpl. Stephen B. Tatum of Kilo Company, 3rd Battalion, 1st Marine Division, for the “unpremeditated murder” of two civilians, both Iraqi children, and the negligent homicide of four other Iraqi civilians, among them a woman and a 4-year-old boy. A native of Edmund, Okla., Tatum who was 25 at the time of the incident, faces life imprisonment if convicted. His alleged war crimes were part of a larger investigation into the deaths of 24 Iraqi civilians in Haditha, Iraq, on Nov. 19, 2005, after an improvised explosive device (IED) killed one Marine and wounded two others.

On Dec. 21, 2006, the government charged four officers with, among other things, dereliction of duty for failing to

FOG OF WAR



JOHN EVERETT

report the alleged violation of the laws of war. Tatum and three other enlisted Marines were accused of committing the actual homicides by violating their rules of engagement (ROE), which define the limits of their legal authority to kill in combat. If the Marines followed those rules, they had license to kill; if they didn't, they might be criminally liable for their actions.

In previous hearings, the government contended that the enlisted Marines went on a rampage, seeking revenge for the loss of their comrade. Many of those killed were women and children who were shot in their homes, some at close range, which suggested execution-style killings.

The tragedy at Haditha fed the fury of the political debate engulfing the war. The war's opponents saw it as validation that the United States is engaged in an unwinnable civil war that is morally challenging American troops who have trouble distinguishing between innocent civilians and the enemy. The war's proponents saw Haditha as further evidence of the enemy's treachery: Rather than follow the laws of war, they hide among civilians, using women and children as human shields.

But politics were of minor concern to Houston criminal-defense attorney Jack Zimmermann as he glanced around the Camp Pendleton courtroom, smiling at observers in the cramped gallery. Zimmermann led Tatum's defense team, which consisted of his partner, Kyle Sampson, and two military lawyers, Lt. Col. Matthew Cord and Maj. Jeff Munoz detailed to assist Tatum.

July 16 marked the first day of Tatum's Article 32 hearing, a probable-cause investigation under the Uniform Code of Military Justice (UCMJ) — part examining trial, part grand jury proceeding. At the conclusion of the Article 32, an investigating officer, in this case Lt. Col. Paul J. Ware, would recommend whether the charges should be referred to a court-martial or dismissed.

"This was a troops-in-contact situation and Tatum cleared those houses exactly the way he was trained to do," says Zimmermann in an interview. "You don't take a chance that there is an insurgent behind a couch. You fire at anything that moves."

As a civilian lawyer who has practiced in the military justice system for 25 years,



From left to right: Lance Cpl. Stephen B. Tatum, Lt. Col. Matthew Cord, Jack Zimmermann and Kyle Sampson.

Zimmermann maintains that the military system "is fairer than the state and federal systems if it functions the way it is supposed to function."

Zimmermann and his trial team had spent much of the past few months getting ready for the hearing. "When we got into this, we had no idea there would be 13,000 pages of discovery," says Zimmermann, a partner in Houston's Zimmermann, Lavine, Zimmermann & Sampson. "Most of our fee was used up in the first month. But in a public service case, the question is not how much money can you make? It's how much money can you afford to lose?"

Certainly the Marine Corps wasn't skimping on its prosecution. After the alleged atrocity received worldwide attention — in part, because it only came to light after a *Time* magazine reporter began asking questions, the Marines launched several internal investigations. The Marine Corps, which ritualizes duty, honor and discipline in its training, also was confronting the shame of another scandal that occurred in Hamdania, Iraq, when seven Marines and one Navy corpsman allegedly kidnapped and murdered an unarmed Iraqi man.

To prosecute both sets of cases, the Marines drew together a team of 10 lawyers, among them three lieutenant colonels, which is "a very senior rank for a Marine trial lawyer," Zimmermann says. Lt. Col. Paul Atterbury led the

prosecution team in Tatum's case, but he declines comment for this article. "We prefer to remain nameless and faceless," Atterbury says.

Unlike the military lawyers who were dressed for trial in desert fatigues, at the hearing Zimmermann and Sampson were suited up in regulation dark suit and tie. Out of deference to the Marines, Zimmermann left his trademark white cowboy hat in Houston.

