

Closing Argument at Guantanamo: The Torture of Mohammed Jawad

Major David J.R. Frakt*

EDITORS' NOTE

The editors of the Harvard Human Rights Journal are pleased to publish Major David J.R. Frakt's argument for a pre-trial dismissal in the case of *United States v. Mohammed Jawad*.¹ *Jawad* was the first military commission case to squarely present the issue of the provable torture of a detainee at Guantanamo Bay, and Mohammed Jawad was the first Guantanamo detainee to take the witness stand in a military commission and describe his mistreatment under oath.

As a longtime practitioner of military law, Major Frakt was well-equipped to provide counsel for Mohammed Jawad. From September 1995 to April 2005, Major Frakt served on active duty as an Air Force JAG officer. In his ten years of experience as an Air Force JAG officer, Major Frakt specialized in military justice, where he tried over 70 court-martial cases as both prosecutor and defense counsel. In April 2005, he transitioned into the Air Force Reserve and began a second career as a law professor, teaching criminal procedure, evidence, and a seminar on war crimes tribunals. In the winter of 2008, just as he was completing research on the rules and procedures for courts-martial and military commissions,² the Department of Defense requested JAG volunteers to serve as prosecutors and defense counsel for the military commissions. Major Frakt volunteered to defend detainees. His prior research would prove particularly relevant to his defense of Mr. Jawad.

Major Frakt's intimate knowledge of humanitarian law helped him craft a rich and persuasive account not only of the individual injustice served upon his client but also of the systemic failure of the rule of law at Guantanamo Bay. Many human rights observers attended Major Frakt's closing

* J.D., *cum laude*, Harvard Law School, 1994; B.A., *summa cum laude*, University of California, Irvine, 1990. The author is a Major in the United States Air Force Reserve Judge Advocate General's Corps. Major Frakt is also Associate Professor of Law and Director of the Criminal Law Practice Center at Western State University College of Law. Major Frakt has taken a leave of absence for the 2008–2009 academic year.

1. *United States v. Mohammed Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed Oct. 9, 2007).

2. 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 (2008).

argument and, as a result, his words were widely distributed and received significant praise.³ Pulitzer Prize winning journalist Anthony Lewis recently described the argument as “a remarkable display of legal and moral courage.”⁴ We at the Harvard Human Rights Journal agree and are pleased to be publishing Major Frakt’s argument. We believe that Major Frakt sheds important light on government policies during the Global War on Terror and hope that his closing argument will serve as a useful tool for other legal advocates.

The piece proceeds in three sections. Section I is an introduction written by Major Frakt providing context for his argument. Section II contains an annotated version of Major Frakt’s argument. Finally, Section III provides an update on Mr. Jawad’s case and the military judge’s ruling on the motion.

INTRODUCTION

In November 2001, President Bush declared that those responsible for 9/11 would be captured and “brought to justice.”⁵ His idea of bringing suspected terrorists to justice was not to try them in federal court, or in a military court-martial, but rather in specially designed military tribunals with severely limited procedural rights for the accused.⁶ The initial military tribunals were challenged in federal court. Ultimately, in *Hamdan v. Rumsfeld*,⁷ the Supreme Court held that the President had exceeded his con-

3. Jamil Dakwar, Director of the ACLU Human Rights Program, called the argument “an historic closing argument that should be taught in every military academy across the country.” *Guantanamo’s Frequent Flyer Program*, posting of Jamil Dakwar to ACLU Blog of Rights, <http://blog.aclu.org/2008/06/20/guantamos-frequent-flyer-program/> (June 20, 2008, 4:45 pm). Deborah Colson of Human Rights First, in a report in the Huffington Post, called the argument a “most powerful indictment of Bush administration policies.” *Supreme Court Returns the Constitution to Guantanamo*, HUFFINGTON POST, June 25, 2008, http://www.huffingtonpost.com/deborah-colson/the-supreme-court-returns_b_109260.html. Michael Winship, of Bill Moyers Journal, called the argument “an unusual and especially fine expression of American patriotism.” *What Patriotism Is, and Is Not*, BILL MOYERS JOURNAL, July 2, 2008, http://www.pbs.org/moyers/journal/blog/2008/07/michael_winship_what_patriotis.html. The prosecution was not particularly impressed, referring to Major Frakt’s argument as “bombast.” Draft Transcript of June 19, 2008 Hearing at 219, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed Oct. 9, 2007) (on file with author). In a subsequent filing with the Commission, the government offered their opinion of the argument: “Instead of arguing the merits of the motion on 19 June 2008 . . . the defense subjected the Commission to a 45-minute disquisition on defense counsel’s personal view of Guantanamo and the Military Commissions that did nothing to assist the Commission.” Government Response to Defense Supplemental Filing in Support of D-008 Motion to Dismiss at 1, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed July 8, 2008) (on file with author).

4. Anthony Lewis, *Official American Sadism*, 55 N.Y. REV. BOOKS 14 (2008), available at <http://www.nybooks.com/articles/21794>.

5. Remarks by the President to U.S. Attorneys Conference, 2 PUB. PAPERS 1459 (Nov. 29, 2001).

6. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001); see also DEP’T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (2002) (Homeland Security Digital Library); Military Comm’n Instruction No. 2, 32 C.F.R. § 11.6 (2005).

7. 548 U.S. 557, 593–95 (2006).

stitutional authority. The military commissions were found to lack the basic guarantees of due process required under the Geneva Conventions and were deemed not to be “regularly constituted courts.”⁸ In response, President Bush forwarded proposed legislation to Congress creating a new set of military commissions and addressing some of the Supreme Court’s concerns. The Military Commissions Act of 2006 (MCA) was enacted in October 2006.⁹ Three detainees were charged in March 2007: David Hicks,¹⁰ Salim Hamdan,¹¹ and Omar Khadr. On June 4, 2007, the charges against Salim Hamdan and Omar Khadr were simultaneously dismissed by two different military judges for lack of personal jurisdiction.¹² The MCA states that “alien unlawful enemy combatants” can be tried by military commission.¹³ Hamdan and Khadr had been found to be “enemy combatants” by Combatant Status Review Tribunals (CSRTs), but the CSRTs had not been tasked with determining whether they were lawful or unlawful combatants. According to the judges, nothing in the language of the MCA indicated that the military commission itself had the power to make this determination; therefore, they reasoned, they had no power to hear the cases. The government filed an interlocutory appeal to the Court of Military Commissions Review (CMCR), a court that existed only on paper. Judges were quickly appointed and the court assembled to hear the appeal. The CMCR issued its ruling in late September 2007.¹⁴ It found that the military commission had the power to determine its own jurisdiction.¹⁵ The charges were reinstated and the military judges were directed to hold preliminary hearings to determine if the detainees were lawful or unlawful combatants. With the commissions back on track, prosecutors began charging additional detainees. The next detainee charged was Mohammed Jawad, an Afghan arrested as a teenager for allegedly throwing a hand grenade that

8. *Id.* at 631–32.

9. Military Commissions Act, 10 U.S.C. §§ 948a–950w (2006).

10. Hicks quickly reached a negotiated plea agreement arranged as a political favor to the Australian government. He was sentenced to nine months for providing material support to terrorism and returned to Australia. He is now free. *Ex-Guantanamo Inmate Released; David Hicks, Caught with Taliban in 2001 is Freed in Australia*, WASH. POST, Dec. 29, 2007, at A14.

11. On August 6, 2008, Mr. Hamdan was convicted of providing material support and acquitted of the charge of conspiracy. He was sentenced on August 7, 2008 to sixty-six months in confinement with credit for sixty-one months already served. Carol J. Williams, *The Nation: Yemeni Gets 5 1/2 Years in Prison with Credit for Time Already Served, Osama bin Laden's Driver Should Complete His Sentence by January*, L.A. TIMES, Aug. 8, 2008, at A1.

