Mohammed Jawad and the Failure of the Guantanamo Military Commissions

David J Frakt
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By David J. R. Frakt

Abstract

In order to justify outrageous treatment of detainees at Guantanamo during the early years of the “Global War on Terror” it was necessary to portray the detainees as hardened terrorist criminals. But it was not enough to simply label them as such; the Bush Administration knew that in order to maintain popular support for their detention policies, they would have to convict a critical mass of the detainees in some sort of legal proceedings.

The problem for the Bush Administration was that few of the detainees were actually involved in any terrorist criminal activity. Fewer still had committed any offenses that might be considered traditional war crimes. And to the extent that there was evidence linking some detainees to criminal activity, much of that evidence was in the form of coerced confessions and highly unreliable hearsay statements (such as raw, unverified, and sometimes unattributed intelligence reports), none of which would be admissible in a normal court of law.

The solution for the Bush Administration was simple - abandon the traditional American concept of the rule of law. In order to convict a significant number of detainees at Guantanamo, it was necessary to create a legal scheme that would allow detainees to be charged with invented war crimes based simply on fighting against the U.S. or being loosely associated with the Taliban or Al Qaeda, and to permit the prosecution to prove these and any other alleged crimes with coerced or otherwise unreliable evidence. That is what President Bush created with his Executive Order of November 2001 authorizing military

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2 Professor Frakt is a Lieutenant Colonel in the U.S. Air Force Judge Advocate General’s Corps Reserve. He served as Lead Defense Counsel, Office of the Chief Defense Counsel, Office of Military Commissions from April 2008 to August 2009. The views expressed herein are the author’s, and do not reflect the views of the Air Force, the Office of Military Commissions, or the Department of Defense.
commissions. By the barest of margins, the Supreme Court refused to endorse his legal scheme, finding that he had overreached his authority.

Thus, President Bush was forced to turn to Congress for authorization. The problem, however, remained the same – to convict a significant number of detainees, it was still necessary to have the authority to charge them with invented war crimes and to use tainted and unreliable evidence. In other words, it was obligatory that the worst features of the original military commissions be preserved under the guise of a new statutory formulation. With the help of Senators John McCain and Lindsey Graham, the Administration was able to get exactly what it wanted, a legislatively approved military commissions scheme, the Military Commissions Act of 2006 (MCA) which retained these two central features. These features were enhanced by the implementing regulations adopted by the Secretary of Defense, known as the Manual for Military Commissions (MMC).

The military commission of U.S. v. Mohammed Jawad, (in which I served as lead defense counsel) perhaps more clearly than any other case demonstrated that the government was relying on its ability to use coerced evidence to earn convictions, even for invented war crimes. In this notorious case, which the New York Times called “emblematic of everything that is wrong with Guantanamo Bay” the prosecution repeatedly took extreme and unsupported positions in litigation before the commission in an effort to preserve its ability to use coerced evidence and to convict detainees for non-existent war crimes. Even with all the advantages afforded to the government by the MCA and MMC, the prosecution was unable to make its case against Mr. Jawad and was ultimately forced to dismiss the charges and release him when a federal judge granted his petition for a writ of habeas corpus. Through the story of Mohammed Jawad and the disintegration of the case against him we can see the larger narrative of the abject failure of the military commissions of the Bush Administration.

Introduction:

The Obama Administration’s decision to seek to amend the Military Commissions Act of 2006 rather than repeal it, which might be called the “mend it, don’t end

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it” approach, has been tremendously controversial, with many Obama supporters considering the decision to be an abandonment of a campaign pledge. Despite the President’s marked preference to look forward rather than look backwards, as we embark on yet another round of military commissions for detainees at Guantanamo, I think it is useful to look back at the previous attempts at military commissions to determine where, when, and why they went wrong.

Although there is disagreement about many aspects of the Bush Administration’s legal strategy in the war on terror, one point on which all sides should agree is that the military commissions failed to achieve their intended purpose. After more than seven years of effort, hundreds of millions of dollars spent, and the involvement of many of the best and brightest lawyers in the Armed Forces and Department of Justice, the military commissions yielded only three convictions, all of relatively minor figures. Not a single terrorist responsible for the planning or execution of a terrorist attack against the United States was convicted. Two of the convicted, David Hicks and Salim Hamdan, received sentences of less than one year and were subsequently released. The third trial, of my client Mr. al Bahlul, although yielding a life sentence, was far from a triumph for the military commissions. There were several problematic aspects of this trial, not the least of which was the fact that several members of Mr. Hicks’ jury were actually recycled for this military commission. More disturbing was the denial of Mr. al

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4 Remarks by the President on National Security, National Archives, Washington D.C., May 21, 2009 “For over seven years, we have detained hundreds of people at Guantanamo. During that time, the system of military commissions that were in place at Guantanamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over seven years.” http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/


Bahlul’s statutory right of self-representation. Mr. al Bahlul, a low-level Al Qaeda media specialist, wanted to represent himself before the military commissions and this request was granted by the military judge at the arraignment, Army Colonel Peter Brownback. Soon thereafter, Col. Brownback was involuntarily retired from the Army and replaced. The new judge revoked Mr. al Bahlul’s pro se status, although he knew that Mr. al Bahlul had refused to authorize me, his appointed military defense counsel, to represent him. As a result, there was no defense presented; Mr. al Bahlul was convicted of all charges and received the maximum life sentence. His conviction is currently on appeal.

Why, with the resources of the Department of Defense, the Justice Department and the national intelligence apparatus at their disposal, were the military commissions such an abysmal failure? The answer is simple: the military commissions were built on a foundation of legal distortions and outright illegality. The rules, procedures and substantive law created for the commissions were the product of, or were necessitated by, the wholesale abandonment and perversion of the rule of law by the Bush Administration in the months after 9/11. Thankfully, in the United States of America a legal scheme with such dubious underpinnings was ultimately doomed to fail. Perhaps no case is more illustrative of this than that of Mohammed Jawad, whom I represented from April 2008 until his release in August 2009.

In a nutshell, the commissions failed because they were built upon a foundation of major distortions, if not outright abandonment, of the law of war and the legally accepted rules of evidence. To ensure that a significant number of those labeled as war on terror adversaries would be convicted, the drafters of the original military commission rules and procedures understood that the traditional laws, rules and procedures that apply in criminal cases could not be used;

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8 Carol Williams, Judge critical of war crimes case is ousted, Los Angeles Times, May 31, 2008.

instead, they invented new war crimes and then allowed the government to rely on coerced statements and unreliable hearsay to prove that these crimes had been committed. When the Presidentially-created commissions which resulted from this approach were invalidated, many of the critical flaws of this legal scheme were incorporated into legislation in the Military Commissions Act of 2006. The implementing regulations prepared by the Secretary of Defense, exacerbated problems rather than ameliorating them. The procedures adopted heavily favored the government but even with the considerable advantages afforded to them by the legislation and regulations the actual procedures utilized went even further in created a one-sided system. Military prosecutors took extreme and frequently untenable legal positions in their interpretations of the statute and rules in order to advance the prosecution effort and hamper the defense. Ultimately, all of these efforts backfired. Military defense counsel refused to let their clients be railroaded. Military judges showed an admirable independence and reverence for the rule of law. Ethical prosecutors resigned rather than compromise their professional integrity. As a result, military commissions never really got off the ground, and President Bush left office with only Mr. al Bahlul still in custody as a convicted unlawful combatant.