"Jack typically wears an oversized Stetson, which does seem out of character for a lawyer who is not flamboyant," says Dr. Paul Radelat, a Houston forensic pathologist whom Zimmermann retained in the Tatum case. "People poke fun at him for it, but it gives him a bit of identity and notoriety."

At 65, Zimmermann is no stranger to military attire. A retired Marine colonel, he served two tours of duty in Vietnam, commanding an artillery battalion and receiving two Bronze Stars for heroism. After attending the University of Texas School of Law, he spent the last three of his 14 years of active duty as a judge advocate. But on the same day that he resigned his regular commission so he could enter private practice, he accepted a commission in a Marine Corps reserve battalion, of which he assumed command in 1983. He retired from the reserves in 1994, but not before serving as a general court-martial trial judge. His son was a Marine officer and his daughter Terri, a

lieutenant colonel in the Marine Corps Reserves and one of his law partners, handled briefing for the Tatum case.

For those in the Camp Pendleton courtroom who might be unfamiliar with his Marine bona fides, Zimmermann displayed two subtle reminders: his Naval Academy class ring and a rosette in his lapel that represents his Bronze Star. During the hearing, Atterbury referred to Zimmermann as colonel.

Article 32 hearings allow the lawyers to question the investigating officer regarding his qualifications and impartiality. Ware acknowledged that he had known Sampson from Sampson's days as a Marine and they remained personal friends.

Atterbury seemed more concerned with whether Ware was biased against the government's witnesses, a few of whom had testified against Lance Cpl. Justin Sharratt, another enlisted Marine who had been charged in the Haditha shootings. A month earlier, Ware presided over Sharratt's Article 32 and recommended that the charges against him be dismissed. The "Convening Authority" — Lt. Gen. James Mattis, the division commander — had final say on the matter. But on Aug. 9, Mattis followed Ware's recommendation and dismissed all charges against Sharratt.

Jim Culp, co-counsel for Sharratt, did not return a telephone call seeking comment before presstime on Aug. 30.

Tatum's case was a harder sell. In his Article 32 hearing, Sharratt contended he had only fired his weapon in self-defense, entering what had been identified for trial purposes as House 4, after two men — military-aged males — pointed AK-47s at him. Tatum, on the other hand, was part of the fire team that attacked House 1 and House 2. The 14 people killed inside those two houses posed no threat to the Marines, the prosecution argued during Tatum's Article 32 — particularly since 10 of the dead were women and children.

Atterbury had no objections to Ware, and the prosecutor began his opening statement, which he delivered sincerely, insistently. He contended that if the evidence showed that Tatum participated in the unlawful killing of Iraqi civilians he "had to be held accountable." It was the government's position that a killing would be unlawful under the ROE if the Marines failed to positively identify that the occupants of the houses they were

about to engage had committed a hostile act or demonstrated hostile intent toward the Marines.

Zimmermann was up next, presenting a 15-page PowerPoint presentation that seemed as much closing argument as opening statement. He urged Ware to focus on Tatum's actions not from the viewpoint of some "two-star general" away from the battlefield, but from the situation as it presented itself to Tatum based on his training, experience and perceptions.

Zimmermann asked Ware to focus on whether Tatum had "criminal intent" when his superiors ordered him to clear a house that had been declared hostile, when he responded to a perceived threat after he heard what he believed was the "racking" of an AK-47 and when he supported a fellow Marine who had already engaged targets. Zimmermann suggested that Tatum was only carrying out his lawful duty, just the way the ROE had instructed him: with deadly force. "We would have chaos if every lance corporal questioned the orders of officers" during an enemy attack, he said.

Zimmermann, as he had throughout much of his storied legal career, sought to vindicate more than just his client. "He is very much into causes and very much into the righteousness of the case," says John Romano, a Palm Beach, Fla., attorney who served under Zimmermann as a military prosecutor. "He isn't about waiting to be paid first."

As he had when he represented a Branch Davidian leader, handled the politicized appeal of a death row inmate or helped prosecute an independent investigation into the fake drug scandal that rocked the Dallas justice system in 2002, he sought to vindicate a larger principle.