12. Dep’t of Defense, *Judge Dismisses Charges Against Second Guantanamo Detainee*, FED. INFO. & NEWS DISPATCH, INC., June 4, 2007, available at 2007 WLNR 10473670; Dep’t of Defense, *Charges Dismissed Against Canadian at Guantanamo*, FED. INFO. & NEWS DISPATCH, INC., June 4, 2007, available at 2007 WLNR 10428257.

13. Military Commissions Act, 10 U.S.C. § 948c (2006) (“Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.”).

14. United States v. Khadr, No. 07-001 (U.S. Ct. Mil. Comm’n Rev. Sept. 24, 2007), available at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf).

15. *Id.* at 20.

injured two American soldiers and their Afghan interpreter in December 2002. Charges were sworn against Mr. Jawad on October 9, 2007.¹⁶

With seventy-five to eighty additional cases against Guantanamo detainees anticipated, the Department of Defense determined that more prosecutors and defense counsel would be needed to staff the Office of Military Commissions, or OMC. By law, those charged under the Military Commissions Act are provided a U.S. military defense counsel, or judge advocate.¹⁷ These lawyers are part of the Judge Advocate General's Corps and are commonly referred to as JAG officers, or JAGs. Each of the Armed Services was asked to provide JAGs to the OMC. In January 2008, the Air Force sent out a call for volunteers from all active duty, reserve, and national guard JAGs. The notice indicated that those with extensive criminal litigation experience, particularly defense experience, were especially welcomed to apply.

I decided to volunteer to serve as a defense counsel. A few weeks later, in late February 2008, I was interviewed by the Chief Defense Counsel. The following week I was offered a position as a defense counsel. I was ordered to report to the main office of the Office of Military Commissions-Defense in Washington, D.C. as soon as I finished teaching my spring semester classes. I reported on April 28, 2008, and on the next day, I was assigned to represent Mohammed Jawad. Mr. Jawad had refused to accept the services of his previously appointed defense counsel, an Army JAG Reservist. The Reservist had completed his one-year assignment and returned to his civilian job, so Mr. Jawad was without appointed counsel at the time, and the military judge was anxious to move his case forward. In fact, as soon as I was detailed to the case, the judge set a hearing for the following week, May 7, 2008. The next day, April 30, I flew to Guantanamo to meet with Mr. Jawad and another assigned client.

I had two meetings with Mr. Jawad at the detention camp where he was held prior to the hearing on May 7. I tried to persuade him to allow me to represent him, but he was understandably wary about accepting the assistance of a U.S. military attorney. In a meeting in the courthouse holding cell just before the hearing, Mr. Jawad and I reached a compromise—he would allow me to represent him for the limited purposes of challenging the legitimacy of the military commissions and the conditions of his confinement. The military judge, recognizing this compromise as progress, accepted the arrangement and gave me three weeks to file “law motions” challenging the jurisdiction of the commissions and the conditions of Mr. Jawad's confinement.¹⁸ The deadline for filing such motions was May 28,

16. Charge Sheet of Mohammed Jawad, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed Oct. 9, 2007), available at <http://www.defenselink.mil/news/Jan2008/d20080130jawadcharge.pdf>.

17. Military Commissions Act, 10 U.S.C. § 948k(a), (c) (2006).

18. Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed May 28, 2008), available at <http://www.defenselink.mil/news/May2008/d20080528jawadmotion.pdf>.

less than a month after I had met Mr. Jawad. The judge also set the next hearing date for June 26.

Two weeks later, the prosecutor, honoring his duty to provide exculpatory evidence to the defense, turned over prison logs revealing that my client had been subjected to a sleep deprivation program known as the “frequent flyer program.” Specifically, Mr. Jawad had been moved back and forth between two prison cells approximately every three hours for fourteen straight days, a total of 112 moves. These cell moves, which were clearly intended to disrupt the detainee’s sleep, were made time-consuming by the fact that both his hands and feet were shackled. My hastily conducted research convinced me that this program constituted torture.¹⁹ Along with the frequent flyer program, the prison logs also revealed that Mr. Jawad had attempted to commit suicide on December 25, 2003.

The only remedy indicated in the Manual for Military Commissions in cases of torture was suppression of evidence obtained by torture.²⁰ The prison records for Mr. Jawad, however, did not indicate that he had been interrogated in conjunction with this program,²¹ so there were no obvious statements to suppress. I decided to seek complete dismissal of the charges under a military law doctrine known as “illegal pretrial punishment.” I found one military case which indicated that dismissal was at least a theoretically available remedy for harsh mistreatment of a service member in pretrial confinement, although no military court had ever done so.²² I filed the motion on the deadline of May 28, 2008.

mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf.

19. See, e.g., DEP’T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION (1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf> (listing three examples of mental torture, namely “mock executions,” “abnormal sleep deprivation,” and “chemically induced psychosis”). The debate concerning sleep deprivation as a basis for a torture claim was illuminated in both parties’ submissions. Compare Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 at 9–14, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed May 28, 2008), available at <http://www.defenselink.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf>, with Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed June 4, 2008), available at <http://www.defenselink.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf>, at 162.

20. 10 U.S.C. § 948r (2006).

21. There was one interrogation in April 2004. The sleep deprivation torture occurred from May 7–20, 2004. No further interrogations were conducted until mid-August 2004. This information is based on intelligence reports received from the government during discovery. These reports are classified.

22. See *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001). The Court held that while dismissal was a possible remedy, it was available only where “no other remedy is appropriate.” *Id.* at 89. Because military judges have the option of providing extra credit toward the confinement sentence, the Court suggested that it would be a very unusual situation where dismissal would be the only remedy, “even where an appellant has been denied a significant constitutional right.” *Id.* (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). However, under the Rules for Military Commission, no provision was made for pretrial confinement credit, so I argued that dismissal was the only appropriate remedy. Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 at 14–16, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed May 28, 2008), available at <http://www.defense>

While I awaited the government's response, a new judge was appointed to Mr. Jawad's case. The new judge, Colonel Stephen Henley, was the Chief Trial Judge of the United States Army. Shortly after being assigned, he moved the June 26 hearing forward a week to June 19, placing the defense under even greater time constraints. In response to my motion, the prosecution asserted that what I was really arguing was the doctrine of "outrageous government conduct"²³ and that the frequent flyer program, which they asserted was not torture, failed to meet the standard. The outrageous government conduct doctrine stipulates that when the government acts in a lawless and conscience-shocking manner towards a defendant, the government may forfeit the right to use evidence obtained through such conduct. In extreme cases, the government may forfeit the right to prosecute the individual at all. Taking the government's assertion as a suggestion, I prepared a reply brief more fully developing the "outrageous government conduct" theory. I submitted this brief on June 13, reiterating my request for dismissal of the charges.

The motion to dismiss for torture was just one of several motions scheduled to be heard on June 19, and I was concerned that I would not be able to present testimony on all of the motions and argue them in one day. I requested two days for the hearing. This request was denied, and I was told to complete both the presentations and the arguments in one day.

The hearing began at 8:30 a.m. on June 19. The morning and early afternoon sessions were marred by technical difficulties. I arranged for two witnesses to testify via video teleconference, but difficulties arose with the link. Once, the connection was lost completely and at other times, high-pitched feedback and reverberations occurred. The hearing also took an unexpected and dramatic twist. In order to prove my torture claim, I arranged for an expert on sleep deprivation, a sleep research scientist on the Harvard Medical School faculty,²⁴ to testify about the effects of sleep deprivation on the mind and body. During the cross-examination of this witness by the prosecutor, Mr. Jawad, who was listening to a simultaneous translation through headphones, became visibly agitated. He leapt out of his seat and demanded to speak. He stated that he did not know who this doctor was but that she had never examined him and if the court wanted to hear about his sleep deprivation then he would tell the court himself. Although I had not intended to put Mr. Jawad on the witness stand and had not

[link.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf](http://www.defenselink.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf).

