



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

6 November 2013

MEMORANDUM FOR DoD C/MSRB, SAF PERSONNEL COUNCIL

FROM: AF/JAO

SUBJECT: Legal Review of P.L. 95-202 Group Application – Air America, Inc

1. **Introduction.** In accordance with Department of Defense Directive 1000.20, former employees of Air America, Inc., who operated aircraft in support of U.S. military forces in Laos from 1959 to 1974, request the Secretary of the Air Force (SecAF) conclude that their service during the Vietnam conflict was equivalent to “active military service” for purpose of determining their eligibility for veterans’ benefits. To assist with the consideration of this application, DOD C/MSRB requested that AF/JAO assess the status of group members during the Vietnam conflict solely from an international law perspective. For reasons addressed below, we conclude that to the extent AA personnel in Laos actively participated in hostilities, they did so as “civilians” and unprivileged belligerents, and not as combatants assimilated to the U.S. armed forces.

2. **Issue.** DODD 1000.20, paragraph 4.2.3 states that “consideration will be given to whether members of the group were regarded and treated as civilians, or assimilated to the Armed Forces as reflected in treaties, customary international law, judicial decisions, and U.S. diplomatic practice”. In other words, under international law, would AA personnel operating in Laos be treated as “civilians” or as “lawful combatants” assimilated into the Armed Forces? The scope of this legal review is exclusively limited to an analysis of the DODD 1000.20, paragraph 4.2.3 factor concerning the group’s status under international law. This legal review does not analyze any of the other DODD 1000.20 equivalency factors.

3. **Background.**

a. The DOD C/MSRB previously analyzed similarly situated groups associated with Air America, and its predecessor, Civil Air Transport (CAT). In 2005, the Board broadly considered the service of all aircrews and ground support personnel of CAT/Air America (CAT/AA). While SecAF’s decision on a group application cannot be appealed, a group’s application can be reconsidered if the group submits new, relevant, and substantive evidence. In 2007, the Board responded to a request for reconsideration with respect to six different subgroups of CAT/AA personnel. Except for one particular sub-group, the Board unanimously determined the service of the CAT/AA subgroups satisfied almost none of the criteria that would indicate the US armed forces exerted control over the subgroup such that their service could be considered to be equivalent to active military service. However, the Board found the application from one particular subgroup to be more meritorious than the other five subgroups. This particular subgroup concerned personnel who operated aircraft in support of U.S. military forces in Laos

from 1964 to 1974. While the merits of this particular subgroup were stronger than the other five subgroups, a majority of the Board still concluded this subgroup satisfied too few of the criteria to indicate the US armed forces exerted control over the subgroup to be similar to that exerted over US military personnel. Accordingly, the Board recommended SAF/MR determine that the service of all of the subgroups are not equivalent to active military duty service.

b. On 17 September 2012, the DOD C/MSRB received another application for recognition of military service from a group of individuals who referred to themselves as "Air America, Inc." The latest application essentially provides additional information with regards to the one particular subgroup that the Board found to be more meritorious than the other subgroups in 2007. The latest application defines the group under consideration as Air America personnel operating aircraft in Laos in support of U.S. military forces from 1959 to 1974 (a slightly broader date range from the scope of the subgroup considered in 2007). The current group asserts that their service should be considered as equivalent to active military service for purposes of eligibility to receive benefits from the Department of Veterans Affairs (VA). On 27 September 2013 and 12 October 2013, the group provided supplemental information in an effort to substantiate their claim. The additional information provided by the group consists of supporting statements from individuals and excerpts from various publications.

c. Following the revised Air America application, on 1 July 2013 the Director for the Air Force Historical Studies Office submitted a Historical Research & Advisory Report (HRAR) to the DOD C/MSRB. The HRAR indicates that CAT/AA personnel were employees of a private commercial company which in fact was solely owned by the US federal government. According to a book by Mr. William Leary, *Perilous Missions: Civil Air Transport and CIA Covert Operations* in Asia, the CIA established CAT/AA as a private airline to facilitate covert anti-communist activities by the US government. According to the book's account, CAT/AA carried out US government policies in places where official US personnel activities were limited. The US government avoided overt US military activities in Laos due to restrictions on U.S. military personnel imposed by the 1962 Geneva Accords. This international agreement obligated the US to respect Laotian neutrality; to refrain from interference in the internal affairs of Laos; to refrain from drawing Laos into a military alliance; and to refrain from establishing a military base in Laotian territory. Apparently, as a result of the US desire not to overtly violate the terms of the 1962 Geneva Accords, the scope of CAT/AA activities within Laos were significantly broader than the ordinary airline transport services that CAT/AA provided outside of Laos.

d. The HRAR summary of CAT/AA activities in Laos included the following:

(1) CAT/AA personnel were involved in search and rescue (SAR) for downed US pilots. SAR missions were essentially special emergency tasks relayed to CAT/AA pilots providing air transport services.