"This is an extremely important case for the future of all American military personnel," Zimmermann says. "If soldiers start hesitating to return fire or follow a superior's order in combat because they're worried somebody might second-guess their actions, they are going to end up dead. So the lives of thousands of future American participants in combat situations are at stake."

Nov. 19, 2005

Out of the fog of war in Haditha, this much became clear: By the summer of 2005, the town of Haditha in the Al Anbar Province of Iraq had become one of the

worst hotspots of the Sunni insurgency. Foreign fighters hid and lived among its residents, some of whom were themselves part of the insurgency. Marine reservists faced heavy casualties from ambushes and IED explosions. Civilians faced retaliatory killings for abetting Americans and belonging to the wrong religious sect.

To help tame Haditha, Kilo Company and the rest of the 3rd Battalion arrived in the fall of 2005. Some troops were on their third tour of duty in Iraq. During Kilo Company's second tour in 2004, Marines, including Tatum and Sharratt, engaged in fierce house-to-house battles to retake the city of Fallujah from insurgent hands. The Marines interpreted the rules of engagement generously, particularly because the military had warned its inhabitants of the impending attack. Almost the entire town of Fallujah fled, including insurgents, as Marines devastated the city, treating those who remained as hostile.

The 3rd Battalion expected another hard-fought battle in Haditha, but they encountered little resistance in October 2005 when the battalion was part of a larger force of Marines that swept through the city. Instead, the insurgents chose to blend into the populace and fight another day, on their own terms.

But hard evidence of their presence remained. "There were IEDs buried all over the town, and even after the Marines had cleared them out, there were new ones that appeared," recalls Lucean Read, a freelance photographer who was embedded with Kilo Company and who testified in Tatum's defense. "The insurgents had learned to wait for everything to calm down, watching Marines form their routines and get complacent."

In the early morning of Nov. 19, 2005, a squad of Kilo Company went on routine patrol. Suddenly, there was an explosion. The last vehicle of a four-Humvee convoy took the full force of a powerful IED blast. Two of the three Marines in the squad were wounded; the third, Lance Cpl. Miguel "TJ" Terrazas, a veteran of Fallujah, was blown in half. He died almost instantly. Tatum and other Marines tended the wounded while Staff Sgt. Frank Wuterich, the squad leader, called for reinforcements.

Within moments of the blast, the Marines halted an approaching white sedan, which carried five Iraqi males, whom the Marines ordered out of the car.

What happened next is a matter of much dispute: Wuterich, in an interview with “60 Minutes,” which was broadcast on March 18, claimed that the Iraqis didn’t follow commands and tried to escape. In a prior Article 32 hearing, Sgt. Sanick P. Dela Cruz testified that the Iraqis complied, their hands on their heads in surrender. Either way, Wuterich allegedly pointed his M-16 and shot them, one after the other, dead. He admitted in the “60 Minutes” interview that he had shot them, claiming the men were legitimate hostile targets.

Wuterich’s Article 32 hearing was scheduled to begin on Aug. 30; his Alexandria, Va., attorney, solo Neal Puckett, did not return a telephone call. Neither did Dela Cruz’s attorney Dan Marino, a partner in Sutherland, Asbill & Brennan in Washington, D.C.

According to the summary of facts found by Ware in his Aug. 23 Investigating Officer’s Report, Lt. William Kallop, leading a quick reaction force, was the first to arrive on the scene. As the senior Marine, Kallop assessed the situation and ordered Wuterich to lead a fire team south to clear a house from where Kallop believed the squad was receiving small-arms fire. Wuterich instructed his team, which included Tatum, to treat the house as hostile.

The ensuing gunfire and grenade blast left six occupants dead; among them a woman huddled over a small boy as if to protect him. Four other Iraqis inside the house lived to tell about it. According to Ware’s summary of facts, one Iraqi male fled the assault on House 1, but Wuterich spotted him as he ran toward House 2. Wuterich ordered his men to pursue the runner into House 2 where the Marines killed a different man, two women and five children. A 13-year-old girl survived the assault.

