

## The Difficulty of Defending Detainees\*

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### I. INTRODUCTION

Let me begin with a disclaimer. The opinions expressed herein are my own and do not represent the views of the Department of Defense, the United States Air Force, the Office of Military Commissions, or the Office of the Chief Defense Counsel.

Prior to becoming a law professor, I was an active duty Air Force Judge Advocate for nearly ten years. When I transitioned into teaching in April 2005, I transferred into the Air Force Judge Advocate General (JAG) Corps Reserve. In January 2008, I received an e-mail from JAG Headquarters, soliciting volunteers to be recalled to active duty to defend detainees facing trial by military commission. They were specifically looking for attorneys with significant criminal defense and international law experience. I had both. In addition, I had just completed a law review article analyzing the rules and procedures for military commissions<sup>1</sup> and had been following developments in the military commissions closely. I decided to volunteer.

In February 2008, I was interviewed by the Chief Defense Counsel for the Office of Military Commissions. The next day, I was offered a position. As soon as I completed my spring semester classes, I drove to Washington, D.C. from California and reported for duty. My first day in the office was April 28, 2008. The next day I was assigned, or in military parlance, “detailed,” as defense counsel to two military commission cases, *United States v. Ali Hamza al Bahlul*<sup>2</sup> and *United States v. Mohammed Jawad*.<sup>3</sup> Immediately thereafter, on April 30, 2008, I flew to

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1. David J.R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315 (2007).

2. See generally Charge Sheet, *United States v. al Bahlul* (Military Comm'n, Guantanamo Bay Feb. 8, 2008), <http://www.defenselink.mil/news/Feb2008/d20080226bahlul.pdf>.

3. See generally Dep't of Defense, Mohammed Jawad, <http://www.defenselink.mil/news/>

Guantanamo to meet with my two clients. Arraignments were scheduled in both cases for May 7, 2008. I had one week to prepare for my first appearance before the commission.

For the last seven months, I have devoted most of my waking hours to the defense of these two individuals. Unfortunately, Mr. al Bahlul refused to accept my services and ordered me not to defend him or represent him in any way. On November 3, 2008, he was convicted of conspiracy and solicitation to commit a variety of terrorist acts and war crimes and also of material support of terrorism.<sup>4</sup> He was sentenced to confinement for life. The jury, a panel of nine Army, Marine, and Air Force Colonels and Navy Captains, including six jurors recycled from the military commission panel that sentenced Australian David Hicks,<sup>5</sup> was out for less than forty-five minutes before settling on the life sentence. There are a lot of interesting things to talk about in the al Bahlul case, and I can tell you that it was incredibly difficult to sit on my hands when I was fully prepared to present a vigorous defense. But I refused to be party to forcing representation on an unwilling client, so I honored his wishes and sat silently throughout the trial.

My other client, in contrast, has accepted my representation, so there is much more that I can say about his case. Mr. Jawad is a young man about twenty-two or twenty-three years old, the same age as many of the first-year law students that I have been teaching for the last few years. I have thought a lot over the last few months about the incredible contrast between the lives led by my law students and the life led by Mohammed Jawad. I have thought about what a privilege it is to live in America and to be able to go to college and then go on to study law and prepare for a successful career as a professional—because it might not have turned out that way. It is all an accident of birth. My students, like me, had the good fortune to be born at a time and place and into a family where such things as going to college and graduate school were possible, maybe even taken for granted.

## II. THE STORY OF MOHAMMED JAWAD

Imagine, instead, that you had been born into a desperately poor tribal village in Afghanistan, in the mid-1980s, in the midst of a lengthy, brutal war with the Soviet Union. If you had been born in such a time

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commissionsJawad.html (last visited Jan. 19, 2009).

4. William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19.

5. Carol Rosenberg, *Alleged al Qaeda Video-Maker Boycotts Own Trial*, MIAMI HERALD, Oct. 27, 2008, available at <http://www.miamiherald.com/news/americas/guantanamo/story/743257.html>; William Glaberson, *Plea of Guilty from Detainee in Guantánamo*, N.Y. TIMES, Mar. 27, 2007, at A1; see generally Scott Horton, *The Plea Bargain of David Hicks*, HARPER'S MAGAZINE, Apr. 2, 2007, available at <http://www.harpers.org/archive/2007/04/horton-plea-bargain-hicks>.

and place, there is a good chance that your father might have died fighting the Soviet Occupation in the latter years of this nine-year Afghan-Soviet war.<sup>6</sup> If that had happened, your mother might have taken you and fled to a refugee camp in Pakistan, where you would have grown up with limited opportunities for education and few opportunities in life. You might have had a little schooling in a local Madrasa<sup>7</sup> and learned a bit of the Koran and some rudimentary math, but even if you were bright and eager to learn, there would have been no books or paper or pencils, and you most likely would have been functionally illiterate.<sup>8</sup> Your mother might have married your father's brother and your new stepfather might have kicked you out of the squalid, crowded hovel as soon as you were old enough to fend for yourself, perhaps at the age of fourteen or fifteen, because you had three younger half-brothers and sisters, and there was one-too-many mouths to feed. You would have tried to make a living by selling chewing gum or trinkets, or perhaps, begging on the street. If you were a child of the street with nowhere to go and little to do, you might have taken to hanging out at the local mosque, where, in the fall of 2002, when you were about sixteen years old, you might have been approached by a man offering you an opportunity for work. The work, you would have been told, was dangerous—clearing old Soviet mines in Afghanistan—but lucrative, enough perhaps to buy a new home for your family, so you would have been tempted to take it. You would have had no way of realizing that the recruiter was lying to you, that he had no intention of training you to clear mines, and that there would be no payment.

If you were this young Afghan boy, you might have been taken to a training camp in the mountains of Afghanistan, ostensibly for mine-clearing training, consisting of several caves and a firing range. There, you would have been forcibly drugged and brainwashed and prepared for your real mission: to be used as a sacrificial lamb in a planned attack on United States forces occupying Kabul, Afghanistan. Once you were firmly under the control of your handlers, you would have been taken to Kabul, given more drugs, and then given a couple of hand grenades and told to go with one of your handlers to look for American soldiers. At the command of your handler, you would then be told to follow his lead and throw the grenade at them. Your handler might have even told you

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6. See generally STEVEN COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004).

7. An Islamic religious school focused on the study of the Koran.

8. Forty-seven percent of the age group ten years old and older were illiterate as of 2005-06, according to the United Nations Educational, Scientific, and Cultural Organization (UNESCO). UNESCO Islamabad, Universal Periodic Review (UPR) of Pakistan (2007), available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PK/UNESCO\\_PAK\\_UPR\\_S2\\_2008\\_UnitedNationsEducationalScientificandCulturalOrganizations\\_uprsubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PK/UNESCO_PAK_UPR_S2_2008_UnitedNationsEducationalScientificandCulturalOrganizations_uprsubmission.pdf). This number is much higher in the poorer regions of the country where Mohammed Jawad grew up. Mr. Jawad is functionally illiterate.

that the grenade would just make a loud noise and frighten the Americans and that would encourage the evil Americans to leave Afghanistan. You might have been told that you would have plenty of time to get away and to meet back at the mosque when it was all over, where you would receive the promised payment for your services.

You might even have done what you were told and thrown one of those hand grenades into a passing American jeep, injuring two U.S. soldiers and their Afghan interpreter. Or maybe you did not. Perhaps you watched from the side of the road as your handler threw the hand grenade, or perhaps you just wandered off into the bazaar to buy some raisins and did not even witness the attack. Whatever happened prior to the attack, at the sound of the explosion, you would have run until you were caught by the local Afghan police, and a gun was held to the side of your head, and you were placed under arrest.

If you were that young Afghan teenager, the Afghan police would have taken you to the police station and then to the Ministry of the Interior. Here, you would have been interrogated for six and a half hours, including interrogation by the Interior Minister himself. The interrogators would have extracted a confession by torture—by threats to kill you and your family, and by physical force. And if they could not coerce the correct confession out of you, they would have just made one up. One of the police officers would have simply written a confession in a language you did not read, write, or even speak, and then they would have taken your hand, put some ink on your thumb, and placed your thumbprint carefully at the bottom of the confession because you did not even know how to sign your name. Perhaps they would have told you not to worry, it was just release paperwork.

The Afghan police would have then turned you over to the American forces, and the Afghans would have told the American forces that you had confessed to being solely responsible for the attack, even though the Afghan police had apprehended at least two other adult suspects who also had confessed. The Americans would have been very angry that you had seriously wounded two of their beloved comrades, and they would have put a blindfold and a hood over your head and flex-cuffs on your wrists, and then taken you back to their base. There, they would have strip-searched you, done a body cavity search, and taken naked photographs of you—the ultimate humiliation for an adolescent boy raised in a deeply traditional, modest Islamic culture. And then, although it would have already been nearly midnight, the Americans would have placed the hood back over your head and taken you to be interrogated for several more hours, using battlefield interrogation techniques designed to reinforce the shock of captivity and the hope-

lessness of resistance.<sup>9</sup> When you denied throwing the grenade, they would not have accepted your denials, and they would have worn you down until you told them whatever they wanted to hear, because you would have been afraid for your life.