(2) CAT/AA pilots flew Air America or Royal Laotian Air Force aircraft to enable US Air Force forward air controllers in civilian clothing to direct USAF strike aircraft. On some occasions, when no other aircraft were available, CAT/AA pilots flew USAF O-1 and U-17 aircraft. Later in the conflict, the role of CAT/AA personnel was limited to maintaining the aircraft used by USAF forward air controllers.

(3) CAT/AA pilots transported US Army Special Forces Advisors and their Laotian liaisons, military personnel attached to the US Embassy, and supplies (including weapons) to assist Laotian security forces.

e. CAT/AA activities in Laos occasionally resulted in CAT/AA personnel coming under hostile fire. According to the group application, CAT/AA personnel wore civilian clothing for some years but throughout most of the 1960s, CAT/AA flight personnel wore a standardized uniform which included rank epaulets. The uniforms worn by CAT/AA personnel purportedly identified such persons as CAT/AA employees as opposed to US military members. There was no evidence to indicate that CAT/AA personnel were ever subject to military discipline. Historical documents do not indicate the US military exercised substantial control over CAT/AA personnel, nor do they give any indication of the term of service for individual CAT/AA personnel or whether any terms of employment were enforceable. According to the HRAR, the control of CAT/AA personnel rested with Air America and ultimately, the CIA. According to the group application, the CIA deferred control of CAT/AA personnel in Laos to either the US Army or US Air Force.

4. International Law.

a. In order to help protect the peaceful population from the effects of war, the law of war distinguishes between persons engaging in hostilities and persons taking no active part in hostilities. Members of the armed forces who are combatants and other members of the peaceful population (civilians) have distinct rights, duties, and liabilities. In international law, no person can exercise the distinct rights afforded both classes at the same time. Said another way, at any given time, an individual can only have one status or the other. To date, the United States has not issued a precise definition of the terms "combatant" or "civilian" or the criteria to be applied in making such a determination. The Geneva Conventions of 1949 requires combatants in the armed forces or an organized militia to fulfill the following four conditions:

- (1) being commanded by a person responsible for his subordinates;
- (2) having a fixed distinctive sign recognizable at a distance;
- (3) carrying arms openly; and
- (4) conducting their operations in accordance with the laws and customs of war.

b. Civilians Accompanying the Force. The GCIII, Article 4(A)(4), describes "civilians accompanying the force" as persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces. An armed force is responsible for authorizing the presence of any "civilians accompanying the force" and providing such civilians with an identity card. Department of Defense Instruction 3020.41 (2005), Contractor Personnel Authorized to Accompany the U.S. Armed Forces, para 6.1.1., states that contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). If captured

during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status. Contractor employees should not take an active part in hostilities but retain the right to self-defense.

5. Discussion.

a. International law enables a State to incorporate an organized group into its armed forces as “combatants” if the State wishes to do so. Paragraph 4.2.3, DODD 1000.20 provides that in “addition to other factors, consideration will be given to whether members of the group were regarded and treated as civilians, or assimilated to the Armed Forces as reflected in treaties, customary international law, judicial decisions, and U.S. diplomatic practice.” If the United States wanted to incorporate AA personnel into the US armed forces, international law would require the US to take affirmative measures to ensure AA members satisfied the requirements from the Geneva Convention discussed above. Whether the United States assimilated AA group members as lawful combatants into the US armed forces is a factual question.

b. As a general matter, when a government entity hires individuals through a contract with a private corporation to perform certain functions, those individuals are generally not considered by the government entity to be members of its armed forces. Should it choose to do so, before the United States could legally incorporate contractors or civilian employees into the US armed forces, in order to comply with international law, it is necessary to subject such personnel to the control of a military commander responsible for their actions. An inherent component to control of a military commander is the ability of the commander to maintain discipline, often manifested through the application of a disciplinary justice system. Since Vietnam was not a declared war under United States domestic law, civilians accompanying the Armed Forces in the field were not subject to the Uniform Code of Military Justice (UCMJ). AA was established as a private company providing contractual services to the federal government. As such, military commanders would not have any actual legal control over contractors or their employees (contractor employees are not the same as government employees); only contractor employer’s manage, supervise, and give directions to their employees. If the United States desired to incorporate AA group members into the US armed forces, an important step would have been for Congress to declare the Vietnam conflict a “war” which would have extended the provisions of Article 2, UCMJ to civilians accompanying the force or Congress could have enacted federal legislation to subject AA group members and others similarly situated to the UCMJ. Congressional failure to place AA personnel under a commander’s disciplinary justice system is circumstantial evidence that the United States intentionally elected not to incorporate AA group members, or members of other similar organizations supporting the conflict at the time, into the US armed forces.