In this article, I analyze why the military commissions were such a catastrophic failure. I argue that the reasons for the failure followed inexorably from decisions made very early in the wake of 9/11 to abandon the rule of law. I demonstrate this theory through an analysis of one of the most notorious failures in the military commission, the case of Mohammed Jawad.

I. Back Story

On August 22, 2009, a military transport plane left Guantanamo Bay, Cuba headed for Bagram Air Base, Afghanistan. On board was my client, Mohammed Jawad, a young Afghan detainee. It was the return leg of a round-trip flight with a very long layover -- over six and a half years. On August 24, Mr. Jawad was reunited with his family in Kabul. Mr. Jawad’s release was the result of an

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10 Mr. Jawad was transferred to Guantanamo from Bagram on February, 6, 2003, after being held at Bagram prison in Afghanistan for 49 days.
extended legal battle which culminated in a July 30, 2009 order by Federal District Court Judge Ellen Segal Huvelle granting Mr. Jawad’s petition for a writ of habeas corpus.\textsuperscript{11} Although Mr. Jawad was not the first Guantanamo detainee to win a habeas corpus petition,\textsuperscript{12} his case was particularly noteworthy because, unlike the other detainees who had previously won release in Federal Court, Mr. Jawad had charges pending in the military commissions. In fact, twenty months earlier, on January 30, 2008, Mr. Jawad became just the fourth detainee to have charges sworn against him\textsuperscript{13} referred to trial by military commission under the Military Commissions Act of 2006.\textsuperscript{14} Ten months after that, in September 2008, the Convening Authority, Susan Crawford, had reaffirmed her decision to refer the case to trial by military commission even though the military judge presiding over the case took the highly unusual step of ordering her to reconsider her original referral decision.\textsuperscript{15} At one point, the case was actually scheduled for trial in December 2008. After a series of setbacks for the government it was rescheduled for January 2009, then stayed indefinitely pending an interlocutory appeal. Further postponements ensued after President Obama assumed office. The charges were ultimately dismissed on July 31, 2009, the day after the writ was granted.\textsuperscript{16}

\textsuperscript{11}Order, Al Haimandy v. Obama (July 30, 2009)

\textsuperscript{12}At the time of this writing, 32 of 41 detainees who have had their petitions decided on the merits have been granted the writ. Habeas corpus scorecard, Miami Herald online, December 27, 2009 http://www.miamiherald.com/guantanamo/


\textsuperscript{15}U.S. v. Jawad, RULING ON MOTION TO DISMISS – UNLAWFUL INFLUENCE (D-004) 1 MC 322, 326, (2008)

The case of Mohammed Jawad has been aptly described as “emblematic of everything that is wrong with Guantanamo.” The spectacular implosion of this case is a useful starting point to understand the broader reasons the military commissions failed.

Before delving into the specifics of the Jawad case, it is important to review the events in the years preceding the litigation. Reviewing the origins of the military commissions, a clear picture emerges of an intentional disregard for existing legal norms. Perhaps the first public indication that the rule of law was to be abandoned was in President Bush’s Military Order of November 13, 2001. In this document, President Bush found: “it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” In other words, what we consider essential for a fair trial for us would not be required for them. How did President Bush know, two months after 9/11, before a single major terrorist suspect had been captured, and before a single prosecutor had reviewed a single piece of evidence, that it would be impracticable to prosecute terrorism cases using existing rules and procedures? Why was he ready to abandon the “principles of law” that we have relied upon to try criminals for over two centuries? Perhaps it was because, “(o)n September 17, 2001, just six days after the terrorist attacks in New York and Washington, DC, President Bush signed a directive authorizing the CIA to set up and run secret

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17 The Price of America’s Good Name, NY TIMES, October 23, 2008.


19 President Bush specifically said that his finding of impracticability was “consistent with section 836 of title 10, United States Code” and used language derived from this code section, Article 36 of the Uniform Code of Military Justice 10 U.S.C. § 836a (2000), as it then existed. This provision authorized the President to prescribe rules and procedures for military commissions and other military tribunals, but required that such regulations, “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” “so far as he considers practicable.” The clear import of the language was that where there were significant practicability concerns, the President could authorize specific deviations from the normal background rules and procedures. President Bush simply decided that it would be impracticable to apply any of the principles of law and rules of evidence generally recognized in American criminal courts. This “wholesale jettisoning of procedural protections” was later invalidated by the Supreme Court in Hamdan v. Rumsfeld. 548 U.S. 557 at __ (2006)
prisons outside the United States.”20 “According to accounts by three former intelligence officials, the C.I.A. understood that the legal foundation for its role had been spelled out in a sweeping classified directive signed by the President on that date. The directive, known as a memorandum of notification, authorized the C.I.A. for the first time to capture, detain and interrogate terrorism suspects, providing the foundation for what became its secret prison system.” 21 If President Bush and his legal advisers knew that detainees brought to these illegal secret prisons would also be subjected to illegal harsh interrogations, and if they wanted to keep these ghost prisons and the methods they used secret, then his determination of impracticability starts to make sense. To the extent that his finding of impracticability was unsupported at the time, President Bush and his senior advisors made a series of additional decisions in the ensuing months which ensured that it would indeed be impracticable to apply the ordinary rules and procedures, at least if the desired outcome was a conviction.

Another major step in the abandonment of the rule of law came on February 7, 2002, when President Bush issued another order,22 this time announcing that the Geneva Conventions would not apply to those detained in the War on Terror, who were labeled with the new and misleading term “unlawful enemy combatants.”23 The President concluded that not only were such persons not entitled to be treated as prisoners of war, but also that they were not even legally entitled to be treated humanely.24 With a stroke of the pen, the President wiped out the principle source of the law of war and the entire existing legal


23 Interestingly, one of the first clear shifts in detainee policy by the Obama Administration was the abandonment of the term “unlawful enemy combatants” and the substitution of the term “unprivileged belligerents” in public comments and in habeas corpus litigation. The term “unprivileged belligerents” was also substituted in the MCA of 2009.

24 Id. “(O)ur values as a nation. . .call for us to treat detainees humanely, including those who are not legally entitled to such treatment.”
framework for the treatment of persons captured in an armed conflict and replaced it with a policy preference for humane treatment, which could be readily discarded whenever it interfered with military or intelligence operations. The decision that humane treatment was not required created confusion about what was permissible and cleared the way for the approval of a vast array of patently illegal and highly coercive “enhanced interrogation techniques” to be employed upon the detainees.

The abandonment of the rule of law was compounded by the decision to house the “unlawful enemy combatants” at Guantanamo Bay, Cuba, and to turn the detention facilities there into a legal black hole, a place where detainees were not even entitled to be informed of the basis for their detention, much less challenge it. Indeed, the Bush Administration, aided and abetted by Congress, made a determined (and for several years, successful) effort to prevent detainees from gaining access to courts or legal representation. In an environment with no judicial oversight or meaningful avenues for redress, the detainees were simply at the mercy of their captors -- and the captors were not in a merciful mood. The extraordinary pressure to produce “actionable intelligence” coupled with the vengeful mood of the times led inexorably to shameful abuses of detainees.

In 2002 and 2003, as Bush Administration officials drafted the rules for the President’s military tribunals, they were aware that despite the hyperbole of Secretary Rumsfeld that the detainees represented “the worst of the worst,” a


26 President’s Memo, supra note 21 “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.” (emphasis added).


Significant majority of the detainees had no strong connection with Al Qaeda, and even fewer had any provable role in any terrorist attack, a conclusion that officials of both the Bush Administration and Obama Administration have now publicly acknowledged. Many of the detainees were completely innocent.