Later that morning, you would have been taken to Bagram prison, where two of your fellow countrymen had, just a few days earlier, been beaten to death by the sadistic American guards—“pulpified,” according to the cold, clinical language of the coroner’s report.<sup>10</sup> You would have been placed in solitary confinement, deprived of sleep, chained to a wall, hooded, pushed down the stairs, beaten, and interrogated repeatedly for days.<sup>11</sup> You would have heard the screams from other cells, and you would have prayed for a quick and painless death.

After forty-nine days in this torture chamber, you would have had a hood placed over your head and had your hands and feet shackled. Then, you would have been put on a plane for an interminable seventeen-hour flight to Guantanamo Bay, Cuba, where “unlawful enemy combatants” were being held in austere detention facilities at the isolated U.S. naval base. To ensure that you would not soil yourself on the plane ride, you would have been starved for three days, and given only small sips of water, ensuring that you would arrive at Guantanamo hungry, weakened, dehydrated, and desperate. To increase your feelings of isolation and hopelessness, you would have been placed in solitary confinement for thirty days upon arrival; your only human contact would be the occasional interrogator.

You would have eventually been told, or learned through your fellow inmates, that America considered you an “unlawful enemy combatant,” entitled to no rights, no access to courts, no access to lawyers, and no right to challenge your detention. You would be advised that, because of this classification, you could be held indefinitely without

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9. See generally DEP’T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION (1992) (listing authorized interrogation methods for military interrogators). The specific techniques utilized against Mr. Jawad are protected from public disclosure, as they are considered to be intelligence “sources and methods.” Testimony about the techniques utilized was presented in a closed, classified session of the military commission.

The commission . . . specifically finds the testimony regarding interrogation of the accused on 17 and 18 December 2002 by U.S. agents is properly classified. The commission further finds that closure of the proceedings is necessary and to protect information, the disclosure of which would reasonably be expected to damage national security, specifically sources and methods regarding intelligence interrogation activities . . . since the entire examination will likely involve classified matters . . . The commission does order the proceedings to be closed.

Record of Trial at 953–54, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Sept. 26, 2008).

10. Lianne Hart, *Afghan Detainee’s Leg Was “Pulpified,” Witness Says*, L.A. TIMES, Mar. 23, 2005, at A-18, available at <http://articles.latimes.com/2005/mar/23/nation/na-abuse23>.

11. See Record of Trial, *supra* note 9, at 595-617 (testimony of Angela Birt, U.S. Army CID Special Agent, retired). For more details about prisoner abuse at Bagram Prison, including the beating to death of Dilawar, an Afghan taxi driver in December 2002, see the documentary film TAXI TO THE DARK SIDE (Jigsaw Productions, Inc. 2007).

charges for the rest of your life. You would be told that you would likely die in captivity, and you would have had no reason to disbelieve it. You probably would have tried to commit suicide by hanging yourself in your cell, even though suicide was forbidden by your religion.<sup>12</sup> Even though the Americans knew that you had no valuable intelligence,<sup>13</sup> they would have interrogated you thirty-six more times to try to get you to confess to the grenade attack. When you continued to defend your innocence, they would have brought in psychologists to figure out the best way to break you.<sup>14</sup> They might have intentionally isolated you from the other prisoners who spoke your language and had befriended you, so that you would have no one to turn to but your interrogator.<sup>15</sup> They might have even put you in the “frequent flyer” program,<sup>16</sup> where

12. In mainstream Islam, suicide is *haram*, i.e., forbidden. See Daniel Engber, *Are Muslims Allowed to Kill Themselves?*, SLATE.COM, July 12, 2006, <http://www.slate.com/id/2143505/>.

Are Muslims allowed to kill themselves? No. There's a clear prohibition on suicide in the collected sayings of the Prophet, known as the *hadith*. In particular, anyone who kills himself must spend an eternity repeating the act in the afterlife: “He who commits suicide by throttling shall keep on throttling himself in the Hell Fire (forever) and he who commits suicide by stabbing himself shall keep on stabbing himself in the Hell Fire.”

*Id.* Mohammed Jawad testified during a hearing on June 19, 2008, that he had attempted to commit suicide even though “Islam never permits . . . suicide” because “it was beyond my control.” Record of Trial, *supra* note 9, at 211. According to another expert on Islam, suicide under such circumstances may be forgiven:

It is true that suicide is strictly forbidden, because it is an affront to God. It is like a person saying to God: “You have given me life and I am taking it away.” This is what is meant by the sacred Hadith in which God is quoted as saying of the one who commits suicide: “My servant has precipitated My will with regard to himself! Therefore, I am forbidding him entry into heaven.” But this Hadith applies to a person in full control of his faculties, suffering no overpowering adversity and having a reasonable life. If such a person commits suicide, then may be [sic] God will not allow him in heaven. A person who commits suicide as a result of a mental disorder like depression or some other severe form of anxiety is not in full control of his senses. We cannot say how God will judge such a person, but we trust to God's justice, because He does not deal unfairly with anyone.

Adil Salahi, *Committing Suicide Is Strictly Forbidden in Islam*, ARAB NEWS, June 22, 2004, available at <http://www.aljazeera.info/Islam/Islamic%20subjects/2004%20subjects/June/Committing%20Suicide%20Is%20Strictly%20Forbidden%20in%20Islam,%20Adil%20Salahi.htm>.

13. Stipulated testimony from the Director of the Joint Intelligence Group at Guantanamo, Esteban Rodriguez, and the Commander of Joint Task Force Guantanamo, Major General Jay Hood, was presented in a preliminary hearing to the effect that Mr. Jawad was not believed to possess any valuable intelligence by the spring of 2004, after he had been interrogated numerous times and provided no useful intelligence. Record of Trial, *supra* note 9, at 395.

14. The involvement of the Behavioral Science Consultation Team psychologist in the mistreatment of Mohammed Jawad was the subject of testimony at a hearing in August 2008, and it was widely covered in the media. Record of Trial, *supra* note 9, at 477; see Benedict Carey, *Psychologists Clash on Aiding Interrogations*, N.Y. TIMES, Aug. 16, 2008, at A-1; Joseph Goldstein, *Psychologists Are Split over Gitmo*, N.Y. SUN, Aug. 15, 2008, available at <http://www.nysun.com/national/psychologists-are-split-over-gitmo/83974/>; Jennifer Turner, *Psychologists on the Dark Side*, Daily Kos, <http://www.dailykos.com/storyonly/2008/8/15/20510/5104/895/568643> (Aug. 15, 2008, 17:14 PST).

15. Guantanamo detention records prove that Mr. Jawad was subjected to two, thirty-day isolation periods and was intentionally separated from other Pashto-speaking detainees to further isolate him. Defense Fifth Supplemental Filing in Support of D-008 Motion to Dismiss Redacted Version at 1, *United States v. Jawad* (Military Comm'n, Guantanamo Bay Aug. 6, 2008).

16. The “frequent flyer” program was the popular euphemism for a sleep-deprivation scheme utilized systematically against detainees at Guantanamo, both as a disciplinary measure and as a method of “softening” detainees for interrogation. See Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 at 1, *United States v. Jawad*, (Military Comm'n, Guantanamo Bay May 28, 2008), <http://www.defenselink.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf>; Josh White, *Detainee's Attorney*

they would have moved you back and forth like a human ping-pong ball from cell to cell every three hours, 112 times over a period of fourteen days, shackling and unshackling you each time, to intentionally deprive you of sleep and disorient you.<sup>17</sup>

This stultifying monotony and misery of captivity would have continued for over five years until one day, someone showed up at your door and informed you that you were being tried as a war criminal. This trial would be by a panel of American military officers in a military commission, and you would face a life sentence for your alleged crime of attempted “murder in violation of the law of war.”<sup>18</sup>

By now, you have realized that this is not a hypothetical scenario. What I have just described is, in essence, the story of my client, Mohammed Jawad.

Imagine now, that you are the military defense lawyer assigned to represent Mr. Jawad. How would you approach him? How do you establish rapport and build a relationship of trust? What can you possibly say to someone in this situation? The first lawyer appointed to defend Mr. Jawad, a Reserve Army Colonel, was appointed in October 2007, when Mr. Jawad was initially charged. He visited Mr. Jawad in Guantanamo every month for the next six months, even requesting a delay in the arraignment so he could spend more time attempting to build rapport. He travelled to Afghanistan to depose some of the key witnesses and brought tapes of the depositions back to show Mr. Jawad. But despite his best efforts, the Colonel could not convince Mr. Jawad to accept him as his lawyer.