The government’s position was that elderly men, defenseless women and small children in Houses 1 and 2, many of whom were still in their night clothes, posed no hostile threat to the Marines.

“They used standard Marine procedure to clear a house,” counters Zimmermann. “The fire team stacks one behind the other. The first man kicks in the door to a room. The second tosses in a grenade; the third and fourth each take a sector and fire. This was a troops-in-contact situation. They were responding to an attack.”

During his two combat tours in Viet-

nam, Zimmermann says he never had to clear a house. But he came close.

In 1965, Zimmermann participated in a Marine assault against the Vietcong near Chu Lai. “I was an artillery forward observer attached to an infantry unit,” says Zimmermann. “The rules of engagement said that if we saw the Vietcong shooting at us, and they went into a straw hut, we were authorized to fire at the house. I would call in artillery until we put a round through the window. We didn’t wait around to find out, but there could have been women and children in there.”

Because it was his first assignment after basic training, Zimmermann had to rely on those with more experience than himself. “Part of the reason I took the Tatum case was payback for the Marine corporal who kept my ass alive in the field for six months,” he says.

Some of that debt already was repaid during his second tour in Vietnam in 1968, when he helped save the life of one of his men during a rocket attack in the demilitarized zone and was wounded in the process. “I got a Bronze Star for that, and my arm was all bloody. They put me in for a Purple Heart, but I didn’t do a damn thing,” Zimmermann says.

The military paid him back after he returned stateside, sending him to graduate school at Purdue University where he received the equivalent of an MBA. But a superior officer, who thought Zimmermann had a way with words, encouraged him to attend law school.

After graduating from UT law in 1975, the Marines sent him to Camp Lejeune, N.C., where he rose through the ranks and became a chief defense attorney, chief prosecutor and then a trial judge — at each level honing his courtroom skills.

“I knew him as a no-nonsense chief prosecutor who was loved by his men,” says attorney Romano, one of 17 prosecutors Zimmermann had supervised. “He was a picture-postcard Marine and felt it was unacceptable for his prosecutors not to put out 100 percent effort in trial.”

In 1978, Zimmermann was assigned to escort fabled Houston criminal-defense attorney Richard “Racehorse” Haynes who gave a speech at a legal seminar at Camp Lejeune. Zimmermann says Haynes told him that when he was ready to leave the military, there would be a place for him with his firm.

“I told him if he came to work for

me, within a year he would be making as much as a general,” recalls Haynes. “I just didn’t tell him I meant a general in the Bolivian army.”

Zimmermann thought about the offer, which couldn’t have come at a better time. He felt his days as a litigator were numbered. He already was a major, too senior in rank to remain in the courtroom. So he flew to Houston, interviewed with Haynes’ firm — then-Haynes & Fullenweider — and resigned from active duty.

“I just wanted to be a trial lawyer,” he recalls.

Witnesses for the Prosecution

Even as a criminal-defense attorney, Zimmermann was still a Marine to the core, and he approached Tatum’s Article 32 as he would any military detail: directly, ethically, fully prepared.

On July 16, the government’s first witness was Staff Sgt. Justin Laughner, a counter-intelligence specialist who, within hours of the Haditha incident, conducted an on-site investigation of the scene to determine if there was evidence of insurgent activity.

He testified that while photographing the bodies of those slain, he found no weapons, no signs of insurgent activity. And based on his experience, Iraqi females and children were not involved in the insurgency.

But when cross-examined by Zimmermann, Laughner testified that all units were aware that there were foreign fighters in the area.

In the entrance to House 2, Laughner said, he observed shell casings from AK-47 rifles. Sunni insurgents use AK-47s, but so do Iraqi civilians, said Laughner. The Iraqi government allowed each Iraqi household to possess one AK-47 for self-defense.

“If you heard the racking of an AK-47 in a house,” Zimmermann asked Laughner, “would you perceive this to be a legitimate threat and automatically use deadly force?”

“Yes,” he responded.

Laughner’s testimony didn’t have the sting of the next witness, Sgt. Dela Cruz, who had been charged with the murders of the five men in the white sedan. Prosecutors dropped the charges in exchange for his cooperation with all the Haditha cases.