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30 Mark Denbeaux, REPORT ON GUANTANAMO DETAINEES: A Profile of 517 Detainees through Analysis of Department of Defense Data, http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf “Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.” “Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all. . . a large majority – 60% -- are detained merely because they are “associated with” a group or groups the Government asserts are terrorist organizations.”

31 For example, Colonel Lawrence Wilkinson, the Chief of Staff to Secretary of State Colin Powell, has written:

“There are several dimensions to the debate over the U.S. prison facilities at Guantanamo Bay, Cuba that the media have largely missed and, thus, of which the American people are almost completely unaware. For that matter, few within the government who were not directly involved are aware either. . .

The first of these is the utter incompetence of the battlefield vetting in Afghanistan during the early stages of the U.S. operations there. Simply stated, no meaningful attempt at discrimination was made in-country by competent officials, civilian or military, as to who we were transporting to Cuba for detention and interrogation. . .

The second dimension that is largely unreported is that several in the U.S. leadership became aware of this lack of proper vetting very early on and, thus, of the reality that many of the detainees were innocent of any substantial wrongdoing, had little intelligence value, and should be immediately released. But to have admitted this reality would have been a black mark on their leadership from virtually day one of the so-called Global War on Terror and these leaders already had black marks enough. . . . They were not about to admit to their further errors at Guantanamo Bay. Better to claim that everyone there was a hardcore terrorist, was of enduring intelligence value, and would return to jihad if released.”


32 BBC Interview by Jan Manel with Ambassador Daniel Fried, special envoy for the closure of Guantanamo, September 16, 2009

Daniel Fried: The detainees in Guantánamo run a spectrum. Some really are awful. Some qualify as “the worst of the worst,” and we’re going to put those on trial. Some, frankly, should not have been in Guantánamo for the past seven years.

Jon Manel: So they were innocent?

Daniel Fried: Innocent, guilt(sic) . . . I look at their files and some of them seem relatively benign, and I have in mind the Uighurs, in particular, but others . . .

Jon Manel: They’re the minority from China . . .

Daniel Fried: That’s right, the Uighur minority from China, but if I had to describe — if there’s such a thing as an average Guantánamo detainee, it’s someone who was a volunteer, a low-level trainee or a very low-level fighter in a very bad cause, but not a hardened terrorist, not an organizer.

Available at: http://news.bbc.co.uk/2/hi/americas/8260081.stm

President Obama himself made similar comments: “[y]ou’ve got a whole bunch of individuals in Guantánamo, some of whom are very dangerous, some of whom were low-level fighters, some of whom
of any wrongdoing, and had been turned in for bounty, or were captured simply because they were in the wrong place at the wrong time.\(^{33}\) \(^{34}\) Indeed, when the government’s evidence has been tested in court in habeas corpus litigation (a right that the Bush Administration vehemently fought against recognizing), the government has failed to meet a preponderance of the evidence standard to legally detain three quarters of the time.\(^{35}\) The detainees who had been around long enough to have their petitions heard were

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\(^{33}\) Mark Denbeaux, REPORT ON GUANTANAMO DETAINEEs: A Profile of 517 Detainees through Analysis of Department of Defense Data, http://law.shu.edu/publications/guantanamoreports/guantanamo_report_final_2_08_06.pdf

\(^{34}\) Approximately 560, or over two thirds of the approximately 774 detainees to pass through Guantanamo, were voluntarily released by the Bush Administration, with dozens more cleared for release and waiting for a country to take them in when President Obama took office. After a year-long review of the remaining detainees, two-thirds of those left, allegedly the worst of the worst, were also cleared for release. Officials seriously contemplated charging only about 10% of the Guantanamo detainees.

\(^{35}\) Habeas scorecard 33/44 Miami Herald
presumably those whom the government considered it had the strongest basis to detain.36

The worst that could be said about many of the detainees was that they had fought against the U.S. and Coalition forces that had invaded Afghanistan, conduct which had not previously been considered a war crime. A small group of those captured were likely guilty of terrorism crimes, but not crimes of war. To the extent that there was any evidence of criminal acts by some of the detainees, much, if not most, of this evidence had been developed through highly coercive interrogations, or through other sources of questionable reliability, and would probably not be admissible in a regular court of law.

The drafters of the original military commission rules37 resolved each of these problems by rewriting the law. First, the rules of evidence were rewritten to allow the introduction of coerced statements and to eliminate the rules barring the fruits of torture and abuse. The rule of evidence for the original military commissions was very simple:

Evidence shall be admitted if, in the opinion of the Presiding Officer38 (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.39

36 It should be noted that all of the detainees ordered released by federal judges were determined to be detainable by Combatant Status Review Tribunals. Clearly, the Supreme Court was correct when it found CSRTs to be an inadequate substitute for habeas corpus. Boumediene v. Bush CITE


38 The Presiding Officer was required to be a judge advocate (military lawyer) but was not required to be a judge or have any training as a judge. In practice, military judges were appointed as Presiding Officers. However, the Presiding Officer’s judgment could be overruled by a majority of the other officers on the commission.

39 Note 33, supra MCO1, Para 6D1
The rules also allowed witnesses to give unsworn testimony and to use “any methods appropriate for the protection of witnesses and evidence.” Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.”

Finally, the rules provided wide latitude to admit hearsay, in various forms:

the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.


Second, the laws of war were rewritten to add terrorism crimes and to create a number of previously unknown war crimes. The most egregious examples were the invented crimes “Murder by an Unprivileged Belligerent,” and “Destruction of Property by an Unprivileged Belligerent” which appeared in the original commission’s list of offenses. These provisions made killing U.S. soldiers, destroying military property, or attempting to do so, war crimes. In other words, the U.S. declared that it was a war crime to fight back, even if the fighters complied with the law of war. These crimes are discussed in greater detail in Section II.

After protracted litigation, the original military commissions were invalidated by the Supreme Court in Hamdan v. Rumsfeld in the summer of 2006 before anyone was convicted. With nearly five years wasted, there was a great rush to put a new legal system in place. The Bush Administration pushed hard for legislation authorizing military commissions closely resembling those it had already created.

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Within months, “new and improved” military commissions were authorized by Congress through the Military Commissions Act of 2006 (MCA). While these legislatively created commissions were undoubtedly an improvement in some respects over those created by Presidential decree, the hastily drafted and poorly considered MCA still incorporated some of the key distortions and departures from the rule of law featured in the invalidated version. Most disturbingly, Congress retained the rules (with minor variations) that permitted coerced evidence to be introduced. Congress also retained the full list of war crimes (again with minor variations), including the invented ones, and even added new ones, such as the flexible catch-all “material support to terrorism.” The Obama Administration has now acknowledged that material support is not a traditional war crime, calling into question all three of the convictions thus far attained. (Mr. Hicks, Mr. Hamdan and Mr. al Bahlul were all convicted of material support. For Mr. Hicks and Mr. Hamdan, it was the only crime of which they were convicted.) Although the military commissions were purportedly modeled on the Uniform Code of Military Justice, the best features of that system, such as the robust pretrial investigation required by Article 32 of the Uniform Code of Military Justice (UCMJ) and equal access to evidence and witnesses, were removed or weakened. The implementing regulations produced by the Secretary of Defense, which could have corrected or

44 Cite
For example, the new commissions required a military judge to preside over the proceedings and provided more meaningful appellate review.

46 Cite code section
47 Congressional Testimony of David Kris, DOJ
48 Cite articles and charges: Both Mr. Hamdan and Mr. al Bahlul have appealed their convictions to the Court of Military Commission Review. Oral argument was presented in late January 2010. Because Mr. Hicks pled guilty pursuant to a negotiated plea agreement, he is not entitled to appeal.