When Mr. Jawad was finally arraigned on March 12, 2008, the first order of business was for the military judge to advise him of his right to counsel and ascertain his desires regarding representation. The following colloquy between the Military Judge (MJ) and the accused, Mr. Jawad (ACC) ensued:

MJ: Do you wish to be represented by [your appointed counsel] who is seated at your table?

ACC: I don't want this counsel. I don't want this session and I don't want any trial in court. I'm asking a question . . . Are you treating me with jus-

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*Seeks Dismissal over Abuse*, WASH. POST, June 8, 2008, at A04; Josh White, *Tactic Used After It Was Banned*, WASH. POST, Aug. 8, 2008, at A12.

17. The military judge specifically found that Mr. Jawad was subjected to the frequent flyer program and that the program “constitutes abusive conduct and cruel and inhuman treatment.” D-008 Ruling on Defense Motion to Dismiss—Torture of the Detainee at 4-5, *United States v. Jawad* (Military Comm'n, Guantanamo Bay Sept. 24, 2008), <http://www.defenselink.mil/news/Ruling%20D-008.pdf>.

18. Charge Sheet, *United States v. Jawad* (Military Comm'n, Guantanamo Bay Oct. 9, 2007), <http://www.defenselink.mil/news/Jan2008/d20080130jawadcharge.pdf>. The crime of “murder in violation of the law of war” is defined in the United States Code. 10 U.S.C. § 950v(b)(15) (2006) (stating, “Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct”).

tice and fairness or you are not treating me with justice and fairness?

MJ: [The military judge attempted to reassure Mr. Jawad that he was trying to treat him with justice and fairness, then continued.] Now my question for you is, do you desire to be represented by [your appointed counsel]?

ACC: Not only him but nobody can represent me[;] it's against the law. . . . [Y]ou know it's against the law, it's unlawful and I don't want the representation.

MJ: So I understand you do not want to be represented by [your appointed counsel]; is that correct?

ACC: Not only him[.] [E]ven if someone else was appointed I wouldn't want them. I'm upset and I want justice and fairness.

MJ: So I understand you don't want to be represented by [your appointed counsel] and do I also understand correctly that you don't want some other military attorney appointed to represent you; is that correct?

ACC: I don't want this decision at all. I want justice and I want it now. I don't want any attorney. I'm innocent. And I've been treated unfairly. Since I've been arrested I've been treated unfairly. I've been tortured. I'm a human being. I've not violated any law. I have not infringed anybody's rights. Whatever has been done to me is illegal. I've been brought here illegally.<sup>19</sup>

The judge's further efforts to convince Mr. Jawad to accept representation also failed. Therefore, the Army Colonel, whose one-year reserve tour was about to expire anyway, was excused, and he returned to his civilian job. This is when I entered the picture.

On May 1 and 2, 2008, I met both of my clients for the first time. The two clients could not have been more different. Mr. Jawad was a functionally illiterate, impoverished Afghan teenager with no ties to al Qaeda or the Taliban. In fact, he is the only detainee charged before the military commissions who is neither alleged to have any ties with al Qaeda or the Taliban, nor alleged to have been involved in any terrorist acts. Mr. al Bahlul, however, was from Yemen, a middle-aged father of four and a fanatically committed member of al Qaeda. He was Osama Bin Ladin's media advisor and personal secretary. As I mentioned earlier, I was not able to persuade Mr. al Bahlul to accept me as his lawyer. Thankfully, I was able to convince Mr. Jawad to allow me the privilege of defending him.

Although the experience of serving as a defense counsel has been extraordinary and I am honored to have had the opportunity to do so, it has also been extremely challenging and frustrating at times. Obviously, each client is very different and each case presents unique challenges, but there are also many common challenges in representing detainees. To a great extent, similar difficulties are experienced by the civilian counsel who represent detainees in habeas corpus and Detainee Treat-

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19. Record of Trial, *supra* note 9, at 19–21.

ment Act (DTA)<sup>20</sup> cases in federal court.<sup>21</sup>

Of course, the legal system in which we are operating presents many challenges. The Military Commissions Act (MCA)<sup>22</sup> is a deeply flawed law, which I believe to be inconsistent with the United States Constitution and international law.<sup>23</sup> The MCA creates an uneven playing field, strongly favoring the prosecution. The implementing regulations, namely the Manual for Military Commissions<sup>24</sup> and the Regulation for Trial by Military Commission,<sup>25</sup> further stack the deck against the defense.<sup>26</sup> The officials responsible for executing the laws and regulations, the Convening Authority<sup>27</sup> and her Legal Advisor,<sup>28</sup> have consistently interpreted the rules in the manner most favorable to the government's interests in obtaining conviction, while minimizing due process for the accused. The prosecution has shown minimal regard for

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20. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739, 2739-44 (2005).

21. Civilian lawyers, mostly working pro bono, led by the Center for Constitutional Rights in New York, have been seeking through writs of habeas corpus to challenge the basis for detention of many of the detainees since shortly after they were moved to Guantanamo. These lawyers won the right to habeas corpus review in *Rasul v. Bush*, 542 U.S. 466, 486 (2004). However, in 2005, Congress passed the Detainee Treatment Act (DTA), which purported to strip federal courts of jurisdiction to consider habeas corpus petitions filed by prisoners in Guantanamo, substituting a limited right to seek review of Combatant Status Review Tribunals (CSRTs) in the United States District Court for the District of Columbia. 28 U.S.C. § 2241(e) (2000). The CSRTs were established in response to another Supreme Court decision, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), released the same day as *Rasul*. *Hamdi* required the government to establish some form of tribunal offering minimal due process rights for detainees to review the basis for their detention. 542 U.S. at 535. The constitutionality of the DTA was immediately challenged and, eventually, the Supreme Court found the habeas-stripping provision of the DTA to be unconstitutional in *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008), and reinstated the right. From 2005 until June 2008, DTA actions were the only congressionally approved method for detainees to challenge the basis for their detention in a federal court.

22. 10 U.S.C. § 948a (2006).

23. See Frakt, *supra* note 1, at 366.

24. U.S. DEP'T OF DEFENSE, THE MANUAL FOR MILITARY COMMISSIONS (2007), available at <http://www.defenselink.mil/news/d20070118MCM.pdf>.

25. U.S. DEP'T OF DEFENSE, REGULATION FOR TRIAL BY MILITARY COMMISSIONS (2007), available at [http://www.defenselink.mil/news/Apr2007/Reg\\_for\\_Trial\\_by\\_mcm.pdf](http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf).

26. See, e.g., Carol J. Williams, *Detainee Lawyers See Stacked Deck*, L.A. TIMES, Nov. 13, 2007, at A14.

27. The duties of the Convening Authority are described in the Military Commissions Act (MCA) and in the Rules for Military Commissions (RMC). Under RMC 103(a)(8), "Convening Authority" means "the Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense for that purpose." The only person designated by the Secretary to be the Convening Authority is Susan J. Crawford, a former United States Court of Appeals for the Armed Forces Judge. U.S. Dep't of Defense, Office of the Assistant Sec'y of Defense (Public Affairs), *Seasoned Judge Tapped to Head Detainee Trials* (Feb. 7, 2007) available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10493>.

28. The Legal Advisor to the Convening Authority is a position created by regulation. The position is not described in the MCA. According to RMC 103(a)(15), the "'Legal advisor' is an official appointed by authority of the Secretary of Defense who . . . provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the [Uniform Code of Military Justice]." This position was held by Air Force Reserve Brigadier General Thomas Hartmann from July 2007 to September 2008, when Michael Chapman, a retired Army Colonel and former military judge, was elevated from Deputy Legal Advisor to replace Brigadier General Hartmann. Carol Rosenberg, *Pentagon Shifts Brass at Guantanamo War Court*, MIAMI HERALD, Sept. 19, 2008, available at <http://www.miamiherald.com/news/americas/guantanamo/story/693830.html>.

the rights of detainees and has consistently taken legal positions with little or no support, pushing the ethical boundaries of the rules of professional responsibility.<sup>29</sup> The fundamental flaws with the laws governing military commissions<sup>30</sup> have been the subject of much public criticism<sup>31</sup> and are widely known in the legal community. However, this article intends to address some of the difficulties of defending detainees that may not be as widely understood.

Some of these difficulties are unavoidable byproducts of circumstances. Others are completely avoidable—the result of obstacles being placed in our way by people who either do not care how hard our jobs are or, in some cases, intentionally seek to make our jobs even harder.