Dela Cruz, however, was not part of

the fire team that attacked Houses 1 and 2. But over Zimmermann's objections, Ware allowed Dela Cruz's testimony to "set the scene."

On July 17, Dela Cruz testified that the squad held a memorial service for Terrazas, during which each man personalized a message in Terrazas' memory on his Camelback canteen. Dela Cruz testified that Tatum had drawn 24 "tick marks," and by them inscribed the words, "This one is for you, TJ," as if to suggest that his death hadn't gone unavenged.

Testifying under a grant of immunity, Dela Cruz admitted that he had lied to the Navy Criminal Investigation Service (NCIS) agents who investigated the incident and questioned him about the killings. Dela Cruz testified that he told them exactly what Wuterich had told the entire squad to say: "If anyone asks why the five Iraqi individuals were shot, say they were running away and the Iraqi army shot them."

But in his testimony Dela Cruz said the Iraqis were not running and were not a threat; when they got out of the car, they placed their hands on their heads. "I looked to my left and saw Sgt. Wuterich shooting," Dela Cruz watched the bodies fall, he said. "They were all dead and then I shot also."

As a witness Dela Cruz seemed overly cautious, taking long pauses before answering the simplest question. During Zimmermann's cross-examination, he admitted that he never actually saw Tatum sign the Camelback; and with Dela Cruz lacking any knowledge of what occurred inside the houses, Zimmermann turned his focus toward the ROE, which Dela Cruz admitted were always changing.

"But nothing in the rules prevented a Marine from defending himself or a fellow Marine?" asked Zimmermann.

Nothing, agreed Dela Cruz.

And if one Marine engaged a target, another Marine would be under a duty to help defend him under the ROE?

Again, Dela Cruz agreed.

The next witness for the prosecution, Lance Cpl. Humberto Mendoza, was a member of the fire team and had actual knowledge of the events inside Houses 1 and 2. But rather than focus on House 1, Atterbury turned Mendoza's attention to the manner in which the Marines made entry into House 2.

"I shot the guy in the kitchen door," testified Mendoza, who said he did so

only because Wuterich had ordered him to shoot. Tatum was the second Marine inside, and tossed a grenade into a room next to the kitchen. There was an explosion and when things turned quiet, Mendoza said, Mendoza moved toward a bedroom and observed "some women and kids in the room." He could see their faces, he said. They looked scared. Believing they posed no threat, he walked into a passageway where he encountered Tatum. "I told him there is women and kids in the room," Mendoza testified.

Tatum replied, "Well, shoot them," recalled Mendoza.

"I said, 'It's just women and kids.' My positive ID was that there were no men, no threat, no hostile situation — nothing that put myself or my platoon in danger," he testified. Nevertheless, Tatum brushed past him and headed for the bedroom. The next thing Mendoza heard was noise from gunfire or a grenade blast, he didn't recall which.

Mendoza had given the prosecution what it needed: evidence of Tatum's criminal intent. If Tatum had prior knowledge that the individuals in the bedroom were women and children who posed no threat to the Marines, his actions in shooting them would violate the ROE and be unlawful.

Mendoza's attorney, associate Jamie McCall of Morgan, Lewis & Bockius in Philadelphia, did not return a phone call seeking comment.

After a lunch break, Atterbury directed Mendoza's attention to House 1, where again Mendoza said he didn't feel threatened. Nevertheless, he discovered a man inside a prayer room, but didn't shoot him at first — not until Cpl. Hector Salinas told him the man "was a bad guy" and to shoot him, testified Mendoza. So he returned to the room, saw the man reach into a closet, thought he might be going for a weapon and shot him. Tatum followed Mendoza into the room, he testified, and shot the man again to make certain he was dead. Dan Hagood, a partner in Dallas' Fitzpatrick Hagood Smith & Uhl, represents Salinas, but declines to comment for this story.

When he began his cross-examination, Zimmermann practically leapt on Mendoza. Zimmermann took Mendoza through three prior statements he gave to investigators, and nowhere had he mentioned that Tatum had told him to shoot women and children. It was only in court

that he told this "new version of the truth," accused Zimmermann. And that was only after he cut his immunity deal, suggested Zimmermann, and only after he asked the chief prosecutor to help him with his U.S. citizenship request. Mendoza is a citizen of Venezuela but a lawful resident of the United States.