49 Cite UCMJ
50 Cite Article 32, UCMJ
mitigated some of the glaring problems with the legislation, served only to exacerbate them. 52

Despite the widespread criticism of the MCA by the international legal community, non-governmental organizations, and American legal scholars, identifying the myriad shortcomings of the military commissions,53 the Bush Administration was determined to press ahead with the military commissions and convict as many detainees as possible. It was the hope and deliberate strategy of the administration that if the military commissions were well underway by the time the next Administration assumed office, with several trials completed and convictions duly rendered (the Administration did not foresee or accept the possibility of acquittals54), the commissions would be difficult to derail.55 This approach was memorably dubbed the “spray and pray”56 strategy by a high-ranking officer who testified in the Jawad case. In fact, Brigadier General


53 See, e.g. ACLU., Martin Scheinin, law review articles, etc.

54 See, Ross Tuttle, Rigged Trials at Gitmo, The Nation, (February 20, 2008) in which the following quotation was attributed by the Chief Prosecutor Colonel Morris Davis to DoD General Counsel William J. Haynes IV, “Wait a minute, we can’t have acquittals. If we’ve been holding these guys for so long, how can we explain letting them get off? We can’t have acquittals. We’ve got to have convictions.” Col Davis testified as a defense witness in U.S. v. Jawad and in U.S. v. Hamdan and gave similar testimony under oath. Cite to Hamdan record/Jawad transcript

55 Adam Zagorin, Trying to Tie Obama’s Hands on Gitmo, TIME, December 8, 2008 http://www.time.com/time/politics/article/0,8599,1865087,00.html

“Several days ago, a team of Obama legal advisers quietly met at the Pentagon with Hartmann and others involved in the Guantánamo trials, sources tell TIME. Hartmann vigorously defended them, arguing that they should continue regardless of the change in administrations. Though specifically asked to do so, Hartmann declined to discuss legal alternatives to the trials, a topic Obama’s representatives had been eager to explore.”

56 This expression was used by a senior Guantanamo official, Brig Gen Gregory Zanetti, in testimony before the military commission in U.S. v. Jawad to describe the push to bring as many cases to trial as possible. See, Jane Sutton, “Guantanamo Trials Put Generals At Odds” Reuters, August 13, 2008 (”The strategy seemed to be spray and pray, let’s go, speed, speed, speed,” Army. Brig. Gen. Gregory Zanetti said. ”Charge ’em, charge ’em, charge ’em and let’s pray that we can pull this off.”)
Thomas Hartmann, Legal Advisor to the Convening Authority and the senior military officer involved with the military commissions prepared a timeline which set forth his plan for the number of cases to be prosecuted, and shared the chart setting forth his plan with senior military leaders in the fall of 2007. According to the Hartmann chart, he expected military prosecutors to charge three “non-HVD”\(^{57}\) detainees per month throughout 2008, while simultaneously prosecuting several “HVD” cases, including those alleged to be responsible for 9/11, the attack on the U.S.S. Cole, and the East African Embassy bombings.\(^{58}\) Had the prosecutions gone according to Brig Gen Hartmann’s plan, there would have been at least two dozen convictions by the time of the 2008 Presidential election.

Clearly, General Hartmann’s vision of a smoothly running prosecution machine at Guantanamo never materialized. In fact, there was only a single conviction (Salim Hamdan) during Brig Gen Hartmann’s 16 month tenure as Legal Advisor. The Hamdan trial was indisputably a crushing failure for the Administration. Mr. Hamdan was acquitted of all the most serious charges against him, and received a sentence, after credit for time served (which the judge awarded over the government’s vigorous objection\(^{59}\)), of only 5 months.

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\(^{57}\) HVD was an acronym for High Value Detainee.

\(^{58}\) I was provided a copy of this timeline in discovery in U.S. v. Jawad, and submitted it to the military commission as an attachment to a defense motion, Amended Supplemental Motion D-004 Motion to Dismiss for Unlawful Influence (July 16, 2008)(Attachment 1). Although all motions and attachments were supposed to be released by the Department of Defense on the Military Commissions Website, this attachment was omitted from publication, without explanation. I describe the timeline extensively in the motion, which is available at http://www.defense.gov/news/Jawad%20-%20D%20-%20004%20Motion%20to%20Dismiss%20Unlawful%20Influence%202.pdf. The timeline is also referenced in the military judge’s ruling on the motion Ruling D-004, U.S. v. Jawad, at page 4, para. 6 http://www.defense.gov/news/Jawad%20-%20D%20-%20004%20Motion%20to%20Dismiss%20Unlawful%20Influence%202.pdf. The timeline was later introduced in pretrial motions to dismiss for unlawful influence in other military commissions, including in U.S. v. Khadr and U.S. v. Mohammed, et al (the 9/11 case).

\(^{59}\) Cite to record/articles
The Washington Post called it “a stunning rebuke.” The London Times called “the stunningly light sentence” “nothing short of a disaster for George Bush.” The Administration tried to put a brave face on this dismal result by arguing that it proved how fair the process was. For example, David Rivkin, described by the New York Times as “a Washington lawyer who has been a consistent supporter of the administration’s detention policies” said “This is an enormously compelling indication of how independent the process has been,” and argued that “the sentence proved that the Bush administration’s system for trying detainees was legitimate and fair.” According to Mr. Rivkin “it would be difficult for anyone to criticize the system after the sentence.” Mr. Rivkin’s prediction did not come to fruition. If anything, criticism of the military commissions intensified in the run-up to the Presidential election in November. After the election, critics of Bush Administration detention policies saw an opportunity for significant changes with the incoming Administration.

As noted previously, the military commissions under the Military Commissions Act of 2006 were so plagued by delays and setbacks, that in the two years from the time the MCA became law until the Presidential election, only three of nearly 30 detainees charged were convicted, none of whom were directly involved in any terrorist attacks. The final conviction, of my client Ali Hamza al Bahlul, came on the eve of the Presidential election, when media coverage was so dominated by electoral politics that the conviction barely registered in the national media.

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60 Jerry Markham and Josh White, Bin Laden Driver Gets 5 1/2 Years; U.S. Sought 30, Washington Post, August 8, 2008
61 Tim Reid, Analysis: Bin Laden driver Salim Hamdan trial a disaster for George Bush, Times Online, August 8, 2008
62 William Glaberson, Bin Laden Driver Sentenced to a Short Term, NY Times, August 7, 2008.

In contrast, the Hamdan trial was also covered by the New York Times, Washington Post, Los Angeles Times, NPR, and several foreign media outlets.
With the fourth trial (the first ever war crimes trial of a child soldier, Omar Khadr) scheduled to commence just days after his inauguration, President Obama was forced to decide quickly whether to allow the commissions to continue. He moved to suspend them for 120 days to allow the new administration to review its detention policies. It was widely expected that this 120 day suspension would be followed by an announcement that the military commissions were to be abandoned. But the order to disband the military commissions never came. In the waning days of the Bush Administration and during this suspension period, holdovers from the prior administration lobbied President Obama’s staff to convince them that the military commissions could be salvaged, and that the defects in the system had now been remedied. Brigadier General Thomas Hartmann briefed senior administration officials on the way forward. Defense Secretary Gates ordered military commission prosecutors to continue to investigate and prepare their cases for trial. President Obama’s decision to close Guantanamo was subjected to a relentless stream of criticism from defenders of the prior administration’s policies. By May, President Obama had changed his mind about military commissions. In a major national security policy speech at the National Archives on May 21, 2009, President Obama announced that he intended to revive the military commissions, with some

64 The trial of Omar Khadr was scheduled to commence on January 26, 2009. Carol Rosenberg, Two war-court cases are set to go forward, The Miami Herald, January 21, 2009.