### III. CHALLENGES OF DEFENDING DETAINEES

A description of my first morning at Guantanamo provides a humorous example of the challenges of representing detainees. My paralegal had arranged appointments for me with both of my clients and had arranged for me to be accompanied by two interpreters—a Pashto

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29. For example, the government has consistently taken the position that the status of being an unlawful combatant is a war crime, despite repeated rulings to the contrary. See, e.g., D-007 Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction at 3, *United States v. Jawad* (Military Comm'n, Guantanamo Bay Sept. 24, 2008), [http://www.defenselink.mil/news/RULING%20D-007%20\(subject%20matter%20jurisdiction\)%20\(2\).pdf](http://www.defenselink.mil/news/RULING%20D-007%20(subject%20matter%20jurisdiction)%20(2).pdf). “The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war.” *Id.* at 3. After issuing this ruling rejecting the government’s unsupported theory of the charges in *United States v. Jawad*, the military judge had to remind the prosecutors of their ethical obligation not to pursue unfounded charges. “[T]he government always has an ethical obligation to not proceed to trial, knowing that it can’t prove a case beyond a reasonable doubt.” Record of Trial, *supra* note 9, at 708. Although the prosecutors claimed at the time that they did have enough evidence to prove the case, they subsequently admitted to the court that they did not: “Under the military judge’s current construction of the M.C.A., the evidence the government intends to offer at trial will not establish the requirement of the ‘in violation of the law of war’ element as the military judge construes it.” D-007 Government Reply to Defense Response to Motion for Reconsideration at 12, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Oct. 21, 2008), <http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf>. Although the judge denied the government request to reconsider his ruling, the prosecution refused my request to voluntarily dismiss the charges.

30. The admissibility of statements obtained by coercion and the liberal rules regarding the use of hearsay evidence are two of the more commonly cited flaws.

31. See, e.g., Letter from William H. Neukom, President, American Bar Association, to President George W. Bush (Feb. 27, 2008), available at [http://www.abanet.org/poladv/letters/antiterror/2008feb27\\_detainees\\_1.pdf](http://www.abanet.org/poladv/letters/antiterror/2008feb27_detainees_1.pdf) (“[T]he military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation’s concept of justice. . . . Under the current system, we believe that detainees will not receive due process or fair trials.”); Anthony D. Romero, Executive Director, American Civil Liberties Union, Statement for the John Adams Project, <http://www.aclu.org/safefree/detention/34773res20080403.html> (last visited Jan. 19, 2009) (“The military commissions set up by the Bush administration for the men imprisoned at Guantánamo Bay—including those it suspects were involved in the September 11 attacks—are not true American justice. . . . The prison at Guantánamo Bay, and the military commission proceedings set to occur there, were set up to evade the American justice system and the rule of law. The proceedings, as proposed under the Military Commissions Act and run by the Department of Defense, are nothing like the trials guaranteed by our Constitution or the long-established military commissions promulgated by the Uniform Code of Military Justice—the finest system of military justice in the world.”).

speaker for Mr. Jawad<sup>32</sup> and an Arabic speaker for Mr. al Bahlul. Knowing that first impressions are critically important and that both Mr. Jawad and Mr. al Bahlul had rejected their previous appointed counsel, I spent a lot of time thinking about what I was going to say to my clients in our initial meetings. I wanted to be sure to start on the right foot, and I had rehearsed in my mind what I thought was a good approach.

Like most things at Guantanamo, things did not go according to plan. I started my first full day by calling the office which coordinates detainee-attorney visits. I informed them that my paralegal had scheduled visits with both of my clients—one for that day and one for the next—but that I did not know which detainee I was to see that morning, and I needed to know so that I could bring the right interpreter. They told me that my first appointment was with Mr. al Bahlul. I picked up my Arabic interpreter and drove to the detention camps, only to be informed after twenty minutes of waiting that my appointment was actually with Mr. Jawad. I had to drive back across the installation to pick up my Pashto interpreter, who had slept in and needed to shower and get dressed.

By the time we got back, we were nearly an hour late for the appointment, and Mr. Jawad had been waiting for nearly two hours because the guards move the detainees into the interview rooms well in advance of the visit. When we finally arrived at the interview room, and were about to enter, the guards informed me that Mr. Jawad had to use the bathroom. I said, “Okay, so let him use the bathroom. We will wait outside.” The guard responded, “He has already gone once this morning.” I said, “So what? Let him go again.” He said, “If we take him to the bathroom again, we are going to have to cancel the visit.” I said, “Why?” He said, “The 2P rule.” When I asked what the “2P rule” was, he said, “The detainee only gets to pee once; if he has to pee twice, the visit is cancelled.”<sup>33</sup> I tried to reason with the guard, but quickly realized it was useless. I asked if I could briefly speak to my client, and they allowed me into the room.

Mr. Jawad was standing up and shifting his weight back and forth from one leg to the other, despite his ankles being shackled. It was obvious that he needed to urinate urgently.<sup>34</sup> I had just a few seconds to tell him that I was his new lawyer and we could come back later before they took him away. I did not even have a chance to explain why we

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32. Pashto, along with Dari, is one of two official languages under the Constitution of Afghanistan and is spoken primarily by ethnic Pashtuns in Afghanistan and Pakistan, with smaller enclaves of Pashto speakers in Iran and India. See *Encyclopedia Britannica*, Pashto language, available at <http://www.britannica.com/EBchecked/topic/445534/Pashto-language>.

33. Like many “rules” at Guantanamo, this policy was unwritten.

34. I later learned that Mr. Jawad suffers from kidney problems and has to urinate frequently, a problem that he attributes to being constantly exposed to the cold temperatures maintained in the Guantanamo detention camps without sufficient clothing.

were late. It was an inauspicious start to our attorney-client relationship, to say the least.

I later found that the policies surrounding detention visits changed often and were enforced in a haphazard and random fashion. Usually, but not always, I was searched upon entrance. This made sense from a security perspective, and I did not question it. But on one occasion, I had completed an interview and was outside the prison building waiting to be let out of the gate when the guard said that they would have to search me. I asked, "Why are you searching me on the way out? You have never searched me before." The guard simply replied, "Those are the rules." I said, "I understand why you need to search me on the way in, to ensure that I do not bring any contraband or metal objects into the facility, but I do not understand why you would need to search me on the way out. I have just been in a room containing two chairs, one table, and one detainee who was shackled to the floor, who himself had been searched prior to entering the room. I do not have a chair in my pocket; I do not have a table in my pocket; and I do not have a detainee in my pocket, so what is it that you think that I might be bringing out that I did not bring in? Furthermore, why do you care if I am bringing something out if the purpose of the search is to ensure that no contraband is brought in?" The guard responded without any irony, "Sir, you are speaking logically. Logic has nothing to do with it." I said, "So logic has nothing to do with it? Can I quote you on that?" He snapped back, "Do not put words in my mouth." Realizing the futility of further resistance at this point, I submitted to the search.<sup>35</sup>

I have offered these vignettes to illustrate the occasionally humorous absurdity of Guantanamo, but most of the challenges that we face as defense attorneys for detainees are much more serious and are not funny at all. As I mentioned, there are some inherent difficulties in creating an attorney-client relationship in Guantanamo. Many of our clients see us, at least initially, as representatives of the enemy. My other prospective client, Mr. al Bahlul, was never able to get past this basic conflict and rejected my assistance throughout his trial. We wear the uniform of their captors, their tormentors, their torturers. Most detainees come from cultures where there is no such thing as a public defender, and they are inherently distrustful of a lawyer paid by the government, particularly the government that is trying them as war criminals. The detainees assume that everything that they say is being recorded and therefore are reluctant to discuss confidential matters, even if the attorney is able to gain their personal trust. It is hard to con-

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35. I hasten to add that the vast majority of guards and other detention facility personnel are unfailingly polite and professional under what are often very difficult conditions, often working twelve hour shifts, six days a week.

vince the detainees that the interviews are not recorded when there are cameras in each interview room. Although these cameras are ostensibly there to protect us from our clients—who are always shackled to the floor—even I am not convinced that our conversations are completely private.

To add to the difficulties in communication, there are language and cultural barriers. Few detainees speak English, and none of the military lawyers speak the native language of the detainees, so all communication must be done through interpreters, which effectively cuts our interview time in half. The skill of the interpreters varies widely, and there are often differences in regional dialects. Frequently, meaning is lost in translation. Some detainees view the interpreters, particularly those from their home countries, as traitors for moving to America, becoming U.S. citizens, and working for the U.S. military. Sometimes there are personality clashes between the interpreters and the clients. I know of several cases in which a detainee has requested a different interpreter. This can be awkward when the request for a new interpreter must go through the current interpreter.

#### *A. Logistical Problems*

Some of the difficulties are logistical in nature, such as physical location, communication barriers, and strict notice and scheduling requirements. For example, the defense offices are in Washington, D.C. and the clients and all commission proceedings are in Guantanamo. Except in emergency situations, phone calls between detainees and their attorneys are prohibited. In addition, all mail to and from the detainees is screened, so attorneys are reluctant to use mail. Thus, the only way to communicate with our clients on routine matters is to fly to Guantanamo. It is essentially a whole day's journey to get there, and there are only two or three available flights per week. Often we fly in propeller-driven C-130 cargo planes, sitting on fold-down fabric and aluminum tube benches along the sides of the fuselage, like paratroopers. Many counsel will fly down Tuesday, meet with their client on Wednesday, then fly back on Thursday, using up three-fifths of the work week for a visit of a couple hours. The transportation has been far from reliable. Frequently, people with flight reservations are bumped at the last minute by higher-priority passengers. I have been stuck in Guantanamo because our plane broke down, and I have missed interviews because flights were delayed or diverted on the way down.