Zimmermann pointed out that Mendoza had killed two unarmed men and he had never felt threatened. That would make his targets illegitimate, yet the government never charged him. And hadn't he flunked an NCIS polygraph, which revealed he was deceitful when he said the man in the prayer room was reaching for a weapon?

Yes, he had failed a polygraph, Mendoza testified, but no, he wasn't lying.

Zimmermann seemed satisfied with his cross-examination, but grew miffed with reporters who hadn't waited for him to finish before they filed their daily stories. Outside the courtroom he told the remaining reporters that unlike Mendoza, Tatum had passed a polygraph, which indicated that Tatum was truthful when he said he didn't know he was firing at women and children.

Zimmermann had long ago learned how to work the media in high-profile cases, tossed into the eye of the storm during his tenure with Racehorse Haynes, "the best criminal lawyer I have ever seen," says Zimmermann.

For the first 18 months that Zimmermann worked for Haynes, Haynes was occupied representing Fort Worth millionaire T. Cullen Davis in an alleged murder-for-hire plot involving a Tarrant County judge. "I was handling all the criminal cases in the office, so I started with high-profile cases from the get-go," said Zimmermann.

In 1981, Zimmermann led the successful defense of Vicky Daniel for the alleged murder of her husband and former Texas House Speaker Price Daniel Jr. Zimmermann raised the defense of spousal abuse syndrome — the first time it was ever accepted by a court in Texas, he says.

Even after Zimmermann left Haynes' firm in 1984 to open his own shop, high-publicity clients came Zimmermann's way. The first of these was Clifford Henry Bowen, whose case Zimmermann took with him when he left Haynes' firm — with Haynes' consent, adds Zimmermann.

An Oklahoma City jury had convicted Bowen of a triple homicide and

sentenced him to three death sentences. Seventeen days before Bowen's scheduled execution, Zimmermann received a telephone call from a South Carolina state trooper who told him that his agency had solved the crime years before, and the killer wasn't Bowen, says Zimmermann. Bowen's execution was stayed but it took Zimmermann three years to convince a federal habeas judge to reverse the cases and another year for him to persuade a prosecutor to dismiss them outright.

"The DA got on television and said that Bowen had hired these out-of-state lawyers, and he got away with murder," recalls Zimmermann. "I got on TV and said that it was very welcoming to see that the Constitution had finally made its way to Oklahoma City."

In 1993, Zimmermann found himself under harsh media scrutiny when he was retained by Steve Schneider, David Koresh's top lieutenant, to help him negotiate a peaceful settlement to the FBI's 51-day siege of the Branch Davidian compound outside Waco. Even though an abortive raid by the U.S. Bureau of Alcohol, Tobacco and Firearms left four ATF agents dead, the government permitted Zimmermann and Dick DeGuerin, Koresh's attorney, to enter the compound to speak with their clients.

"We spent a lot of time establishing a rapport with Koresh and Schneider, just like you would any client," recalls Zimmermann. "They were worried they couldn't get a fair trial, and we convinced them that they could."

Zimmermann says he and DeGuerin negotiated the Branch Davidians' surrender, the terms of which had been accepted by the FBI. But rather than wait out Koresh for several more days, on April 19, 1993, the FBI assaulted the complex, which burst into flames and resulted in the death of about 80 Branch Davidians, among them Koresh and Schneider.

"The deal would have worked," recalls DeGuerin, a partner in Houston's DeGuerin Dickson & Hennessy. "It involved Koresh and I coming out first and surrendering to a single Texas Ranger."

The government maintained it had its reasons for going in when it did: the fear that Koresh was sexually abusing children inside the compound, the fact that Koresh had agreed to surrender before and didn't, the desire to end the lengthy standoff and the need to apprehend those

allegedly responsible for the deaths of the ATF agents.

Whether the FBI or sect members set the fire still remains a point of contention.

Zimmermann remains an outspoken critic of the government's actions. "I believe in the system," he says. "And if the system had worked in Waco, the right result would have happened, and those people would still be alive."