65 Cite Executive order


“We are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them...we are treating these cases with the care and attention that the law requires and that our security demands...Now, going forward, these cases will fall into five distinct categories...The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions. Military commissions...are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.” President Obama acknowledged that this decision was widely viewed as a breach of a campaign promise: “Now, some have suggested that this represents a reversal on my part” but asserted that he had never opposed “reformed” military commissions.
reforms, a clear reversal of a campaign promise. He then re-suspended the military commissions for another 120 days, until mid-September 2009, to allow for further study and to suggest statutory reforms to the Military Commission Act of 2006 which required legislative action.

Over the summer, the debate continued in Congress over the appropriate forum to try detainees and whether the MCA should be reformed, repealed or left alone. Several hearings were held. Civil liberties and human rights NGO’s lobbied the Administration and Congress fervently for a repeal. In July 2009, the Senate-passed version of the 2010 National Defense Authorization Act (NDAA) included some modest revisions to the Military Commissions Act of 2006, some endorsed by the Administration. The Senate also passed a non-binding “Sense of the Senate” resolution expressing that military commissions are the preferred forum to try detainees at Guantanamo. The House version of the NDAA did not include any changes to the MCA.

Judge Huvelle announced that she was ordering the release of Mohammed Jawad late on the morning of July 30, 2009 at the Federal Courthouse in the District of Columbia. Just hours later, I was scheduled to testify before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties to

68 The Administration notified Congress on [date] of five proposed rule changes to the Rules for Military Commissions. By law, these changes became effective [date] days from the date of notification.

69 See, Julian E. Barnes, Obama to continue military tribunals, LA TIMES May 15, 2009, available at [link] “The Obama administration will announce Friday that it will continue to use military commissions to prosecute some terrorism suspects, current and former officials said -- reversing a campaign promise to abolish the controversial tribunals started under President George W. Bush.”; PETER BAKER and DAVID M. HERSZENHORN, Obama Planning to Keep Tribunals for Detainees NY Times, May 14, 2009, [link];

70 Cite story about 120 day suspension

71 Cite Senate SASC and Judiciary Committee hearings and House Judiciary Subcommittee hearings where David Kris and Jeh Johnson testified.

72 See testimony of Kris and Johnson from House Hearing July 31, 2009

73 Sense of the Senate resolution.....cite
discuss proposals to reform the Military Commissions Act of 2006. This was the final Congressional hearing before the NDAA went to conference committee. Committee Chair Jerrold Nadler commenced the hearing by acknowledging the order releasing Mr. Jawad.  

My personal view, which I shared with Congress that afternoon, and in a subsequent commentary in the on-line journal Salon, is that the MCA should simply be repealed. I did not always feel this way. In 2007, I wrote an article identifying ways that the MCA and its implementing regulations could be improved to provide fair, legitimate trials for detainees. But after 16 months as a defense counsel for the Office of Military Commissions, actively practicing before the military commissions at Guantanamo, my understanding of the myriad and fundamental flaws with the Military Commissions Act of 2006 and its implementing regulations had deepened and my views had evolved. But few in Congress shared my view, or at least were willing to state so publicly, and repeal efforts never gained any momentum. 

Recognizing that repeal was unlikely, I devoted the bulk of my testimony to recommending revisions to the MCA. In October, a revised Military Commissions Act was passed as part of the 2010 National Defense Authorization Act and it was signed into law on October 28, 2009. Few of my recommendations were incorporated in the final bill, known as the Military Commissions Act of 2009.

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74 Cite to Congressional Record, quote Nadler.


78 Warren Richey, Obama endorses military commissions for Guantánamo detainees, Christian Science Monitor, October 29, 2009; Josh Gerstein, Obama Signs Military Commission
In November 2009, Attorney General Holder announced that some cases previously referred to trial by military commission, notably the 9/11 conspiracy trial, would be transferred to federal court, while other cases would be allowed to go forward in the revamped military commissions. The decision to try some detainees in federal court was met with widespread disapproval from Republican elected officials and generated significant public opposition, with many calling for the military commissions to continue. I applauded the decision to try the alleged 9/11 co-conspirators in federal court, but questioned the wisdom or fairness of a two-tiered system of justice. Although Mr. Holder’s announcement was greeted with a fair amount of criticism, particularly from conservatives, his decision appeared to have the firm backing of the Administration. This support began to unravel after the attempted Christmas Day bombing by Umar Farouk Abdulmutallab reignited fears of another terrorist attack and New York officials began to publicly question the wisdom of trying the case on lower Manhattan. Concerns about the cost and safety of holding the trial in New York, and an apparent strong public and congressional preference to try the 9/11 case in a military commission has led the Administration to reconsider.

The Military Commissions are now poised to begin again. A new Convening Authority has been appointed, and a new Manual for Military Commissions will be published shortly. Will this round of military commissions be a success, or will they fail? The early indications are not good. Already, the fledgling efforts to

Reforms, Politico.com, October 28, 2009

David Frakt on Material Support Charges and Military Commissions, emptywheel by Marcy Wheeler

Carol Rosenberg, Obama appoints new chief for war court at Guantanamo, Miami Herald, March 25, 2010. This article and others reported that Retired Navy Vice Admiral Bruce MacDonald, former Judge Advocate General of the U.S. Navy, had been appointed to the position recently vacated by Susan Crawford.
restart the commissions have been plagued by delays and confusion.\textsuperscript{81} If the new round of military commissions is to be more successful than prior efforts, it is important to understand the reasons for the earlier failures, and try to learn from the mistakes of the past.

Perhaps better than any other single case, a detailed examination of the case of Mohammed Jawad can help to illustrate the perversion of the rule of the law and illuminate the reasons for the failure of the military commissions to date.

II. THE CASE OF MOHAMMED JAWAD

\textit{a. Background facts:}

Mohammed Jawad was arrested by Afghan authorities on suspicion of involvement in a single grenade attack on U.S. forces on December 17, 2002. He was approximately 14 years old. In the attack, which occurred in a crowded public bazaar in downtown Kabul, Afghanistan, two U.S. servicemembers and their local Afghan interpreter were injured. According to contemporary news accounts\textsuperscript{82} and public statements by senior Afghan officials\textsuperscript{83} multiple persons were arrested for and confessed to this crime. However, Mohammed Jawad was the only suspect handed over to U.S. authorities. Before turning him over, Afghan authorities threatened to kill him or a member of his family if he did not confess.\textsuperscript{84} They then forced him to place his thumbprint on a document purporting to be a confession, although the document was written in a language he could not speak, much less read.

Mohammed Jawad was then taken to a special operations forward operating base on the outskirts of Kabul, where he was stripped naked and


\textsuperscript{82} Cite to news articles

\textsuperscript{83} Cite to RF/RL reports

\textsuperscript{84} Henley ruling
photographed. He was subjected to a highly coercive interrogation which started near midnight and lasted well into the early morning. Although at the outset of the interrogation, he denied throwing the hand grenade (a position that would have made little sense if he had in fact just voluntarily confessed to the Afghan authorities), the interrogators (who were convinced he was responsible and had been informed that he had already confessed) were eventually able to extract another confession, or so they claimed.