Detention officials request two weeks' notice for interviews. There are a limited number of interview rooms and times available, and we must compete with other commission counsel and habeas counsel for these limited slots. There are no regular evening or weekend visit

slots.<sup>36</sup> If counsel are able to arrange a flight, procure a competent interpreter, and get an interview slot, there is always a substantial risk that the client will refuse to see his attorney. Detainees have little control over their lives and get few choices. One choice they do have is whether to meet with their attorneys. Many of the detainees express their dissatisfaction with the proceedings by refusing to meet with their attorneys. Mr. al Bahlul, for example, more often than not declined to meet with me. This is a very common problem.

### *B. Detainees' Mental Health*

Another obstacle is the mental health of detainees. As one might imagine, those who have been held in such harsh conditions for so long tend to suffer from a variety of mental health ailments.<sup>37</sup> Many are suffering from Post-Traumatic Stress Disorder (PTSD) as a result of being tortured, while others are simply depressed. Attention span is also a problem. Mood swings and paranoia are common. The detainees tend to be distrustful of the medical staff, so many do not get the help that they need. These mental health problems often manifest themselves in displays of anger or lack of cooperation, which result in the detainees' few privileges being removed along with other disciplinary measures, contributing to a downward spiral in the mental health of detainees. Memory loss is also a significant problem, particularly when trying to reconstruct events that occurred several years earlier.

### *C. Discovery Issues*

Assuming you can overcome the logistical and cultural obstacles to establish a working relationship with your client, the difficulties have only begun. One of the greatest obstacles to effectively representing our clients, that I and many other defense counsel have experienced, is the difficulty of extracting discovery from the government.

The following story illustrates how bad things have been in the discovery arena. The first day I was appointed, I sent a routine discovery request to the government asking them to identify their witnesses and the interrogators who had interviewed my client and to turn over relevant documents and evidence. For the next four months, despite inces-

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36. Lately, with the assistance of the Joint Task Force Guantanamo (JTF-GTMO) Office of the Staff Judge Advocate, there has been a greater willingness to accommodate visits during irregular hours, particularly for counsel who are engaged in commission hearings during normal weekday visiting hours.

37. See HUMAN RIGHTS WATCH, *LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO* (2008), available at <http://www.hrw.org/en/reports/2008/06/09/locked-alone>; see also UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, CIVIL AND POLITICAL RIGHTS: SITUATION OF DETAINEES AT GUANTÁNAMO BAY 31 (2006), available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16\\_02\\_06\\_un\\_guantanamo.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf).

sant reminders from me and two motions to compel discovery, which I filed with the commission, the government simply ignored the discovery request. It constantly pushed for a quick trial date but refused to turn over the evidence or its witness list. The government even went so far as to say, in a written filing with the court in response to a motion to compel, that it *had no obligation to respond to a discovery request at all*.<sup>38</sup> Each time I filed a motion to compel discovery and accused the government of withholding information, it falsely assured the court that it had fully complied with its discovery obligations and had turned over all relevant material.<sup>39</sup> Finally, the military commission gave the government a deadline to provide discovery and informed it that any documents not turned over by the deadline would be barred from introduction at the trial.<sup>40</sup> At the deadline, the prosecution provided over 6,000 pages of new discovery.<sup>41</sup> A few days later, the lead prosecutor resigned, in significant part because of problems with the discovery process.<sup>42</sup>

This practice of making last-minute discovery dumps is not unique to my case. I happened to be in Guantanamo during the *United States v. Salim Hamdan* trial in July 2008, when I got a frantic plea for help from the paralegal on the *Hamdan* team. In the midst of trial, the government had dumped a thousand pages of new evidence on the defense, and the judge had refused to grant a continuance. The attorneys on the case were too busy to go through the new materials and wondered if I could possibly help.

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38. “If the defense is stating (or implying) that the Government has an obligation under applicable rules of discovery to respond to their written discovery requests with a written discovery response, they are wrong again.” D-010 Government Response to Defense Supplemental Motion to Compel Discovery Pursuant to RMC 701(*h*) and 905(b)(4) and Request for Other Appropriate Relief at 3, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Aug. 8, 2008), <http://www.defenselink.mil/news/Jawad%20-%20D%20-%20010%20Motion%20to%20Compel%20Discovery.pdf>. The original and two supplemental defense motions to compel discovery and the government responses are available at this website.

39. See generally *id.* “The Government has fully complied with its discovery requirements under RMC 701.” *Id.* at 3. The lead prosecutor, Lieutenant Colonel Vandeveld, later testified that these statements were untrue:

Q [MAJ FRAKT]: Do you recall over the course of the summer the government saying repeatedly, both in documents signed by yourself and representations to the Court by yourself and by Colonel Stevenson and in documents signed by Colonel Stevenson, that the government had fully complied with its discovery obligations?

A [LT COL VANDEVELD]: Well, I know I represented that to the commission, and I know now that that was not accurate.

Record of Trial, *supra* note 9, at 1064.

40. D-017 Ruling on Defense Motion to Dismiss—Violation of R.M.C. 703 and 707, at 2, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Aug. 27, 2008), <http://www.defenselink.mil/news/Jawad%20-%20D%20-%20017%20Motion%20to%20Dismiss%20Speedy%20Trial.pdf>.

41. D-017 Ruling on Defense Request for Reconsideration and Supplement at 2, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Sept. 5, 2008) (“On 29 August 2008 and 2 September 2008, the government provided over 6000 pages of discovery material to defense counsel.”).

42. Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, WASH. POST, Sept. 25, 2008, at A06; Josh Meyer, *Guantanamo Prosecutor Quits*, L.A. TIMES, Sept. 25, 2008, at A-19.

Crucial evidence in my own case has been lost or destroyed. The initial interrogation of my client by U.S. forces in Kabul was videotaped, but the tape has disappeared. In addition, exculpatory evidence related to the other suspects in the attack has been withheld. I know this because the lead prosecutor on my case, a Reserve Army officer and career civilian prosecutor from Pennsylvania, Lieutenant Colonel (LTC) Darrel Vandeveld, courageously decided that he could no longer ethically serve as the prosecutor on my case because of the systemic discovery problems.<sup>43</sup> He submitted his resignation and a declaration to the commission detailing the problems. In this declaration, LTC Vandeveld wrote:

My ethical qualms about continuing to serve as a prosecutor relate primarily to the procedures for affording defense counsel discovery. I am highly concerned, to the point that I believe I can no longer serve as a prosecutor at the Commissions, about the slipshod, uncertain "procedure" for affording defense counsel discovery. . . . [W]hat I found, and what I still find, is that discovery in even the simplest of cases is incomplete or unreliable.

...

In my view, evidence we have an obligation as prosecutors and officers of the court has not been made available to the defense [sic]. Potentially exculpatory evidence has not been provided. . . . My personal practice of disclosing exculpatory or mitigating evidence is not universally practiced at OMC-P.<sup>44</sup>

After submitting this declaration to the commission, I requested that LTC Vandeveld be called as a witness, as the prosecution controls access to all government witnesses. The prosecution denied my request and refused to bring LTC Vandeveld to Guantanamo. They argued to the commission that he had no relevant testimony to offer.<sup>45</sup> When the judge ordered him to testify via video-teleconference link, the prosecution falsely informed the commission that if LTC Vandeveld were called, he would invoke his right not to testify when, in fact, he was sitting outside the video-teleconference site waiting to testify.<sup>46</sup> Ultimately, LTC Vandeveld was called, and he testified that all discovery had not been provided to the defense, specifically identifying several items.<sup>47</sup> The judge ordered the government to turn the items over

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43. Finn, *Guantanamo Prosecutor Quits*, *supra* note 42, at A06; Josh Meyer, *For Lawyer, Trial Was Tribulation*, L.A. TIMES, Oct. 12, 2008, at A-1.

44. Lieutenant Colonel Darrel J. Vandeveld, Declaration on September 22, 2008, <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonialsproject/testimonies/testimonies-of-prosecution-lawyers/declaration-of-lieutenant-colonel-darrel-vandeveld-september-22-2008>; see Hina Shamsi, *Honor Bound*, Daily Kos, <http://www.dailykos.com/storyonly/2008/9/30/125832/830/699/615613> (Sept. 30, 2008, 10:06 PST).

45. Record of Trial, *supra* note 9, at 691-92.

46. *Id.* at 789.