Zimmermann says the system also didn't work for his client Gary Graham, who became a cause célèbre of death penalty opponents who believed his claim of actual innocence. In 1993, Zimmermann joined a habeas team led by Houston criminal-defense counsel Richard H. Burr III, searching for any way to get a hearing to present newly discovered eyewitness testimony that, if believed, might exonerate Graham who was convicted for the murder of a Houston man in a Safeway parking lot in 1981.

The controversy over Graham's pending execution took place against the backdrop of George W. Bush's first presidential campaign. A dogged media insisted that then-Gov. Bush defend his execution record as Bush maintained that under his watch no innocent person had been put to death in Texas.

In the run-up to Graham's scheduled execution, Zimmermann and Burr met with the lawyers from the governor's office as well as the head of the Texas Board of Pardons and Paroles. "I don't know if we got caught up in presidential politics or not, but they didn't think there was legal authority to grant us another stay of execution," says Zimmermann.

"I had been around the block so many times," says Burr, a partner in Houston's Burr & Welch. "I knew where the case would end up. But Jack kept hoping for both of us."

Burr and Zimmermann worked feverishly out of Zimmermann's office until the moment they got word of Graham's execution on June 22, 2000.

"I don't even know what his position is on the death penalty," says Burr. "I think the principle he is trying to vindicate is that the system will work if it has vigorous, truthful advocacy before it."

Rules of Engagement

At Tatum's Article 32, Zimmermann toyed with reporters, saying they needed to wait around until the fourth day of

the hearing when the government's forensic experts would testify. Although he didn't say why, it became obvious after NCIS death scene reconstruction expert Special Agent Thomas F. Brady testified. Through him, the government presented its theory that the Marines had executed some Iraqi civilians, shooting them at close range.

On July 19, Brady testified that in March 2006 he traveled to Haditha as part of an NCIS forensic team. It was his job to piece together through physical evidence what happened in House 1, which by the time he arrived four months after the incident, had been repaired. Brady gave his opinion regarding the relative positioning of the shooters to the victims. He concluded that the woman and 4-year-old boy, who were killed in the bedroom, were shot from behind and at close range. He based his opinion in part on the entry wounds to the boy's chest and neck — and said when the boy was shot, his face was likely positioned against the floor. This suggested that the boy was somehow kneeling or crouching.

But during cross-examination, Zimmermann challenged Brady with an alternate theory, acting it out as he spoke. If the bullet exited the boy's temple, wouldn't there be blood on the floor or on the wall in front of him? Wasn't it more consistent with the physical evidence that the woman, in an effort to protect the boy, pulled him toward her. That would put the left side of his face against her chest, which would account for the blood and brain matter on her shirt and dress as the boy was shot and fell forward. Wasn't this more consistent with the shooter standing in the doorway to the bedroom?

But Brady said Zimmermann's theory was biomechanically unsound and stuck by his own.

What Brady couldn't shake, however, was the thin evidence upon which his opinion was based. Through no fault of his own, Brady had found himself reconstructing a death scene four months after the event. Whether this was due to dereliction of duty on the part of Kilo Company officers who allegedly failed to investigate the Haditha incident was a matter for other Article 32s. The death scene reconstruction of House 1 largely was based on Sgt. Laughner's photos, which may not have accurately depicted

the scene at the time of death, according to Ware's report. What's more, there was no DNA evidence, no ballistic tests, no autopsy results — none of the kinds of evidence upon which forensic experts typically base their opinions, said Zimmermann.

A second death scene reconstruction expert who examined House 2 didn't harm the defense much, testifying that the two shooters who killed the women and children inside the back bedroom likely were positioned at or near the doorway entrance — not at close range.

More incriminating were statements that Tatum allegedly gave NCIS agents during an extensive interrogation process that began in Iraq with two separate interviews in March 2006 and ended at Camp Pendleton with two separate interviews in May 2006. NCIS Special Agent Matthew Marshall conducted the interrogations. He testified for the government that after a "laid back" 12-hour interview at Haditha Dam, then the headquarters of the Third Battalion, Tatum signed a statement that said when he engaged the occupants of House 1, he did not know they were women and children.