Unfortunately, the videotape of this interrogation, which would have resolved disputed claims about the nature and level of coercion used and the content of the alleged confession, was lost. Interestingly, this second confession, (or at least what the U.S interrogators remembered about it), provided a completely different version of the grenade attack and events leading up to than the “confession” prepared by the Afghan police. These two conflicting coerced confessions eventually formed the centerpiece of the prosecution’s case against Mohammed Jawad.

Later that morning, Mohammed Jawad was transported to Bagram Prison. Over the next 49 days, he underwent brutal treatment and at least eleven abusive interrogations by U.S. personnel who subjected him to beatings, forced him into so-called “stress positions,” forcibly hooded him, placed him in physical and linguistic isolation, pushed him down stairs, chained him to a wall for prolonged periods, threatened to kill him; in short, they inflicted a wide variety of mental and emotional intimidation on this frightened teenager. U.S. forces also subjected Mohammed to sleep deprivation; interrogators’ notes indicate that he was so disoriented at one point that he did not know whether it was day or night. Mohammed was also intimidated, frightened and deeply disturbed by the

85 Reference Henley ruling and habeas petition “Mohammed was subjected to inhuman and degrading treatment by U.S. personnel at FOB 195 upon his arrival there. He was ordered to remove all his clothing, strip-searched, and directed to pose for nude photographs in front of several witnesses. Mohammed was also subjected to coercive interrogation while at FOB 195. U.S. officials blindfolded and hooded Mohammed, and subjected him to interrogation techniques designed to “shock” him into the extremely fearful state associated with his initial arrest. Other acts of coercion and intimidation include, while he was blindfolded and hooded, being told by interrogators to hold on to a water bottle that he believed was actually a bomb that could explode at any moment.”
sounds of screams from other prisoners and rumors of other prisoners being beaten to death.”

On Feb 6, 2003, Mohammed was transported to Guantanamo on a 23 hour flight. Over the next several years, he was the victim of cruel, abusive and inhumane treatment, tantamount to what is universally recognized as torture. This maltreatment including repeated periods of physical and linguistic isolation, designed to create complete dependence on his interrogators, to break his will and to devastate him emotionally. On that score, the program succeeded. On December 25, 2003, according to official prison logs, Mohammed tried to commit suicide. Mohammed was also subjected to the notorious sleep deprivation program, euphemistically referred to as the “frequent flyer” program, during which he was repeatedly moved from one cell to another in frequent intervals, throughout the day and night, to disrupt his sleep. Military records show that Mohammed was the victim of the “frequent flyer” program from May 7 to May 20, 2004, during which he was forcibly moved 112 times, on an average of about once every three hours.

While the detention officials at Guantanamo were abusing Mohammed and hundreds of other detainees in the early years of its operation, the Bush Administration was setting up a new system to try detainees. The President had decided as early as November 2001 that military tribunals would be used. Further orders establishing the tribunals and delineating their rules and procedures were published in 2002. In 2003, the order providing the list of crimes punishable by military commissions was issued.


87 Just days before Mohammed arrived at Bagram, on December 4 and 10, 2002, two detainees held there were beaten to death by U.S. Forces. Tim Golden, U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths, New York Times, May 20, 2005.

88 See, Motion to Dismiss for Torture and Ruling. See also, Amnesty International Report on Jawad; Amended habeas complaint, etc.

89 See Nov 13, 2001 order Detention, Treatment and Trial for Certain Non-Citizens in the war Against Terrorism

90 Mil Comm order no 1, Procedures for Trials by Military Commissions (March 21, 2002)

In summer 2004, military prosecutors assigned to the military commissions started charging detainees. Salim Hamdan was one of the first to be charged in July 2004. Several others were also charged, including my client, Ali Hamza al Bahlul. Mr. Hamdan’s federal court challenges to the legitimacy of the tribunal effectively halted prosecutions and no detainees were ever convicted under this system. Eventually, Hamdan’s case went to the Supreme Court, which, on June 26, 2006, invalidated the Executive Order creating the military commissions.  

Although Mohammed Jawad was identified in 2004 by the Criminal Investigation Task Force as a “good candidate for a military tribunal under President’s Executive Order,” charges were never filed under this system, and his case lay dormant for three more years, while he continued to languish in Guantanamo.

In response to the Supreme Court’s ruling, the Bush Administration proposed legislation to Congress to authorize the creation of military commissions. The hastily drafted Military Commissions Act of 2006 (MCA) became law in October 2006. In the Spring of 2007, David Hicks, Omar Khadr and Salim Hamdan became the first three detainees to be charged under the the MCA. David Hicks pled guilty to a charge of material support to terrorism in return for a generous plea bargain that enabled him to be returned to Australia and released just a few months later. Omar Khadr and Salim Hamdan, however, decided to defend themselves. In June 2007, pretrial proceedings in both cases came to an abrupt halt when the military judges in both cases dismissed all charges for lack of personal jurisdiction. The government was forced to file an interlocutory appeal with the Court of Military Commission Review, a court which at the time existed only on paper and had no judges, rules or procedures. While this court was hastily assembled and the appeals briefed and argued over the remainder of the summer, all other cases which were in the pipeline at the Office of Military Commission- Prosecution (OMC-P) were put on hold. During this hiatus, Air Force Reserve Brigadier General Thomas Hartmann, who had recently been appointed as the new Legal Advisor to the Convening Authority, requested to be briefed on all of the cases being prepared by OMC-P, at that

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93 CITF Commander Memorandum dated__, on file with author.

94 10 U.S.C. Sect 948a
time amounting to several dozen. According to multiple witnesses, and the
sworn testimony of Brig Gen Hartmann himself, the General believed the
Mohammed Jawad case was a good one because it involved an attack on
American troops and urged that it be made a prosecutorial priority. Based in
significant part on Brig Gen Hartmann’s strong affinity for the case,
Mohammed’s case rapidly ascended the prosecutorial priority list. In fact,
after the CMCR reversed the military commission trial judges and reinstated the
charges against Mr. Khadr and Mr. Hamdan, Mohammed Jawad was the next
detainee to be charged.

The charges sworn against Mohammed on October 9, 2007, were fairly
straightforward. He was charged with three specifications (or counts) each of
two different crimes: “attempted murder in violation of the law of war” and
“intentionally causing serious bodily injury”. This second charge was later
dismissed, after it was conceded by the government that it was a lesser
included offense of the more serious charge of “attempted murder in violation
of the law of war.” All the charges stemmed from one incident, the alleged
throwing of the hand grenade by Jawad on December 17, 2002. The three
separate counts were for each of the three victims of the attack, the two U.S.
soldiers and the Afghan interpreter. Mohammed Jawad was the first and only
detainee to face prosecution in the military commissions who was not charged
with either terrorism, material support to terrorism or conspiracy. He was also the
only detainee to be charged who was not alleged to have any connection with
Al Qaida or the Taliban.

After the charges were sworn, following the military commission procedural rules,
they were presented to the Convening Authority for her to decide whether to
refer the charges to trial by military commission. The charges were
accompanied by written pretrial advice prepared by General Hartmann. The
pretrial advice explained the government’s theory of the case and its assertions
of personal and subject matter jurisdiction:

“the Prosecutor asserts that the offenses are violations of the laws of war
because Jawad was not a lawful enemy combatant (i.e. in personam

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95 According to the sworn testimony of former Chief Prosecutor Colonel Morris Davis, the
Jawad case “went from the deep freeze to the front burner.” CITE

96 General Hartmann was the Legal Advisor to the Convening Authority.
jurisdiction exists) and because the attack took place in the context of and in connection with an armed conflict.” 97

The Convening Authority, following the advice of General Hartmann, referred the charges to trial by military commission on January 30, 2008.