23. See Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 at 4-6, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed June 4, 2008), available at <http://www.defenselink.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf>, at 165-67. The theory of "outrageous government conduct" was first developed in *Rochin v. California*, 342 U.S. 165, 172 (1952). In *Rochin*, the Court overturned a conviction in which the evidence of morphine use was obtained by entering the defendant's home without a warrant, opening his mouth, and forcibly extracting his stomach's contents.

24. Dr. Janet Mullington, Ph.D., Associate Professor of Neurology, Harvard Medical School.

prepared a direct examination, he was determined to assert his right to be heard, so I decided to adapt accordingly. I told him that the witness was almost finished and he would be given the opportunity to testify next. Thus, Mr. Jawad became the first detainee to describe his torture at Guantanamo under oath in a military commission.

The commission recessed at around 4:00 p.m. for afternoon prayers (Mr. Jawad is a devout Muslim). During the recess Mr. Jawad informed me that he was tired and not feeling well and wanted to return to his cell. I informed the judge, and, over the prosecution's objection, Mr. Jawad was excused for the remainder of the day. We then proceeded with other witnesses, including the former Chief Prosecutor, Air Force Colonel Morris Davis, who testified for the defense that the Legal Advisor, Brigadier General Hartmann, unlawfully influenced him in violation of the Military Commissions Act.²⁵

Finally, at around 9:30 or 10:00 p.m., I completed presenting my witnesses and evidence, and the court offered me the opportunity to make an oral argument on the motion to dismiss for torture. I had given a good deal of thought to the argument and had written most of it out in advance. Of course, at the time that I drafted the argument, I thought that Mohammed would be in the courtroom to hear it. The argument was really for him. I wanted him to know that I really did care about him, and that I would fight for him without regard to the personal consequences for my military career. I also knew that there would be several human rights observers from various NGOs present, including Human Rights Watch, Human Rights First, Amnesty International, and the ACLU. I knew that many of these observers still harbored doubts about whether military defense counsel would be willing to be as aggressive and zealous in defending detainees as would a civilian defense counsel. In fact, I had engaged in an op-ed debate with Professor Erwin Chemerinsky on this point.²⁶ I did not want to deliver the typical motion argument, focusing on the specific facts of the case and the relevant legal precedents. I felt I had already adequately briefed the court on the facts and law. Rather, I wanted to put the torture of Mohammed Jawad into the larger context of the Global War on Terror and the extreme lawlessness that characterized the administration's response to the perceived threat of terrorism. What I had learned about the treatment of the detainees shamed me deeply. Conscious that the world would be watching and judging the commissions, I wanted to prove that someone in the U.S. military was willing to stand up for real American values and the Constitution.

25. 10 U.S.C. § 949b (2006) prohibits the exertion or attempted exertion of unlawful influence over "the exercise of professional judgment" of either the prosecutor or the defense counsel. Colonel Davis testified that he had personally written this section of the MCA at the invitation of Senators Lindsey Graham and John McCain.

26. David Frakt, *Winning Detainee Hamdan's Case Didn't Prevent Navy Lawyer's Promotion*, L.A. DAILY J., Nov. 7, 2006, Forum.

Words hold immense power, and a well-crafted speech, passionately delivered, can bring about change. While I cannot take credit for many of the ideas in my argument,²⁷ I hoped that it might, in some small way, help nudge the country back in the direction of restoring the primacy of the rule of law.

The press covered the hearing well,²⁸ and several of the human rights observers also wrote articles or posted blog entries online about the hearing, some of which included extended excerpts of my argument. In the interests of preserving the historical record and providing some context to the argument, I decided to annotate the argument, identifying the persons and events referred to and providing the legal and factual basis for the argument.

CLOSING ARGUMENT: MOTION TO DISMISS,
UNITED STATES V. MOHAMMED JAWAD

Before the Military Commission, Guantanamo Bay, Cuba, June 19, 2008.

On February 7, 2002, President Bush issued an order. The order stated, in pertinent part:

I accept the legal conclusion of the Department of Justice and determine that Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees. . . .

I determine that the Taliban detainees do not qualify as prisoners of war . . . al Qaeda detainees also do not qualify as prisoners of war. . . .

Our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, *including those who are not legally entitled to such treatment.*²⁹

As a matter of *policy* the United States Armed Forces shall continue to treat detainees humanely, *and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.*³⁰

27. See, e.g., PHILIPPE SANDS, *TORTURE TEAM* (2008); JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

28. See, e.g., William Glaberson, *Detainee's Lawyers Make Claim on Sleep Deprivation*, N.Y. TIMES, July 15, 2007, at A15; Josh White, *Interrogation Technique Used at Guantanamo After Ban*, WASH. POST, Aug. 8, 2008, at A12.

29. The italicized print was in my original printed draft of the argument and reflects the emphasis that I placed on these words in oral argument.

30. President's Memorandum to the Vice President et al. regarding Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) (Homeland Security Digital Library), available at http://www.perc.us/archive/White_House/bush_memo_20020207_ed.pdf.

With these fateful and ill-advised words, President Bush, our Commander-in-Chief, perhaps unwittingly, perhaps not, started the U.S. down a slippery slope, a path that quickly descended, stopping briefly in the dark, Machiavellian world of “the ends justify the means,” before plummeting further into the bleak underworld of barbarism and cruelty, of “anything goes,” of torture. It was a path that led inexorably to the events that bring us here today, the pointless and sadistic treatment of Mohammed Jawad,³¹ a suicidal³² teenager.³³

President Bush’s words were important and deserve special attention. For those of us in the military who have faithfully attended our annual Law of Armed Conflict training,³⁴ or, in my case, have given the training many times,³⁵ the Geneva Conventions³⁶ and humane treatment were synonymous; they were one and the same. The Geneva Conventions represented the baseline; they embodied the determination of the world to make war a more humane enterprise, to prevent a descent into wholesale barbarity, as had occurred during the Second World War. But now we were being told that humane meant something else, something less, than the Geneva Conventions. And we were being told that we could act inconsistently with the Geneva Conventions, when military necessity demanded it. Those of us

31. Mohammed Jawad is one of two detainees captured as juveniles charged with crimes before the military commissions. For further background on Mr. Jawad, see AMNESTY INT’L, THE CASE OF MOHAMMED JAWAD, CHILD ‘ENEMY COMBATANT’ (2008), available at <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>.

32. On December 25, 2003, Mr. Jawad attempted to commit suicide in his cell at Guantanamo. Official prison logs, which are currently confidential, provide two different accounts of his suicide attempt. One entry states that at 2307 hours “Detainee attempted self harm by banging his head off metal structures inside his cell.” Another entry states that at “approximately 2307 detainee attempted self harm by using the collar of his shirt to hang himself from the mesh inside his cell.”

33. There is no known record of Mohammed Jawad’s birth. Mr. Jawad provided different accounts of his age at the time of his capture, stating at various times that he was sixteen, seventeen, or eighteen. However, according to official U.S. Government documents, Mr. Jawad was under eighteen years of age at the time of his alleged crimes on December 17, 2002, so he was definitely still a teenager when he attempted suicide. The government attempted to determine Mr. Jawad’s age by performing a bone density scan on October 26, 2003. The reviewing radiologist concluded that Mr. Jawad had “a bone age of approximately 18 years by the methods of Greulich and Pyle.” Government Response to Defense Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to R.M.C. 907(b)(1)(A) (Child Soldier), attach. 1, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed June 24, 2008) (on file with author).