c. In the present case, the available information suggests that the United States government clearly intended AA personnel in Laos to be treated as “civilians”. According to the historian’s report, military personnel in many instances were operating in civilian attire in the same locations as AA personnel. The US government took affirmative actions to ensure AA personnel and USAF air controllers were perceived by all outside observers as “civilians” in order to conceal and facilitate “covert” US military activities in Laos. As noted above, the United States had international obligations to respect Laotian neutrality; to refrain from

interference in the internal affairs of Laos; to refrain from drawing Laos into a military alliance; and to refrain from establishing a military base in Laotian territory. In order to gain recognition as lawful combatants in the armed forces, international law requires members of AA to conduct their operations in accordance with the laws and customs of war. However, it would appear that the AA members undertook "covert operations" rather than actively participate in hostilities as an open and transparent armed force as required by the laws of armed conflict and customs of war.

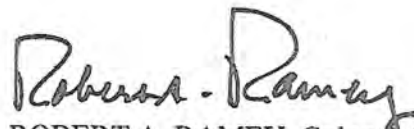
d. The Department of Defense Dictionary of Military and Associated Terms (Joint Publication JP1-02), defines "covert operation" as "an operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor. A covert operation differs from a clandestine operation in that emphasis is placed on concealment of identity of sponsor rather than on concealment of the operation." In a covert operation, the identity of the sponsor is concealed, while in a clandestine operation the operation itself is concealed. Put differently, clandestine means "hidden," while covert means "deniable." Covert operations aim to fulfill their mission objectives without any parties knowing who sponsored or carried out the operation.

e. The law of armed conflict requires States to overtly distinguish its lawful combatants from civilians in order to minimize the impact of war on the civilian population. The law of armed conflict does not permit a State to disguise its combatants as "civilians." A State does not have any authority under international law to directly participate in an international armed conflict with a "covert" military force. Thus, any military member acting "covertly" while dressed as a civilian is an unprivileged belligerent and places his right to prisoner of war status in jeopardy if he/she is captured by the adversary. Unprivileged belligerents are individuals who are directly engaged in hostilities against one of the parties to the conflict and who are not entitled to combatant immunity. An individual who is "not entitled to combatant immunity" includes any individual who is not part of one of the categories of persons described by Article 4(a)(1), (2), (3), or (6) of the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949. Unprivileged belligerents are persons who, by their conduct, subjected themselves to being targeted for attack and may be criminally prosecuted and punished under domestic law for their war like acts if captured.

f. It is unclear to what extent, if any, AA personnel in Laos were controlled by the US military. However, because the United States government was legally obligated to refrain from military activities in Laos and was unwilling to acknowledge any overt US military participation in the conflict from personnel stationed within Laos, under international law, it would not be possible for either the US military personnel or the AA personnel stationed in Laos to participate in the Vietnam conflict as lawful combatants. If lawful combatant status was unavailable for US military personnel stationed in Laos, there's little advantage gained in an examination of the question to what extent AA personnel in Laos were intentionally assimilated into US military units in Laos. Even if we assume AA personnel in Laos were fully incorporated into US covert military activities in Laos, neither AA personnel nor the US military personnel stationed in Laos participating in hostilities would be lawful combatants under international law. To the extent that any AA personnel in Laos directly participated in hostilities during the Vietnam conflict, they did so as civilians and as unprivileged belligerents. Under international law, the US

decision to conduct "covert" military activities in Laos precludes the ability of AA personnel or US military personnel stationed in Laos from qualifying as lawful combatants.

6. **Conclusion.** During the Vietnam conflict, the US government intentionally took affirmative measures to ensure the public persona of AA personnel was that of "civilians." While some AA group members undoubtedly worked valiantly over an extended period of time, and, it appears, even directly participated in armed conflict at various points over the 15-year period under review, they did so as "civilians" rather than lawful combatants. This narrow determination, while it may tend to disfavor approval of the group application under DoDD 1000.20, does not preclude SecAF from approving this application based upon a consideration of other factors listed in DODD 1000.20. Should you have any questions, please contact Lt Col Christopher Supernor at DSN 225-9631.

A handwritten signature in black ink that reads "Robert A. Ramey". The signature is written in a cursive, slightly slanted style.

ROBERT A. RAMEY, Colonel, USAF
Director, Operations and International Law