In February 2008, I volunteered and was selected to serve as a military defense counsel with the Office of Military Commissions-Defense. I had previously served on active duty as an Air Force Judge Advocate from 1995 to 2005. In 2005, I had transferred to the Air Force Reserves and started a new career as a law professor. I agreed to serve a one-year active duty tour to commence as soon as my spring semester ended in April. On April 28, 2008, I reported for duty and was immediately assigned to represent Mohammed Jawad. Mohammed had been assigned counsel as soon as charged were sworn, but his original defense counsel, an Army Reservist, had completed his voluntary one year tour of duty and had decided to return to his civilian job, leaving Mohammed without representation. Complicating matters was the fact that at his arraignment in March 2008, Mohammed had indicated that he did not want to be represented by this officer, or, indeed, any other lawyer.

The military judge assigned to the case was eager to get the case moving again. As soon as he was informed that I had been appointed as Mr. Jawad’s new counsel, he ordered another hearing for the earliest possible date, May 7, 2008, the following week. I flew to Guantanamo on the first available plane and began to meet with Mohammed. Over the next week, I managed, with the help of my Pashto interpreter to build up enough trust and rapport with Mohammed that he agreed to allow me to represent him, on a limited basis, before the military commissions. The scope of my representation was to be limited to “challenging the legality and legitimacy of the military commissions and the conditions of my client’s confinement.” 98 At the conclusion of the hearing, the military judge gave me three weeks to file “all legal motions.”

b. LEGAL MOTIONS


98 Transcript of May 7, hearing CITE
Given the short time period that I had been afforded to file legal motions and my agreement with my client on the scope of representation, my initial focus was not on factual innocence or guilt and potential defenses at trial, but rather on potential bases for dismissal of the charges that might allow Mr. Jawad to avert a trial altogether.

I decided to pursue a number of different theories, simultaneously attacking the jurisdiction of the military commission on several fronts. I filed multiple motions challenging the personal jurisdiction of the military commissions over my client. Of the many motions to dismiss that I filed, only one was actually granted, but it was a pyrrhic victory. I filed a motion to dismiss the “intentionally causing serious bodily injury” charges on the basis that the offense was a lesser included offense of the more serious crime of attempted murder in violation of the law of war. The motion was granted, but, at the time, my client was still facing up to life in prison if convicted of the remaining charge. However, despite failing to win the requested relief, several of the rulings generated by my motions proved to be very helpful both in ultimately achieving a favorable resolution to the case and in creating precedents that will help to restore the rule of law in future cases.

In the following section I describe these motions, the government’s responses and the rulings and their rationales, along with the consequences and implications of the rulings both in Mohammed Jawad’s case and more broadly, for subsequent prosecutions before the commissions.

i. PERSONAL JURISDICTION – GENEVA CONVENTIONS

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99 At this point, I was the sole defense counsel appointed to represent Mr. Jawad. Later in the summer, after the first motions hearing on June 19, 2008, Lieutenant Commander Katharine Doxakis, a Navy Reserve JAG officer was appointed as assistant defense counsel. After the next hearing, on August 13-14, 2008, Major Eric Montalvo, a Marine Corps JAG also joined the team as assistant defense counsel.


101 The motion was granted orally, on the record, during the June 19, 2008, motions hearing. Transcript page....
The first such motion was a general challenge to jurisdiction which could have applied equally to all detainees at Guantanamo. I asserted that Mr. Jawad was entitled, under the laws of war, to a presumption that he was a lawful combatant and entitled to be treated as a prisoner of war, consistent with the Third Geneva Convention Relative to the Treatment of Prisoners of War, Article 5, and Additional Protocol 1, Article 45. I argued that where there was doubt about the lawful combatant status of a detainee, the detaining power was obligated under the Geneva Conventions to provide a hearing, to determine his status. Until such a tribunal was held, Jawad could not be subject to the jurisdiction of a military commission, which was limited to trying unlawful combatants, and, therefore, the preferral of charges was defective and void.

President Bush’s unilateral declaration that no one detained by the United States in Afghanistan, whether believed to be Taliban or Al Qaeda, was entitled to Prisoner of War status made this motion necessary. Rather than the individualized determination required by the law of war, the President had made a categorical determination that individuals associated with these groups were not entitled to PW status and that the Geneva Conventions did not apply to them at all. While the determination that Al Qaeda members caught fighting in Afghanistan (particularly non-Afghans) were not entitled to PW status is defensible, the decision to deny PW status to Taliban soldiers, who were the official armed force representing the lawful government of Afghanistan was of dubious merit. The primary basis for the decision appeared to be that the Taliban generally did not wear what Western societies recognize as a military uniform. This was a highly questionable conclusion upon which to deny PW

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102 D-001 Amended Defense Motion to Dismiss for Lack of Personal Jurisdiction (August 1, 2008). The original motion with this title was submitted by my predecessor on the case, Colonel Michael Sawyers, a US Army Reserve JAG, but was withdrawn by me at my original appearance in the case on May 7, 2008. The original and amended motions, government replies and defense response briefs are available at: http://www.defense.gov/news/Jawad%20-%20D%20- %20001%20Motion%20to%20Dismiss%20Lack%20of%20Jurisdiction.pdf

103 Cite

104 It could be argued that the Taliban wore distinctive clothing and had a distinctive appearance, including long beards, that enabled them to be readily identified. Certainly, the Northern Alliance, the Afghan rebel forces with whom the U.S. joined forces, did not claim any difficulty in identifying their enemies.
status, criticized by numerous legal scholars. Many of these same scholars argued that if those captured were not deemed to be covered by Geneva Convention III relative to Prisoners of War, then they must be covered by the Geneva Convention IV relating to civilians. The status “unlawful enemy combatant” was a new category invented by the Bush Administration as the basis for asserting that those who fell within this classification were not covered by any of the Geneva Conventions. The general consensus among other signatories to the Geneva Conventions is that there are no such gaps in the Geneva Conventions, that all persons detained during an armed conflict are protected by them.

Ironically, Mohammed Jawad was not even alleged to be a member of either Al Qaeda or the Taliban; He was the only person to have charges referred to trial by military commission who was not accused of being connected with either of the groups with whom we were at war. Rather, he was alleged simply to have been one who “engaged in hostilities” against the United States as part of an “associated group.”

The prosecution was forced to defend the Bush policy of denying Geneva Convention rights in their response; otherwise, they would have had to concede that the military commissions had no jurisdiction over any detainees (since none of the detainees had ever been afforded any tribunal required by the Geneva Conventions). The government’s response to the motion argued first that Mohammed Jawad was not entitled to assert any Geneva Convention protections and that the Military Commissions Act “was the only applicable law.” They cited a provision in the MCA itself which purported to deny detainees any rights under the Geneva Conventions. “No alien unlawful enemy combatant...may invoke the Geneva Conventions as a source of rights.”