47. See *id.* at 1037-70. "Q [MAJ FRAKT]: In your role as the lead prosecutor, do you believe that all evidence in the custody of the U.S. Government related to this case has been turned over to the defense?"

within a week.<sup>48</sup> It still failed to do so, citing the need to get permission to release the documents from other U.S. government agencies.<sup>49</sup>

Even if the defense does get the discovery to which it is entitled, or at least some of it, that does not mean it can proceed normally to defend the client. The majority of the discovery—and particularly in the “high value”<sup>50</sup> cases, such as the 9/11 co-conspirator case—is classified. The detainees, having been classified as enemy combatants, are not entitled to a security clearance. Thus, not only can you not show your client the discovery, you cannot even discuss it with him. Dealing with classified evidence also creates difficult problems with storage and transportation, particularly between Guantanamo and Washington. In the High Value Detainee (HVD) cases, the government has decided that anything the detainee tells his attorney is classified as “Top Secret,” so any notes the lawyer takes must be locked in a special container and immediately stored in a classified safe. Special computers must be used to prepare court filings, and the filings may not be publicly released.

In September 2008, I represented Mohammed Jawad in a suppression hearing.<sup>51</sup> The government called as their witness a military interrogator who had interrogated Mr. Jawad on the night of his capture. The interrogator testified that Mr. Jawad had admitted to throwing the grenade that injured two U.S. soldiers and their interpreter. The defense was attempting to demonstrate that the confession had been obtained by coercion. On cross-examination, my co-counsel tried to elicit the facts and circumstances of the confession. Several times when he asked a question, the judge instructed the witness not to answer.<sup>52</sup> The judge explained that answering the questions would reveal classified methods of intelligence-gathering that could not be disclosed in an open session.<sup>53</sup> The last thing I wanted was a closed session. I wanted the press and the non-governmental organization human rights observers who were present to hear what had been done to my client, so they, in turn, could share the information with the public. Ultimately, I was forced to request a closed session in order to get the evidence before the

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A [LT COL VANDEVELD]: No, it has not.” *Id.* at 1037. For a news account of Lieutenant Colonel Vandeveld’s testimony, see Mike Melia, *Former Gitmo Prosecutor Blasts Tribunals*, USA TODAY, Sept. 27, 2008, available at [http://www.usatoday.com/news/topstories/2008-09-26-2627224296\\_x.htm](http://www.usatoday.com/news/topstories/2008-09-26-2627224296_x.htm).

48. Record of Trial, *supra* note 9, at 1070.

49. See Government Notice and Request for Extension of Time Concerning Documents to Be Provided to the Defense, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Oct. 2, 2008) (on file with author).

50. “High-value” is the term used by the Office of Military Commissions Prosecution to denote detainees believed to have significant intelligence value because of their leadership roles in al Qaeda and/or their roles in major terrorist attacks. The High Value Detainees (HVDs), as they are known, all face the death penalty, while non-HVDs have been charged with non-capital crimes. The HVDs are housed in a separate secret maximum security detention facility.

51. See generally Record of Trial, *supra* note 9.

52. *Id.* at 801, 802, 805.

53. “Counsel, I think the specific interrogation techniques, if you go into those, we will have to close the proceedings.” *Id.* at 801.

judge.<sup>54</sup>

Getting access to witnesses has also proved to be problematic for the defense, if one can even figure out who the witnesses are. The interrogation reports, detention records, and medical records generally have no names on them, and the government refuses to provide the names of detention facility employees, citing privacy concerns. To obtain witnesses for hearings, the defense must request that the government produce the witness.<sup>55</sup> The request must include a synopsis of the expected testimony to demonstrate the relevance and necessity of the witness.<sup>56</sup> This forces the defense to reveal its strategy well in advance of the hearing if the defense wants the witness to be produced, but there is no guarantee that the witness will be produced. I have submitted many witness requests with detailed summaries showing clear relevance which were summarily denied by the prosecution. In several cases, I requested a government witness be produced that I knew had relevant information to provide, but who had refused to speak with me. The government denied the requests without even calling the witnesses to find out what they knew.<sup>57</sup>

Denials of requests for witnesses may be appealed to the commission in the form of a motion to compel the production of a witness. Generally, I have had success with this approach, but it requires a lot of extra work and requires me to reveal more defense strategies to the commission. Several times, the commission has ordered the witness to be produced so late in the game that there was no time to bring the witness to Guantanamo, so the witness had to testify via telephone or video-teleconference. On one occasion, at the beginning of a hearing, the judge ordered a witness produced that had, without any legitimate basis, refused to talk to me without a court order.<sup>58</sup> The government produced the witness in the middle of the hearing, and I was forced to ask for a recess to talk to the witness. The judge ordered a “recess in place” and gave me five minutes to interview the witness in the jury deliberation room prior to putting the witness on the stand.<sup>59</sup>

The government has thus far refused me all access to any of the other detainees, even when I have demonstrated that they were eyewit-

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54. *Id.* at 953-54.

55. R.M.C. 703(c)(2) (“The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.”).

56. R.M.C. 703(c)(2)(B)(i).

57. Defense Motion for Production of Witnesses Pursuant to R.M.C. 703(c)(2)(D) in Support of D-008 Motion to Dismiss (Torture of Detainee) at 2, *United States v. Jawad* (Military Comm’n, Guantanamo Bay June 5, 2008); *see also* Record of Trial, *supra* note 9, at 92-93.

58. *See* Record of Trial, *supra* note 9, at 416.

59. *Id.* at 418 (“DC [MAJ FRAKT]: May we have a brief recess to talk to General Zanetti[?] . . . MJ [COL HENLEY]: Why don’t we recess in place? You can have 5 minutes to talk to General Zanetti.”).

nesses to abuse of my client.<sup>60</sup> Most of the detainees are represented by counsel—either commission counsel, habeas counsel, or both—which makes it risky to talk to them even if I do get permission. On one occasion, the government refused to let me speak to a witness without a court order, even after the prosecution had offered a sworn affidavit from the witness as an attachment to one of its motions.<sup>61</sup>

#### *D. Availability of Resources*

Another difficulty is obtaining appropriate resources, especially expert consultants and witnesses. The defense office has no independent budget other than for office supplies. All requests for expert witnesses and consultants must be approved by the Convening Authority, Susan Crawford, who is a political appointee and close friend of David Addington<sup>62</sup> and has been characterized as an administration insider and “Cheney protégée.”<sup>63</sup> The Convening Authority routinely denies defense requests for expert assistance, no matter how fully substantiated the request.<sup>64</sup>

Here are a couple of examples. Earlier this summer, I learned that my client had been subjected to sleep deprivation while at Guantanamo. I was trying to prove that sleep deprivation was a form of torture or cruel and abusive treatment. To do this, I wanted to offer expert testimony from a sleep scientist on the physical and mental health effects of sleep deprivation. I found a world-renowned sleep expert from the Harvard Medical School, Dr. Janet Mullington, who had conducted numerous sleep deprivation studies and written many articles on the subject. However, the Convening Authority initially denied my request on the basis that this doctor did not have “any expertise concerning the impact of sleep deprivation on persons in confinement.”<sup>65</sup> After I pointed

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60. Mr. Jawad was physically abused by guards on June 2, 2008, in full view of numerous other detainees, as reported in the official government report of the investigation concerning the incident. I requested the opportunity to interview the detainees, but my request was denied. Defense Motion for Production of Witnesses Pursuant to R.M.C. 703(c)(2)(D) at 6-7, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Aug. 5, 2008) (on file with author).

61. The witness was the Chief Medical Officer, Dr. Bruce Meneley. He had submitted an affidavit as an attachment to the government’s response to a defense motion to dismiss based on torture. Record of Trial, *supra* note 9, at 473. When we requested to speak to him, he refused, asserting that he had been instructed not to speak with the defense without a court order. *Id.* at 649.

62. David Addington was Vice President Dick Cheney’s Chief of Staff and Former Legal Counsel.

63. See Scott Horton, *The Great Guantanamo Puppet Theater*, HARPER’S MAGAZINE, Feb. 21, 2008, available at <http://www.harpers.org/archive/2008/02/hbc-90002460>; Andy Worthington, *The Dark Heart of Guantanamo*, The Huffington Post, [http://www.huffingtonpost.com/andy-worthington/the-dark-heart-of-guantan\\_b\\_131188.html](http://www.huffingtonpost.com/andy-worthington/the-dark-heart-of-guantan_b_131188.html) (Oct. 2, 2008, 10:26 EST).

64. For example, the Convening Authority denied our request for an expert on the law of war, an independent investigator, and a psychological and medical expert. See Defense Motion for the Employment of a Defense Expert at Government Expense Pursuant to R.M.C. 703(c)(2)(D) at 1, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Sept. 15, 2008), <http://www.defenselink.mil/news/Jawad%20D-020%20-%20Motion%20for%20Expert%20Witness.pdf>.