34. See DEP’T OF DEF., DIRECTIVE 2311.01E, DoD LAW OF WAR PROGRAM ¶ 5.7.2 (2006) (Homeland Security Digital Library) (requiring heads of Department of Defense components to “[i]nstitute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination, as required by” the Geneva Conventions).

35. See U.S. AIR FORCE, AIR FORCE INSTRUCTION 51-401: TRAINING AND REPORTING TO ENSURE COMPLIANCE WITH THE LAW OF ARMED CONFLICT (LOAC) ¶ 3.1 (1994), available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI51-401.pdf> (“Annually, all commanders will ensure that assigned personnel are trained in the principles and rules of LOAC.”). This Instruction places the responsibility on the Judge Advocate General to implement the LOAC training program. *Id.* ¶ 2.1. While on active duty from September 23, 1995 to March 31, 2005, I gave dozens of LOAC briefings to Air Force personnel.

36. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

who were familiar with the Geneva Conventions, whose job it was to know them, were puzzled and deeply troubled by the President's order and had serious forebodings about the implications of such a decision. We understood that there were no gaps in Geneva;³⁷ there was no one who fell outside their protection, that Common Article 3³⁸ applied to everyone.

But the civilian political appointees of this administration intentionally cut the real experts on the law of armed conflict, the uniformed military lawyers, the JAGs, out of the loop, marginalized them, for fear that their devotion to the Geneva Conventions might pose an obstacle to their intended course of action. The State Department, led by Colin Powell, tried to raise a red flag, but to no avail.³⁹ Instead, the administration chose to

37. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, VOLUME IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (1958). The International Criminal Tribunal for the Former Yugoslavia, charged with prosecuting war crimes and crimes against humanity committed during the recent conflicts in the Balkans, has affirmed this principle in a 1998 judgment, stating that "there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war . . . he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied." *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶ 271 (Feb. 20, 2001).

38. The First, Second, Third, and Fourth Geneva Conventions contain an identical Article 3, known as Common Article 3, which states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) Taking of hostages;
 - (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 36, at art. 3.

39. On January 26, 2002, Secretary of State Colin Powell raised serious concerns about the proposed plan to refuse to apply the Geneva Conventions to the conflict in Afghanistan, noting in a written memo that the decision would "reverse over a century of U.S. policy and practice . . . and undermine the protections of the law of war for our troops." Memorandum from Colin Powell, Sec'y of State, U.S. Dep't of State, to the Counsel to the President and the Assistant to the President for Nat'l Sec. Affairs, Executive Office of the President (Jan. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>. In a separate memorandum to the Counsel to the President, the State

rely on the infamous torture memos by John Yoo,⁴⁰ Robert Delahunty⁴¹ and Jay Bybee.⁴² These secret memos attempted to redefine torture for the purpose of providing legal cover for administration officials who approved the use of patently unlawful tactics.⁴³ These legal opinions, now disgraced, disavowed, and relegated to the scrap heap of history where they belong, laid the groundwork for the wholesale and systematic abuse of detainees which ultimately ensnared my client, Mohammed Jawad.

I'm sure that all of these people, the President included, thought they were doing what was best. But what sometimes appears to be in the inter-

Department's legal adviser, William H. Taft IV, also argued that the Geneva Conventions should apply to the conflict in Afghanistan: "[t]he President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years." Memorandum from William H. Taft IV, Legal Advisor, U.S. Dep't of State, to Counsel to the President, Executive Office of the President (Feb. 2, 2002), *available at* http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf. Mr. Taft also stressed that application of the Conventions would further the important policy of demonstrating "that the United States bases its conduct not just on its policy preferences but on its international legal obligations." *Id.*

40. John C. Yoo was the Deputy Assistant Attorney General at the Office of Legal Counsel in the Department of Justice from 2001 to 2003. In a memo to the General Counsel of the Department of Defense, William J. Haynes II, Mr. Yoo argued that the constitutional guarantees of due process and freedom from cruel and unusual punishment, contained in the Fifth and Eighth Amendments, respectively, as well as federal criminal statutes, did not apply to "properly authorized" interrogations of enemy combatants held outside the United States during an international armed conflict. Memorandum from John Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Mar. 14, 2003) (Homeland Security Digital Library). He also co-drafted, with Robert Delahunty, a legal opinion to Mr. Haynes, ultimately signed by Jay Bybee, concluding that the Geneva Conventions and the War Crimes Act did not apply to the conflict in Afghanistan. Memorandum from Jay Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Executive Office of the President, and William J. Haynes II, General Counsel, Dep't of Def. (Jan. 22, 2002) (Homeland Security Digital Library) [hereinafter Bybee War Crimes Memorandum]. Mr. Yoo is now a professor of law at Boalt Hall at the University of California at Berkeley.

41. Robert J. Delahunty served as Special Counsel with the Office of Legal Counsel in the Department of Justice from 1992 to 2002 and later as Deputy General Counsel at the White House Office of Homeland Security in 2002 and 2003. Along with Mr. Yoo, Mr. Delahunty co-drafted the controversial memorandum to Mr. Gonzales and Mr. Haynes concluding that the Geneva Conventions and the War Crimes Act did not apply to the conflict in Afghanistan, *see* Bybee War Crimes Memorandum, *supra* note 40, and contributed to other key torture policy documents. Robert Delahunty is now an associate professor of law at the University of St. Thomas School of Law.

42. Jay Bybee served as the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice from October 2001 to March 2003. He is the author of a 2002 memo that redefined torture to include only physical pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" or mental pain and suffering that "result[s] in significant psychological harm of significant duration, e.g., lasting for months or even years." Memorandum from Jay Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto Gonzales, Counsel to the President, Executive Office of the President (Aug. 1, 2002) (Homeland Security Digital Library). "[C]ruel, inhuman, or degrading acts" that did not meet these standards did not constitute torture under this definition. *Id.* Mr. Bybee also wrote or signed several other key torture policy documents. *See, e.g.*, Bybee War Crimes Memorandum, *supra* note 40. He now serves as a judge on the United States Court of Appeals for the Ninth Circuit.

43. *See generally* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007).

ests of America at first glance, upon further reflection reveals itself not to be. Interning Japanese-Americans during World War II⁴⁴ perhaps seemed like a good idea at the time, but in hindsight we can see that it was a terrible injustice, inconsistent with American ideals and utterly unconstitutional.⁴⁵ It is a shameful episode in our history, a xenophobic overreaction. The conscious, deliberate decision to abandon the Geneva Conventions and the entire fiasco that is Guantanamo will undoubtedly be viewed by historians as an even more disgraceful chapter in our history.

The February 7, 2002, order of President Bush invited the rule of law to be circumvented. Even though the President paid lip service to humane treatment by stating that detainees were not legally entitled to be treated humanely and by his qualification of “to the extent appropriate and consistent with military necessity,”⁴⁶ the implication was clear—it was only *policy* to be humane, not a legal requirement, and there would be no legal consequences to those who didn’t treat detainees humanely if there was some military justification for it. Of course, during a “global war,” it is possible to rationalize almost anything under the general rubric of military necessity. After all, if there is even a slight possibility that some military advantage might be gained by some course of action, don’t we owe it to our troops to do it? If there is even a minute chance that some sliver of intelligence might be gleaned about an impending terrorist attack, don’t we owe it to the American people to do everything in our power to extract it? The obvious answer to most of those working in detainee operations at Guantanamo and elsewhere was “Yes.”

Adding to the pervasive atmosphere of lawlessness in the early days of Guantanamo was the administration’s assertion that the detainees could be held indefinitely without charge, without access to counsel, without any recourse to challenge their detention.⁴⁷ The administration asserted that

44. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). The constitutionality of President Roosevelt’s executive order was upheld by the Supreme Court in a 6–3 decision in *Korematsu v. United States*, 323 U.S. 214 (1944).