Marshall testified that after Tatum returned from his tour of duty, he gave two statements at Camp Pendleton, the second May 17, 2006, statement being the more damning of the two. In that statement, Marshall testified that Tatum confessed that he knew there were women and children in the back room of House 2 prior to shooting them. Explaining why, Tatum said, "Women and children can hurt you, too," Marshall said.

But on cross-examination, co-defense counsel Sampson hammered hard on the possible legal inadequacies of the May 2006 statements: Tatum had refused to sign them and they were never tape recorded or transcribed. And during the May 9, 2006, interview, Tatum had requested a lawyer, though Marshall maintained that the issue was cured by Tatum's subsequent waiver of counsel.

But Investigating Officer Ware said he didn't believe it was his job to rule on the statements' admissibility — and he didn't. Rather he felt it was his role only to advise the Convening Authority that

certain evidence might be inadmissible and weaken the government's case.

The ultimate issue for Ware to determine was whether there were reasonable grounds to find that the killings or force Tatum used were lawful. Because the ROE gave the Marines their authority to kill, it was not surprising that much of the last two days of testimony became an academic debate about how to apply Tatum's ROE training to the facts on the ground.

Somewhere between broad training directives — that Marines don't shoot unarmed women and children and Marines may use deadly force to defend themselves — there existed the murky middle that was Haditha.

But the government primarily took the position throughout the hearing that the ROE required Marines to positively identify the occupants of a room as being hostile — hostile act-hostile intent — distinguishing between innocents and the enemy before they could use deadly force.

The defense took the position that to adopt such a strained interpretation of the ROE would put all Marines in combat at risk. What Marines had to positively identify was not the individuals but the situation, and if they reasonably believed from their viewpoint that the situation was hostile, even if they were mistaken, they were justified in using deadly force.

Concluding seven days of testimony was Tatum, who under the procedure governing Article 32 hearings, could give his unsworn statement that was not subject to cross-examination. Tatum's comments were brief, but to the point: While listing the reasons he had fired inside Houses 1 and 2, he said that because of the poor visibility — smoke, dust, darkness — he only knew he was shooting at targets. He said "the conversation Mendoza said happened, never happened." Also he never told NCIS that he knew, before firing, that there were women and children inside the houses. If he had known, "I would have physically stopped everybody from shooting," he said.

Choking back tears, he told Ware, "I am not comfortable with the fact that I might have shot a child. I don't know if

my rounds impacted anyone. That is a burden I will have to bear."

Several courtroom observers felt that Tatum's statement was effective and moving. But just how effective was a question left for Ware.

On Aug. 23, the defense had the answer. "I recommend withdrawal and dismissal of all charges," Ware wrote in a 29-page report. Regarding the alleged crime of negligent homicide resulting from the incidents in House 1, he found the evidence insufficient. Regarding the alleged crime of unpremeditated murder resulting from the incidents in House 2, Ware found there were reasonable grounds for charges, but he still recommended dismissal. "The evidentiary hurdles are too great and basing a prosecution on LCpl Mendoza's testimony is too weak a case to warrant referral to trial," Ware wrote.

Zimmermann couldn't have been more pleased if he had written the report himself. Much of the language in the report validated positions that the defense had taken: Ware was highly suspect of Mendoza's credibility; he took Special Agent Brady to task for rejecting the defense's alternative theory on shooter positions; he agreed with the defense's theory of criminal liability, which maintained, among other things, that in a troops-in-contact situation, there need not be a "specific individualized positive identification" of the occupants of a room.

Ware wrote that by the time Tatum realized he was firing at women and children, his body already had acted. For those who might question Tatum's motives, Ware wrote, "Tatum shot and killed people in Houses 1 and 2, but the reason he did so was because of his training and the circumstances he was placed in, not to exact revenge and commit murder."

Because the final decision about his client's fate rests with Lt. Gen. Mattis, Zimmermann declines to comment about Ware's report other than to say he agrees with its findings. But if history is any guide, Zimmermann might say that he has every confidence in the fairness of the military justice system, and if it works the way it was designed to work, he believes that Tatum will be exonerated. 