65. Memorandum from Susan Crawford, Convening Authority (June 11, 2008) (on file with

out to her that it was a gross violation of medical ethics to conduct sleep-deprivation experiments on prisoners and there were no doctors with any such expertise, she reconsidered and reluctantly agreed to appoint the expert.

In another hearing, I was attempting to demonstrate that the commission lacked subject matter and personal jurisdiction over my client for three different reasons. First, he was a child soldier and juveniles were not covered by the Military Commissions Act. Second, under the Geneva Conventions, a person detained as an enemy combatant in a war zone is presumed to be a lawful combatant and entitled to be treated as a prisoner of war until a hearing is held to determine his status, and this right had not been afforded to my client—or any of the other detainees at Guantanamo. Third, the act of which my client was accused did not constitute a violation of the law of war because throwing a hand grenade at an armed enemy soldier during an armed conflict is not a war crime.

All three issues involved complex issues of the law of war. I had arranged for a highly regarded expert on international law and the law of war from Duke Law School to testify on all three of these matters and requested the Convening Authority to appoint her as an expert and to pay her. The Convening Authority refused, saying the testimony was irrelevant and experts on the law could not testify in court proceedings because it invaded the province of the judge.<sup>66</sup> When I pointed out in a request for reconsideration that law of war experts routinely testify in military courts-martial for both sides, that military commission rules of evidence specifically authorize testimony from law of war experts, and that a law of war expert had just testified in the *Hamdan* case on one of the exact same issues, she was undeterred. She denied the request again on another nonsensical basis.<sup>67</sup> I brought my expert as an ordinary witness and appealed to the judge to appoint her as an expert. The judge recognized the witness as an expert, heard her testimony for nearly two hours, and asked her numerous questions himself. After she testified, I renewed my request that she be appointed as a paid expert. The judge refused, directing me to re-file my request with the Convening Authority now that “circumstances seem to have changed.”<sup>68</sup> I did, and the request was denied again. This time, the Convening Authority claimed that my expert had agreed to testify pro bono, when, in fact, she had testified that she wanted to be paid. Ultimately, after the military judge

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author).

66. Defense Motion for Production of Witnesses Pursuant to R.M.C. 703(c)(2)(D), *supra* note 60.

67. See Defense Motion for Employment of Defense Expert at Government Expense Pursuant to R.M.C. 703(c)(2)(D), *supra* note 64, at 3.

68. Memorandum from Susan J. Crawford, Convening Authority (July 29, 2008).

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specifically ruled that my expert should be paid, the Convening Authority authorized payment for the day of testimony only, denying any payment for my expert's many hours of preparation and multiple days of travel, and denying my request that she be authorized to testify at the trial.<sup>69</sup>

*E. Political and Leadership Issues*

In my view, the entire atmosphere of the military commissions is poisoned by unethical leadership and political meddling. For example, I have repeatedly requested to meet with the Convening Authority and the Convening Authority's Legal Advisor to discuss my client's case. Both officials have refused all requests to meet with me. In one e-mail denying my request to meet with the Convening Authority from one of her staff, the author cited the Convening Authority's alleged policy of not having ex parte contact with either party, although she is not acting as a judge and direct discussions with the parties are specifically authorized in the Rules for Military Commissions.<sup>70</sup> Furthermore, the Convening Authority has routinely met with the Chief Prosecutor, who detailed himself as an assistant prosecutor in the *Jawad* case. She informed the Chief Defense Counsel in another letter that she was meeting with the Chief Prosecutor specifically to discuss *Jawad*.

Political interference with the independence of the Chief Prosecutor caused the former Chief Prosecutor, Air Force Colonel Morris Davis, to resign publicly in October 2007.<sup>71</sup> Several line prosecutors, most recently in my case, have also quit, citing ethical concerns.<sup>72</sup> A friend of mine, an Air Force Academy graduate and fellow Harvard Law School alumnus, was so disgusted with his experience at the Office of Military Commissions (OMC) that he resigned his commission completely.<sup>73</sup> The Legal Advisor to the Convening Authority, Brigadier General Thomas Hartmann, was disqualified in three different cases, including mine, for his improper actions, before ultimately being removed

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69. Memorandum from Susan Crawford, Convening Authority (Oct. 20, 2008) (on file with author).

70. R.M.C. 705(d)(1).

71. Morris Davis, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, available at <http://www.nytimes.com/2008/02/17/opinion/17davis.html>; see, e.g., Jess Bravin & Evan Perez, *New Setback for Guantanamo Trials*, WALL ST. J., Oct. 5, 2007, at A4; Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics: Pressure for "Sexy" Guantanamo Hearings*, WASH. POST, Oct. 20, 2007, at A03; Carol J. Williams, *War Court Prosecutor Quits Post*, L.A. TIMES, Oct. 6, 2007, at A14.

72. See, e.g., Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1; Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1; Dan Ephron, *Gitmo Grievances*, NEWSWEEK, May 26, 2008, available at <http://www.newsweek.com/id/137627>.

73. Telephone Interview with John Carr, formerly Major, United States Air Force, in Washington, D.C. (Aug. 22, 2008); see Interview by Michele Norris with Jess Bravin, *Military Prosecutors Criticized Detainee Trials, All Things Considered*, (Aug. 1, 2005), <http://www.npr.org/templates/story/story.php?storyId=4780888>.

from his position in late September and moved into another position in the OMC—a move he characterized as a promotion, despite being removed from any legal duties.<sup>74</sup> Brigadier General Hartmann was later investigated by the Air Force JAG Corps for professional misconduct, including giving misleading and incomplete testimony to the commission under oath during my cross-examination of him in the *Jawad* case.<sup>75</sup> The *Miami Herald* reported that General Hartmann recently submitted his retirement paperwork.<sup>76</sup> These resignations and reassignments reflect the difficulty, if not outright impossibility, of complying with the high ethical standards required of government attorneys and prosecutors within a legal system that is specifically designed to undermine the rule of law.

#### IV. SUCCESSES OF DEFENSE COUNSEL

I could continue chronicling the difficulties of representing detainees with many more examples, but it is not the obstacles that are the real story, in my opinion. The more important story is how the defense counsel for the detainees of Guantanamo have overcome these obstacles, doing amazing work and achieving resounding successes despite overwhelming odds. Military defense counsel have taken on the corrupt and lawless Bush Administration and repeatedly won.

It is not just because of the Administration's incompetence that it took nearly seven years to try Osama Bin Laden's driver; it was the tremendous work of military defense counsel. Salim Hamdan's counsel challenged the Administration all the way to the Supreme Court and had the original military commissions—which were even worse than the current incarnation—invalidated in *Hamdan v. Rumsfeld*.<sup>77</sup> Eager to exact revenge on Hamdan for this slap in the face, Hamdan was the first detainee to be tried under the new commissions authorized by the Military Commissions Act of 2006.<sup>78</sup> The prosecutor asked for a sentence of thirty years and argued that Hamdan should receive no credit for time served in confinement. The judge held that he would get credit, and after informing the members<sup>79</sup> of this fact, they issued a sentence of only five additional months.<sup>80</sup> This was a “stinging rebuke” to the Admini-

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74. Peter Finn, *Guantanamo Trials' Overseer Reassigned*, WASH. POST, Sept. 20, 2008, at A02; Rosenberg, *supra* note 28.

75. Josh Meyer, *Tribunals Overseer Under Investigation*, L.A. TIMES, Oct. 25, 2008, at A1.

76. Carol Rosenberg, *War Court "Czar" to Retire*, MIAMI HERALD, Nov. 2, 2008, available at <http://www.miamiherald.com/news/americas/guantanamo/story/752457.html>.

77. 548 U.S. 557 (2006).

78. This statement does not include David Hicks, an Australian who pled guilty as part of a plea bargain worked out as a political favor to the Australian Prime Minister.

79. Jurors in military commissions are referred to as “members.”

80. William Glaberson, *Bin Laden Driver Sentenced to a Short Term*, N.Y. TIMES, Aug. 8, 2008, available at <http://www.nytimes.com/2008/08/08/washington/08gitmo.html>.

stration and a stunning victory for the defense.<sup>81</sup> The government then filed a motion asking the judge to reconsider granting sentence credit to Hamdan, but the judge declined.<sup>82</sup> Hamdan was returned to Yemen to complete his sentence and was released from confinement on January 8, 2009.<sup>83</sup>

The *Jawad* case has also proven to have a significant impact on national events. After I exposed the unethical practices of a military psychologist who advised the interrogators attempting to extract a confession from Mr. Jawad,<sup>84</sup> the American Psychological Association voted to bar its members from participating in such interrogations.<sup>85</sup> Importantly, Mr. Jawad was the first detainee to take the stand and testify about the mistreatment he received at the hands of the U.S. government. The judge found Mr. Jawad's testimony credible and recently ruled that the government's actions constituted "abusive conduct and cruel and inhuman treatment."<sup>86</sup> In essence, this was the first American court to rule that a war crime was committed by U.S. personnel; abuse of a prisoner of war is a grave breach of the Geneva Conventions.<sup>87</sup> In fact, the military judge stated that those responsible should face disciplinary action.<sup>88</sup> Of course, this has not happened.