45. In 1995, the Supreme Court criticized the decision in *Korematsu*, noting that it upheld an “illegitimate racial classification” and that “[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995). In *Adarand*, the Court noted that *Korematsu* has since been publicly discredited and that Congress has agreed with the dissenters’ position in that case and attempted to make amends, recognizing that “a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.” *Id.* at 215 (Pub. L. No. 100-383, § 2(a), 102 Stat. 903). See also Neil Gotanda, *The Story of Korematsu: The Japanese-American Cases*, in *CONSTITUTIONAL LAW STORIES* 249, 270–72 (Michael C. Dorf ed., 2004).

46. President’s Memorandum to the Vice President regarding Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) (Homeland Security Digital Library).

47. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”); *Rasul v. Bush*, 542 U.S. 466, 476 (2004) (“Petitioners in these cases . . . have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing.”).

the detainees were beyond the reach of any federal court and were not eligible for habeas corpus, a hallowed right guaranteed by the founding fathers of this great country.⁴⁸ In effect, the administration created a legal black hole at Guantanamo, a policy universally decried by even our staunchest allies in the war on terror, but steadfastly defended by the administration.

If there was any doubt that the President intended unlawful tactics to be used, all doubt was erased when Secretary of Defense Rumsfeld authorized, on December 2, 2002, numerous extra-legal special interrogation techniques.⁴⁹ These techniques and how they were developed and utilized were the subject of hearings before the Senate Armed Service Committee yesterday⁵⁰ and are described in detail in the book *Torture Team*,⁵¹ which I have attached to this motion.

Eventually, cooler and wiser heads started to inject some rationality into the treatment of the Guantanamo detainees. Unsung heroes like Alberto Mora, Navy General Counsel, and Admiral Jane Dalton,⁵² and the service TJAGs Major General Rives⁵³ and Major General Romig,⁵⁴ fought vigorously for the restoration of Geneva. But it ultimately took the intervention of the Supreme Court to restore the rule of law to Guantanamo. The Court intervened and made it clear that the Geneva Conventions did apply to detainees at Guantanamo, and that they did have the right to habeas corpus, a right that Congress has twice, unsuccessfully, attempted to take away.⁵⁵ This fight to restore the rule of law took time, years in fact, in which the detainees of Guantanamo continued to suffer indignity and inhumanity. It was not until July 2006⁵⁶ that the Deputy Secretary of Defense

48. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2244–48 (2008).

49. Memorandum from William J. Haynes II, Gen. Counsel, to Sec'y of Def. regarding Counter-Resistance Techniques (Nov. 27, 2002) (Homeland Security Digital Library). This memo was authorized on December 2, 2002. Haynes was then the General Counsel for the Department of Defense.

50. *The Origins of Aggressive Interrogation Techniques: Hearing Before the Senate Armed Services Comm.*, 110th Cong. (2008); see also *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statements of David Addington, Chief of Staff to Vice President Dick Cheney, and Prof. John Yoo, Boalt Hall School of Law, University of California at Berkeley, in which David Addington and John Yoo testified about their roles in the drafting of the August 1, 2002 “torture memorandum,” *supra* note 42); Mark Mazzetti, *Ex-Pentagon Lawyers Face Inquiry on Interrogation Role*, N.Y. TIMES, June 17, 2008, at A8; Joby Warrick, *CIA Played Larger Role In Advising Pentagon: Harsh Interrogation Methods Defended*, WASH. POST, June 18, 2008, at A1.

51. SANDS, *supra* note 27.

52. Former Legal Advisor to the Chairman, Joint Chiefs of Staff.

53. Lieutenant General Jack L. Rives, The U.S. Air Force Judge Advocate General. Lieutenant General Rives was Deputy Judge Advocate General and acting Judge Advocate General from February 2002 to February 2006, when he was appointed The Judge Advocate General.

54. Major General Thomas J. Romig, U.S. Army Judge Advocate General from October 2001 to September 2005.

55. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680, 2739–42; Military Commissions Act, 28 U.S.C. § 2241(e) (2006). These efforts to deny detainees habeas corpus were ultimately found unconstitutional in *Boumediene v. Bush*, 128 S. Ct. 2229, 2271–74 (2008).

56. As a result of *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Gordon England issued a memorandum stating that “common Article 3 of the Geneva Convention applies as a matter of law” to the treatment of detainees held by the Department of Defense, and that the “humane treatment [is] the overarching requirement of Common Article 3.”⁵⁷ So we were back to where we started. Unfortunately, by then, the damage had already been done, both to the detainees and to the reputation of the United States as a law-abiding country.

America is a nation founded on a reverence for the rule of law. We should never forget that when we take an oath to enlist or be commissioned as an officer in the United States Armed Forces, we do not swear to defend the United States, we swear “to support and defend the *Constitution* of the United States against all enemies, foreign and domestic.”⁵⁸ The Oath of Office for the President contains similar words: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the *Constitution* of the United States.”⁵⁹ Tragically, under the undeniably heavy pressure to defend Americans from terrorist attack, some of our military and civilian leaders lost sight of their obligation to defend the Constitution as well.

Under the Constitution, all men are created equal, and all are entitled to be treated with dignity. No one is “undeserving” of humane treatment. It is an unmistakable lesson of history that when one group of people starts to see another group of people as “other” or as “different,” as “undeserving” or “inferior,” ill-treatment inevitably follows. In the Global War on Terror generally and in the detention camps of Guantanamo especially, the detainees were seen as “terrorists,” as “the worst of the worst,” something less than human, and were treated accordingly. After six and a half years, we now know the truth about the detainees at Guantanamo: some of them are terrorists, some of them are foot soldiers, and some of them were just innocent people, caught in the wrong place at the wrong time. But the detainees at Guantanamo have one thing in common—with each other, and with us—they are all human beings, and they are all worthy of humane treatment. We should also never forget that no one in Guantanamo has been

57. Memorandum from Gordon England, Deputy Sec’y of Def., to Secretaries of the Military Dep’ts regarding Application of Common Article 3 of the Geneva Convention to the Treatment of Detainees in the Dep’t of Def. (Jul. 7, 2006), available at <http://www.fas.org/sgp/othergov/dod/geneva070606.pdf>.

58. DEP’T OF THE ARMY, DA FORM 71: OATH OF OFFICE—MILITARY PERSONNEL (1999), available at <http://www.apd.army.mil/pub/eforms/pdf/a71.pdf> (“I, _____ (SSN), 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 reservation 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.”).

59. U.S. CONST. art II, § 1, cl. 7.

convicted of a single crime,⁶⁰ and that even in these deeply flawed military commissions, they are entitled to a presumption of innocence.⁶¹

Throughout the Global War on Terror we have heard repeatedly from our military and civilian leaders that this was a new kind of war, a war that requires new methods, new ideas, “thinking outside the box.” So that is what the highly creative and motivated people at Guantanamo did; they abandoned the tried and true and lawful methods of Army Field Manual 34-52⁶² and wrote a new playbook, a playbook that included intimidation with dogs, sexual humiliation, and sleep deprivation. These and other methods were employed at Guantanamo and, as the Schlesinger report⁶³ put it, migrated to Abu Ghraib, where they resulted in the shocking conduct portrayed in the infamous photographs. The Secretary of Defense said “take the gloves off” and the soldiers and sailors of Guantanamo saluted smartly and said, “Yes, Sir!” In fact, many of the illegal and abusive “enhanced” interrogation techniques were personally approved for use by the Secretary of Defense; other techniques, like the frequent flyer program, were simply invented on the fly.