I believe that I, along with my co-counsel, will obtain an even more favorable result than that obtained by Salim Hamdan's defense team. We intend to win the case outright, either by dismissal or acquittal—assuming that the case is ever decided on the merits. We have already had several key victories in the case. In September 2008, we filed a motion alleging that the government had failed to state an offense, and the commission ruled that the government's entire theory of the case was unsupported by any persuasive authority. The judge indicated that on the facts the government has proffered thus far, it will not be able to prove that Mr. Jawad violated the law of war.<sup>89</sup> The judge then in-

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81. Jonathan Diamond, *Why Bush Is Quiet on Hamdan Verdict*, The Huffington Post, [http://www.huffingtonpost.com/jonathan-diamond/why-the-bush-is-quiet-on\\_b\\_117764.html](http://www.huffingtonpost.com/jonathan-diamond/why-the-bush-is-quiet-on_b_117764.html) (Aug. 11, 2008, 18:06 EST).

82. Peter Finn, *Judge Rejects Government Call to Reconsider Hamdan Sentence*, WASH. POST, Oct. 31, 2008, at A10.

83. *Yemen Releases Former bin Laden Driver from Jail*, N.Y. TIMES, Jan. 11, 2009, [http://www.nytimes.com/2009/01/12/world/middleeast/12yemen.html?\\_r=1&ref=world](http://www.nytimes.com/2009/01/12/world/middleeast/12yemen.html?_r=1&ref=world).

84. See *supra*, note 14.

85. Benedict Carey, *Psychologists Vote to End Interrogation Consultations*, N.Y. TIMES, Sept. 18, 2008, at A-26; Dan Efron, *The Biscuit Breaker*, NEWSWEEK, Oct. 27, 2008, available at <http://www.newsweek.com/id/164497>.

86. D-008 Ruling on Defense Motion to Dismiss—Torture of the Detainee, *supra* note 17, at 4-5.

87. See *generally id.*

88. *Id.* at 5.

89. D-007 Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction, *supra* note 29, at 3 ("The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the Accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion that his conduct violated the law of war and the

structed the prosecutors that if they did not have any other facts or another theory, they should seek to have the case dismissed.<sup>90</sup> The government's response was to request reconsideration of the judge's ruling on the law.<sup>91</sup> In its request for reconsideration, the government frankly acknowledged that it had no evidence to support one of the elements of the sole charge against Mr. Jawad under the judge's "current construction" of the law.<sup>92</sup> The government even went so far as to ask the judge to dismiss the charge if he was unwilling to alter his ruling, so that it could appeal the decision to the Court of Military Commission Review.<sup>93</sup> The judge did neither, simply denying the motion and putting the ball back in the prosecution's court to fulfill its ethical obligation and seek dismissal of the charge from the Convening Authority.<sup>94</sup> Incredibly, the prosecutors have refused to seek dismissal.

On October 28, 2008, the defense won another key ruling when the judge suppressed an alleged confession, which was the linchpin of the government's case.<sup>95</sup> The judge found that the confession had been obtained by torture, the first such ruling to come out of the military commissions.<sup>96</sup> The judge subsequently suppressed another confession made to U.S. interrogators, ruling that it was tainted by the earlier torture.<sup>97</sup> Realizing that it could not prove Mr. Jawad's guilt without this tainted confession, the government filed an interlocutory appeal to the Court of Military Commission Review seeking to have the evidence reinstated. As a result of the appeal, Mr. Jawad's trial, originally docketed for January 5, 2009, was indefinitely stayed on November 25, 2008.<sup>98</sup> Oral argument on the appeal was held on January 13, 2009,<sup>99</sup> shortly be-

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propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused.").

90. Record of Trial, *supra* note 9, at 708.

91. D-007 Government Motion for Reconsideration at 1, United States v. Jawad (Military Comm'n, Guantanamo Bay Oct. 9, 2008), <http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf>.

92. D-007 Government Reply to Defense Response to Motion for Reconsideration, *supra* note 29, at 12.

93. *Id.*

94. D-007 Ruling on Government Motion for Reconsideration at 2, United States v. Jawad (Military Comm'n, Guantanamo Bay Oct. 29, 2008), *available at* <http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf>.

95. D-022 Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities at 3, United States v. Jawad (Military Comm'n, Guantanamo Bay Oct. 28, 2008), <http://www.defenselink.mil/news/d20081104JawadD022Suppress.pdf>.

96. Captain Keith Allred, the judge in *Hamdan*, granted a motion to suppress some statements on the basis that they were coerced, a lower standard than torture under Military Commission Rule of Evidence 304. See Jerry Markon, *Guantanamo Judge Blocks Use of Some Statements*, WASH. POST, July 22, 2008, at A01.

97. D-021 Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody at 5, United States v. Jawad (Military Comm'n, Guantanamo Bay Nov. 19, 2008).

98. Under RMC 908(b)(8), a stay of proceedings is automatic upon written notice to the military judge of an interlocutory appeal.

99. Ruling on Motion for Oral Argument at 1, United States v. Jawad (Military Comm'n, Guantanamo Bay Dec. 19, 2008), <http://preview.defenselink.mil/news/d20081219Jawadargument.pdf>.

fore President Obama was to assume office. On January 22, two days after the inauguration, President Obama signed an Executive Order directing that the status of all detainees be reviewed by May 20, 2009, and directing the Secretary of Defense to “immediately take steps sufficient to ensure that during the pendency of the Review . . . all proceedings pending in the United States Court of Military Commission Review, are halted.”<sup>100</sup> Accordingly, on January 23, 2009, the government requested that the Court of Military Commission Review hold its ruling in abeyance and issue a continuance until May 20, 2009.<sup>101</sup> This request was granted in an order issued February 4, 2009.<sup>102</sup>

Although the trial of *United States v. Jawad* was originally scheduled to occur under the Bush Administration, it now appears unlikely that he will *ever* be tried by military commission. President Obama and his new Attorney General have both expressed concerns about the fairness of military commissions and have indicated a preference to try detainees in federal court or in traditional courts-martial. Even if some commission cases are allowed to go forward, President Obama is unlikely to allow child soldiers, such as Mohammed Jawad and Omar Khadr, to be tried as war criminals. Thus, the change of administration may well save the government from the ultimate embarrassment of losing a case in a system rigged to make conviction all but inevitable. While the military commissions are on hold, I am continuing to advocate for Mr. Jawad. In January, along with my co-counsel from the ACLU National Security Project, I filed an amended habeas corpus petition on Mr. Jawad’s behalf in a United States District Court seeking his immediate release.<sup>103</sup>

## V. CONCLUSION

If Mr. Jawad is ever tried, I am certain that he will be exonerated. Why am I so confident? Because I believe, deep in my heart, that truth, justice, fairness, and respect for the rule of law is the American way. Occasionally, in dark times such as we have experienced for the last seven years, these quintessential American values are temporarily subordinated. But eventually, the pendulum swings back, and these values reemerge.

America is a nation founded on a reverence for the rule of law.

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100. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

101. Government Motion for Continuance, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Jan. 23, 2009).

102. Order Granting Appellant’s Request for Delay, *United States v. Jawad* (Military Comm’n, Guantanamo Bay Feb. 4, 2009).

103. Amended Petition for Writ of Habeas Corpus, *Al Halmandy v. Bush*, No. 05-cv-2385 (D.D.C. Jan. 13, 2009), *available at* [http://aclu.org/pdfs/natsec/amended\\_jawad\\_20090113.pdf](http://aclu.org/pdfs/natsec/amended_jawad_20090113.pdf).

When I took the oath to be commissioned as an officer in the United States Armed Forces, I did not swear to defend the United States. I swore to “support and defend the *Constitution* of the United States against all enemies, foreign and domestic.”<sup>104</sup> It is a mark of America’s greatness that we recognize that defending our Constitution against our enemies also means defending our enemies under the Constitution. It is another mark of America’s unique greatness that we entrust our military officers to do both, knowing that they will do so with equal fervor, and that they will not be deterred, no matter what difficulties they may face. In conclusion, although it has been the greatest challenge of my professional career to defend detainees at Guantanamo, it has also been my greatest honor.

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104. DEPT OF THE ARMY, DA FORM 71: OATH OF OFFICE—MILITARY PERSONNEL (1999), <http://www.apd.army.mil/pub/eforms/pdf/a71.pdf> (“I, (First Name, Middle Name, Last Name) (Social Security Number) having been appointed an officer in the Army of the United States, as indicated above in the grade of \_\_\_\_\_ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; SO HELP ME GOD.”).