The public revelation of the events at Abu Ghraib on 60 Minutes II in late April 2004⁶⁴ caused the Department of Defense to go into full damage control mode. As part of the damage assessment, Secretary Rumsfeld dispatched the Navy Inspector General, Vice Admiral Church,⁶⁵ to Guantanamo to evaluate the treatment of detainees there.⁶⁶ He visited Guantanamo from May 5 to May 7, 2004, and reported back to the Secretary and to the press that there was virtually no detainee abuse at Guanta-

60. One detainee, David Hicks, did agree to a plea agreement with the Convening Authority whereby he pled guilty to providing material support to terrorism in exchange for a nine-month sentence. He was sentenced on April 2, 2007 and returned to Australia on May 19, 2007 as part of an agreement with the Australian government to serve out the remainder of his sentence. See, e.g., Rohan Sullivan, *Ex-Guantanamo Inmate Released; David Hicks, Caught with Taliban in 2001, Is Freed in Australia*, WASH. POST, Dec. 29, 2007, at A14.

61. Military Commissions Act, 10 U.S.C. § 9491(2)(c)(1) (2006) (“[T]he accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt.”).

62. DEP’T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION (1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>.

63. James R. Schlesinger, former Secretary of Defense, served as Chairman of a panel charged with reviewing Department of Defense detention operations. INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS 11 (2002) (Homeland Security Digital Library).

64. *60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast Apr. 28, 2004).

65. Vice Admiral Albert T. Church, III, USN, Ret. Vice Admiral Church later conducted “a comprehensive review of Department of Defense (DoD) interrogation operations” and authored a report known as the Church Report. Large portions of the report remain classified. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (2008) (Homeland Security Digital Library).

66. See Donald Rumsfeld, *Secretary of Defense, Pentagon Press Briefing Regarding Detainee Treatment in Guantanamo* (CNN television broadcast May 4, 2004).

namo, and that everything was in order.⁶⁷ General Hood was running a tight ship. Detainees received great treatment. Incredibly, the very day that Admiral Church was investigating conditions at Guantanamo and finding the treatment of detainees to be so wonderful, detention officials at Guantanamo ordered the initiation of the frequent flyer program on Mohammed Jawad. Before the wheels of Admiral Church's plane were even off the Guantanamo runway, Mohammed Jawad's arms and legs were being shackled in preparation for the first of 112 moves up and down the hall of L Block, every 3 hours for the next 14 days.⁶⁸ While Mr. Jawad was being shackled for the first of these moves, back on Capitol Hill, Secretary of Defense Rumsfeld was testifying before the Senate and House Armed Services Committees, reassuring the nation that the abuse at Abu Ghraib was isolated to a few rogue guards. When Secretary Rumsfeld testified before the HASC on May 7, 2004, the day the torture of Mohammed Jawad commenced, he told Congress, in reference to those detainees who had been abused at Abu Ghraib, "I am seeking a way to provide appropriate compensation to those detainees who suffered such grievous and brutal abuse and cruelty at the hands of a few members of the U.S. military. It is the right thing to do."⁶⁹ Today, the government takes a decidedly different tack. They deny the suffering of Mr. Jawad, accusing him of being weak.⁷⁰ And they are attempting to reward him by pressing forward with the first war crimes trial against a child soldier in the history of the civilized world.⁷¹

67. See, e.g., Josh White and R. Jeffrey Smith, *Abuse Review Exonerates Policy; Low-Level Leaders and Confusion Blamed*, WASH. POST, Mar. 10, 2005, at A16.

68. The source of the information regarding the frequent flyer treatment of Mohammed Jawad is a Detainee Information Management System (DIMS) report provided to me by the Office of Military Commissions—Prosecution in discovery. The prosecution conceded at the June 19, 2008 hearing that Mr. Jawad was subjected to this program. See Josh White, *Detainee's Attorney Seeks Dismissal Over Abuse*, WASH. POST, June 8, 2008, at A4 ("Col. Lawrence Morris, the military commissions' chief prosecutor, said yesterday that the government acknowledges that Jawad was subject to some form of the frequent-flyer treatment.").

69. *Operations and Reconstruction Efforts in Iraq: Hearing Before the H. Comm. on Armed Services*, 108th Cong. 290 (2004) (statement of Donald Rumsfeld, Sec'y of Def.); see also *Mistreatment of Iraqi Prisoners: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004) (statement of Donald Rumsfeld, Sec'y of Def.).

70. The trial counsel, cross-examining Mr. Jawad, asked him the following question: "So today you want to tell everybody that you are a weak man?" Draft Transcript of June 19, 2008 Hearing at 219, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed Oct. 9, 2007) (on file with author).

71. The prosecution disputes this point, asserting that after World War II, a British Military Court tried a fifteen-year-old for war crimes and sent him to prison, and that the Permanent Military Tribunal at Metz exercised jurisdiction over a sixteen-year-old German school girl and tried her as a "war criminal." Government Response to Defense Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to R.M.C. 907(b)(1)(A) (Child Soldier), *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed June 24, 2008) available at <http://www.defenselink.mil/news/Jawad%20-%20D%20-%200012%20Motion%20to%20Dismiss%20Child%20Soldier.pdf>, at 55. No citations to these cases were provided by the government. However, I found the cases and found that the government's assertions were misleading. See Defense Reply to Government Response to Motion to Dismiss for Lack of Personal Jurisdiction R.M.C. 907(b)(1)(A), attach. 1 at 2, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed July 2, 2008), available at <http://www.defenselink.mil/news/Jawad%20-%20D%20-%200012%20Motion%20>

Major General Hood, the JTF-GTMO Commander who took command in March 2004, states that he ordered the frequent flyer program stopped in late March 2004.⁷² He says he did not authorize and would not have authorized the program to be administered to Mohammed Jawad. General James T. Hill, the SOUTHCOM Commander,⁷³ the person to whom Major General Hood reported directly, states that he did not authorize the frequent flyer program, did not know about it, and that it was contrary to his orders which required prior approval for sleep deprivation and limited it to four days.⁷⁴ The Joint Detention Group Commander, Major General Cannon,⁷⁵ disavows any knowledge of Mr. Jawad's treatment.⁷⁶ In fact, Major General Cannon seems to have developed a very convenient case of amnesia. The Joint Intelligence Group Director, Esteban Rodriguez,⁷⁷ doesn't know about Jawad's treatment specifically, but states that there was a second, unauthorized frequent flyer program carried out by the Joint Detention Group used as a form of disciplinary measure. He said, as did Major General Hood, that there was no special effort to collect intelligence from Mr. Jawad, that he was not believed to possess any valuable intelligence.⁷⁸ This is borne out by the fact, at least based on the information provided to me by the government, that no interrogations of Mr. Jawad took place at or near the time that he was being tortured. Thus, the most likely scenario is that they simply decided to torture Mr. Jawad for sport, to teach him a lesson, perhaps to make an example of him to others. Whatever the reason, it was

to%20Dismiss%20Child%20Soldier.pdf, at 8385. In my view, the starting point for the modern law of war is the Geneva Conventions of 1949.

72. I interviewed Major General Jay W. Hood on June 12, 2008. Major General Hood, then Brigadier General, was Commander of Joint Task Force Guantanamo (JTF-GTMO) from late March 2004 to 2005. Based on this interview, attended by a member of the prosecution, both sides stipulated to Major General Hood's expected testimony. Interview with Jay W. Hood, Major General and former Commander of Joint Task Force Guantanamo (June 12, 2008).

73. U.S. Southern Command. JTF-GTMO reported directly to SOUTHCOM.

74. General Hill's order on interrogation techniques, dated June 2, 2003, is still classified. However, the portion referencing sleep deprivation has been publicly released. The order stated: "I define 'sleep deprivation,' referenced in Technique V, as keeping a detainee awake for more than 16 hrs, or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession." DEP'T OF THE ARMY, ARMY REGULATION 15-6: FINAL REPORT, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY (2005), available at <http://www1.umn.edu/humanrts/OathBetrayed/Schmidt-Furlow%20Report.pdf>. The prosecution and defense stipulated to General Hill's testimony based on an e-mail message from him.

75. Major General Nelson G. Cannon, U.S. Army National Guard, then Colonel Cannon, was Commander, Joint Detention Operation Group, at JTF-GTMO from July 2003 to August 2004.

76. E-mail from Major General Nelson (Jerry) Cannon to Major David J.R. Frakt (June 15, 2008) (submitted as an appellate exhibit at the hearing and on file with the author). The prosecution and defense stipulated to the testimony of Major General Cannon.

77. Esteban (Steve) Rodriguez, of the Defense Intelligence Agency was Director of the Joint Intelligence Group, JTF-GTMO from July 17, 2003 to sometime in 2006. In this position, he was responsible for intelligence collection operations.

78. Interview with Esteban Rodriguez, Former Joint Intelligence Group Director (June 17, 2008). The prosecution and defense stipulated to Mr. Rodriguez's testimony.

a direct violation of Major General Hood's orders, and a grave breach of the Geneva Convention and the Convention against Torture.⁷⁹

According to Major General Hood, the first he learned of this is when I informed him a couple of weeks ago. He was provided the DIMS⁸⁰ report, the motion, and the spreadsheet⁸¹ that I prepared. What was his reaction? A resounding thud of indifference. In fact, it took an order from you, your honor, to even get him to talk to me about it. Here was a major general in the Army who has just learned that a detainee was subjected to grave abuse, on his watch, in direct violation of his orders. One would have expected him to go through the roof, to order heads to roll, to launch an immediate investigation—and he couldn't even be bothered. Quite a contrast from the way General Hartmann reacted when he thought his orders weren't being followed.⁸²

As for Major General Cannon, he was similarly apathetic, if not more so, about the plight of Mohammed Jawad. It is an absolute disgrace that this officer has been promoted twice after allowing a suicidal teenager to be subjected to this kind of abuse in his detention facility. It is my recommendation that charges be preferred against Major General Cannon under the UCMJ⁸³ for cruelty, maltreatment and abuse,⁸⁴ dereliction of duty,⁸⁵ and violation of a lawful order⁸⁶ at the earliest opportunity. He was the Commander of the Detention Group. He completely and utterly failed to prevent the flagrant abuse of a detainee under his protection. It is high time that someone in a position of authority be held accountable, and not just the guards who were carrying out orders this time.

Why was Mohammed Jawad tortured? Why did military officials choose a teenage boy who had attempted suicide in his cell less than five months

79. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

80. Detainee Information Management System, the official computerized recordkeeping system of detention operations at Guantanamo.

81. I prepared an Excel spreadsheet listing all of the known interrogations of Mohammed Jawad in U.S. custody, over fifty in all.

82. Brigadier General Thomas Hartmann, a U.S. Air Force Reserve JAG officer, was appointed the Legal Advisor to the Convening Authority for the Military Commissions on July 1, 2007. I had filed another motion to dismiss the charges based on the exertion of unlawful influence over the prosecution by Brig. Gen. Hartmann. Earlier in the day, the former Chief Prosecutor, Colonel Morris Davis, and the former Deputy and Acting Chief Prosecutor, Lieutenant Colonel William Britt, testified that they had received numerous "ass-chewings" for disobeying or disregarding orders and instructions from Brig. Gen. Hartmann. Brig. Gen. Hartmann also testified at the hearing and admitted that he had "expressed his displeasure" to Col. Davis and Lt. Col. Britt.

83. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2007).

84. *Id.* § 893 art. 93 ("Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.")

85. *Id.* § 892 art. 92 ("Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.")

86. *Id.*

earlier to be the subject of this sadistic sleep deprivation experiment? Not that anything would justify such treatment, of course, but at least in the case of the other detainees known to have been subjected to sleep deprivation, they were believed to possess critical intelligence that might save American lives. Unfortunately, we may never know. I've asked to speak to the guards who actually carried out the program, and I've been denied. In the absence of information to the contrary, which the government would surely provide if it existed, we are left to conclude that it was simply gratuitous cruelty.

The government admits that Mohammed Jawad was treated improperly but offers no remedy. We won't use any evidence derived from this maltreatment, they say, but they know that there was no evidence derived from it because the government didn't even bother to interrogate him after they tortured him. Exclusion of non-existent evidence is not a remedy. Dismissal is a severe sanction, but it is the only sanction that might conceivably deter such conduct in the future.

February 7, 2002. America lost a little of its greatness that day. We lost our position as the world's leading defender of human rights, as the champion of justice and fairness and the rule of law. But it is a testament to the continuing greatness of this nation, that I, a lowly Air Force Reserve Major, can stand here before you today, with the world watching, without fear of retribution, retaliation or reprisal, and speak truth to power. I can call a spade a spade, and I can call torture, torture.

Today, Your Honor, you have an opportunity to restore a bit of America's lost luster, to bring back some small measure of the greatness that was lost on February 7, 2002, to set us back on a path that leads to an America which once again stands at the forefront of the community of nations in the arena of human rights.

Sadly, this military commission has no power to do anything to the enablers of torture such as John Yoo, Jay Bybee, Robert Delahunty, Alberto Gonzales,⁸⁷ Douglas Feith,⁸⁸ David Addington,⁸⁹ William Haynes,⁹⁰ Vice President Cheney and Donald Rumsfeld, for the jurisdiction of military commissions is strictly and carefully limited to foreign war criminals, not the home-grown variety. All you can do is to try to send a message, a clear and unmistakable message that the U.S. really doesn't torture, and when we do, we own up to it, and we try to make it right.

I have provided you with legal authority for the proposition that you have the power to dismiss these charges.⁹¹ I can't stand before you and say

87. Former White House Counsel, later Attorney General of the United States.

88. Undersecretary of Defense for Policy from July 2001 to August 2005.

89. Chief of Staff and former legal counsel to Vice President Dick Cheney.

90. Department of Defense General Counsel from May 2001 to March 2008.

91. In the defense motion to dismiss, and in the defense reply to the government's response to the motion to dismiss, I cited dozens of cases that supported the view that the military judge had the authority to dismiss the charges based on the torture of the defendant while in U.S. custody. There

that you are legally required to do so. But I can say that that it is a moral imperative to do so, and I ask that you do so.

AFTERWORD

During the hearing, I made an unusual request. I informed the military judge that I did not feel that I had learned everything there was to know about the mistreatment of my client. I suggested that if he felt that I had provided him enough evidence upon which to rule in the defense's favor and dismiss the charges, then he should do so. But if he were not yet convinced that dismissal was warranted, I requested that I be given the opportunity to supplement the record as I acquired additional discovery. The judge did not specifically answer this question, but since he didn't deny the request, I took it as a "yes." After the June 19 hearing, I was provided substantial additional evidence of the mistreatment and torture of Mohammed Jawad, including physical beatings at Bagram Prison in Afghanistan, where Mr. Jawad was held from December 18, 2002 to February 6, 2003 before transfer to Guantanamo. I also was provided records showing that Mr. Jawad was placed in isolation for two thirty-day periods. The first period of solitary confinement was standard practice for all new arrivals at Guantanamo and occurred from February 7, 2003 to March 8, 2003. Mr. Jawad was likely sixteen or seventeen at the time.⁹² The next period of isolation was ordered by intelligence officials upon the recommendation of the Behavioral Science Consultation Team psychologist to socially, physically and linguistically isolate this teenage boy in order to create complete dependence on his interrogator. This period of segregation occurred from September 17 to October 16, 2003 and was specifically intended to break Mr. Jawad and to devastate him emotionally.⁹³ The isolation failed in its purpose of persuading Mr. Jawad to admit throwing the hand grenade; he continued to assert his innocence. But it did have the other desired effect of causing emotional devastation. Prison records indicate that he tried to commit suicide on December 25, 2003. The last incident of abuse occurred

were two primary lines of authority for this premise. The first line of authority was derived from military cases. The Court of Appeals for the Armed Forces, the highest military court, has stated that charges can be dismissed in an appropriate case for "illegal pretrial punishment" which encompasses unduly harsh conditions of confinement. *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001). The other line of authority was derived from the constitutional due process doctrine of outrageous government conduct or "conduct that shocks the conscience" derived from *Rochin v. California*, 342 U.S. 165, 172 (1952). See Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed May 28, 2008), available at <http://www.defense.gov/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf>.

92. No record of his birth exists.

93. This document is classified and therefore not available. See Defense Fifth Supplemental Filing in Support of D-008 Motion to Dismiss, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed Aug. 6, 2008) (on file with author) (describing the contents of the Behavioral Science Consultation Team's recommendations).

in June 2003, when Mr. Jawad was beaten and pepper-sprayed by prison guards.

In all, I filed seven supplemental motions to the motion to dismiss for torture and other outrageous conduct between June 23, 2008 and August 6, 2008. Additional testimony on these supplemental motions was presented at the next hearing on August 13 and 14, 2008. The judge announced at the conclusion of the hearing that he intended to issue a ruling on the motion prior to the next hearing, scheduled for September 25, 2008. On September 24, 2008, the military judge issued his ruling. Although he did not dismiss the charges, finding “that the remedy sought by the defense is not warranted under the circumstances,”⁹⁴ the ruling was nonetheless a significant victory for the defense and for the rule of law.

The military judge made a number of noteworthy findings of fact and conclusions of law. First, the judge was sharply critical of the “frequent flyer” program, finding that “under the circumstances, subjecting this Accused to the ‘frequent flyer’ program from May 7–20, 2004 constitutes abusive conduct and cruel and inhuman treatment” and stating that “[t]hose responsible should face appropriate disciplinary action, if warranted under the circumstances” for their “flagrant misbehavior.”⁹⁵ Judge Henley came close to holding that the U.S. had tortured Mohammed Jawad, finding specifically that “the scheme was calculated to profoundly disrupt his mental senses.”⁹⁶ This language is nearly identical to one of the definitions of psychological torture under federal law.⁹⁷ Ultimately, Judge Henley found that it was not necessary to determine whether Mohammed Jawad had been tortured:

[T]he narrow issue before this Military Commission is whether dismissal of the charges against this Accused is appropriate for the conduct of an apparent few government agents. Answering this question does not require the Military Commission to decide as fact that this Accused was tortured. Assuming, but not deciding, that the government’s actions against this Accused produced the pain and suffering of the requisite physical and/or mental intensity and of such duration to rise to the level of “torture,”

94. Ruling on Defense Motion to Dismiss—Torture of the Detainee ¶ 13, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed Sept. 24, 2008), available at <http://www.defenselink.mil/news/Ruling%20D-008.pdf>.

95. *Id.* ¶ 12. Torture of a detainee is a war crime and a grave breach of the Geneva Convention Common Article 3. See United States War Crimes Act, 18 U.S.C. § 2441(d)(1)(A) (2006).

96. *Id.* ¶ 5.

97. See 18 U.S.C. § 2340(2) (2004) (defining psychological torture as “severe mental pain or suffering,” including “the administration or application . . . of . . . procedures calculated to disrupt profoundly the senses or the personality”).

this Military Commission finds that the remedy sought by the defense is not warranted under the circumstances.⁹⁸

Perhaps the most important legal conclusion in the opinion was this statement: “It is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused.”⁹⁹ Judge Henley cited *United States v. Fulton*¹⁰⁰ for this proposition, thereby fully endorsing the defense theory that dismissal was an available remedy, which the government had vigorously disputed. This holding opens the door for other detainees who have been abused even more severely than Mr. Jawad to seek dismissal of the charges against them. For example, many of the so-called “high value” detainees, such as the alleged 9/11 co-conspirators, were held in secret CIA “ghost prisons” prior to transfer to Guantanamo, where they are believed to have suffered severe abuse, including waterboarding and other aggressive interrogation techniques.

Ultimately, Judge Henley did not provide any specific remedy for the abuse he found Mr. Jawad to have experienced, but he indicated that he would tailor an appropriate remedy at a later time:

[W]hen other remedies are available to adequately address the wrong, dismissal should be the last of an escalating list of options. Here, the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including, but not limited to, sentence credit towards any approved period of confinement, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial. The Military Commission will rule upon the appropriate application of these, and other proposed remedies, as dictated by developments in this case.¹⁰¹

On September 25 and 26, the Commission held a suppression hearing in Mr. Jawad’s case at which additional evidence of abusive treatment was introduced. Judge Henley later ruled explicitly that self-incriminating statements attributed to Mr. Jawad had been obtained by torture, and he suppressed the statements.¹⁰² This torture, however, was at the hands of

98. Ruling on Defense Motion to Dismiss—Torture of the Detainee ¶ 13, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed Sept. 24, 2008), available at <http://www.defenselink.mil/news/Ruling%20D-008.pdf>.

99. *Id.* ¶ 14.

100. *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001). I cited *Fulton* in my original motion to dismiss. See *supra* note 22 and accompanying text.

101. Ruling on Defense Motion to Dismiss—Torture of the Detainee ¶ 14, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed Sept. 24, 2008), available at <http://www.defenselink.mil/news/Ruling%20D-008.pdf>.

102. Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities, (Military Comm’n, Guantanamo Bay, Cuba filed Oct. 28, 2008), available at <http://www.defenselink.mil/news/d20081104JawadD022Suppress.pdf>.

Afghan authorities, who arrested Mr. Jawad and interrogated him for several hours before turning him over to U.S. authorities. Judge Henley also suppressed statements made to U.S. interrogators in Kabul on the day that Mr. Jawad was arrested, finding that they were “tainted” by death threats made by the Afghan authorities just hours earlier.¹⁰³ On September 24, Judge Henley also issued a ruling on another motion to dismiss that I filed (for lack of subject matter jurisdiction), which cast doubt on the government’s ability to successfully prosecute Mr. Jawad.¹⁰⁴ In that ruling, Judge Henley found that there was no “persuasive authority” to support the prosecution’s theory of the case on one of the elements of the charged offense of “attempted murder in violation of the law of war.”¹⁰⁵ During the September 25–26 session, Judge Henley advised the government that if they did not have additional evidence to support this element, they had an ethical obligation to dismiss the charge voluntarily. In October, the prosecution filed a motion requesting reconsideration of this ruling.¹⁰⁶ The motion was denied on October 29, 2008.¹⁰⁷ These rulings have substantially decreased the likelihood that Mr. Jawad will be convicted of any offense. In late November, the government filed a notice of intent to appeal Judge Henley’s second suppression ruling. He issued a stay of proceedings pending the outcome of the appeal at the Court of Military Commission Review. The trial of Mr. Jawad, originally scheduled to commence January 5, 2009, has been postponed indefinitely.

103. Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused while in U.S. Custody (Military Comm’n, Guantanamo Bay, Cuba filed Nov. 19, 2008) (on file with author).

104. Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba filed Sept. 24, 2008), available at [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).

105. *Id.* ¶ 4 (“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 propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused.”).

106. Government Motion for Reconsideration, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba, filed Oct. 9, 2008), available at <http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf>.

107. Ruling on Government Motion for Reconsideration, *Jawad* (Military Comm’n, Guantanamo Bay, Cuba, filed Oct. 29, 2008), available at <http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf> at 28.