This blatantly unconstitutional provision of the MCA attempted to abrogate a

105 CITE

106 CITE


108 10 U.S.C. § 948(b)
ratified treaty, which under Article VI of the Constitution is the supreme law of the land. As a fallback position, the government argued that Jawad had already had “unprecedented” “procedural protections” in the form of Combatant Status Review Tribunals, which more than satisfied the requirements of the Geneva Convention. “The Defense cannot. . .even attempt. . .to dispute that the CSRT process satisfies Article 5, even assuming Mr. Jawad is entitled to its protections.” 109 Needless to say, the Defense did attempt to dispute this. 110 In fact, I had done so quite explicitly in my original motion, citing the very recent decision in Boudedien v. Bush111:

The defense does not concede that CSRTs are legally adequate forums to make such determinations, and indeed, the Supreme Court has recently suggested that they are not. “Although we make no judgment as to whether CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact.” 112

Ultimately, although the trial judge seemed somewhat persuaded by the defense arguments, he indicated that he felt bound by a prior decision of the Court of Military Commission Review on a similar issue113 to deny the motion. 114


110 See, Defense Reply to Government Response to Defense Motion to Dismiss for Lack of Personal Jurisdiction (August 8, 2008), at p. 2 “The government’s invocation of the CSRT as an example of due process is bizarre. Mr. Jawad’s CSRT considered completely unreliable hearsay testimony including a demonstrably false confession, failed to call any witnesses, received no evidence in mitigation or extenuation, and did not even bother to ask whether Mr. Jawad constituted a current threat to the United States or its allies. In fact, the CSRT recognized that he might not actually be guilty of the offense of which he is charged, but found him to be an enemy combatant nonetheless. The suggestion that Mr. Jawad has received a ‘superabundance’ of due process beggars belief.” On the inadequacies of CSRTs generally, see Frakt, Indelicate Imbalance article, 332-339.


112 Id. 128 S. Ct. at 2270.

However, the judge did rule that before being allowed to proceed to trial, the prosecution would have to prove, by a preponderance of the evidence in a preliminary jurisdictional hearing, that Jawad was, in fact, an “alien unlawful combatant.” The government was never able to do so.

ii. CHILD SOLDIER

Another unprecedented policy decision by the Bush Administration gave me a further basis to challenge the jurisdiction of the court. Starting in the 1980s, the use of child soldiers had become an increasingly alarming problem worldwide. In an effort to combat this unfortunate phenomenon, an international treaty barring the recruitment and use of children under the age of 18 in armed conflicts was developed. This treaty, the Optional Protocol on the Involvement of Children in Armed Conflict, reflected the international consensus that child soldiers, even those who committed atrocities, generally should be treated as victims of war, and every effort should be made by the international community to rehabilitate these children and prepare them for reintegration into society. This treaty entered into force on February 12, 2002 and was ratified by the U.S. on December 23, 2002, less than one week after Mohammed Jawad was detained by the U.S.. According to Article 6(3) of the Optional Protocol:

States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

114 Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction D-002, 1 Mil. Comm. Rep. 327, 328 at n.7 (NIMJ 2009). “While acknowledging that distinguished legal scholars disagree with the Court of Military Commission Review’s analysis, the Military Judge is nonetheless compelled to follow its precedent.”

115 Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction D-002, 1 Mil. Comm. Rep. 327, 328 (NIMJ 2009). The hearing was originally scheduled for December 9-18, 2008,(see id. note 8) but was later postponed, then cancelled.

116 Cite

Although the treaty did not specifically bar the prosecution of child soldiers for war crimes, it was inconsistent with the intent and spirit of the treaty to allow child soldiers to be prosecuted, particularly in a legal system designed for adults, which had no provisions to address the specific needs and issues of children. By definition, child soldiers had been illegally recruited and were barred from conflict because they were too young to understand or comply with the law of armed conflict, yet Jawad was being charged with an intentional violation of the laws of war.

Accordingly, I challenged the personal jurisdiction of the court on the basis of Mohammed Jawad’s age at the time of his capture.\textsuperscript{118} Although his exact age was disputed and never conclusively determined, the United States had conceded in official reports to the U.N. that he was a minor (under the age of 18) at the time of his alleged offense and detention.\textsuperscript{119} The theory of this motion was that the Military Commissions Act did not specifically authorize the exercise of jurisdiction over child soldiers and that the commission should not presume such a dramatic and controversial policy choice (allowing juveniles to be tried as war criminals) in the absence of any evidence in the legislative history that Congress had even considered the question.\textsuperscript{120} The Uniform Code of Military Justice, which provides for military jurisdiction over all U.S. servicemembers contains no age limitation for court-martial jurisdiction. But there is a de facto age limitation to face trial by court-martial by operation of the laws governing military recruitment. It is illegal to join the military in the United States until the age of 18. (Seventeen year olds may join with the permission of a parent, but 17 year old recruits aren’t permitted in combat zones.) Thus, there is no military


\textsuperscript{119} Optional Protocol on the Involvement of Children in Armed Conflict List of issues to be taken up in connection with the consideration of the initial report of the United States of America (CRC/C/OPAC/USA/1).

\textsuperscript{120} As I later testified before Congress, there was not a single mention of the words “child soldier” “juvenile” or “minor” in the entire legislative history of the Military Commissions Act of 2006. CITE
jurisdiction over minors in combat situations under the UCMJ. Because the MCA was explicitly based on the UCMJ, I reasoned that the same age limitations should apply, and that Congress’ failure to explicitly state an age limitation was simply an oversight. The lack of any provisions in the MCA or its implementing regulations to address the specific needs of juveniles, which I argued was implicitly required by the Optional Protocol, also suggested that it was not contemplated that juveniles be tried in military commissions. In addition to the purely legal arguments, I also made a number of policy and morality based arguments against prosecuting minors as war criminals, noting in a supplement to the original motion the irony that while the first person to be tried by the International Criminal Court was being prosecuted for the recruitment and use of child soldiers, the United States was treating the victims of a similar crime themselves as war criminals.

Not surprisingly, the prosecution, having made the decision to recommend charges in the first place, vigorously defended their right to prosecute minors. But the morality based arguments did start to have an effect on at least one of the prosecutors, Lieutenant Colonel Darrel Vandeveld. Lt Col Vandeveld eventually resigned from the Office of Military Commissions rather than continue to prosecute Mohammed Jawad. This very public defection helped to turn the tide of public opinion against the prosecution. Vandeveld cited the United States’ mistreatment of Jawad, as well as the U.S. failure to comply with the terms of the Optional Protocol, as important factors in his decision.

In any event, this motion was denied; in his opinion, the trial judge, Colonel Stephen Henley, concluded that if Congress had intended to limit the jurisdiction of the MCA to unlawful combatants of a certain age, Congress would have so specified.

The MCA does not contain any age limitation, even though Congress was aware of how to state exceptions to application of the MCA. See 10 U.S.C. §§ 948a(2)(A), 948b(d), and 948d(b). Nor is there any evidence that Congress intended an age limitation. 121

121 Ruling D-012, paragraph 4a (September 24, 2008) available at: http://www.defense.gov/news/RULING%20D-012%20(child%20soldier).pdf 1 Mil. Comm. Rep 338, 339 (NIMJ 2009) See also, id. note 8: “As both Mohammed Jawad and Omar Khadr have been in U.S. custody at Guantanamo Bay since 2002, a fact Congress is aware of, Congress could have provided for an age requirement when enacting the Military Commission Act in 2006; it chose not to.”
My view of Congress’ intentions proved to be too generous and Col Henley was ultimately proven correct. In the summer of 2009, Congress held a series of hearing to consider reforms to the Military Commissions Act. Numerous civil rights and civil liberties groups lobbied Congress to strip the military commissions of jurisdiction over juveniles.\textsuperscript{122} On July 30, 2009, I testified before a House Subcommittee considering proposals to reform the MCA to include an age limitation, and was questioned about this by Representative Jerrold Nadler.\textsuperscript{123} After specifically considering the issue, Congress intentionally chose not to include an age limitation in the Military Commissions Act of 2009. Congressmen Nadler, speaking in support of passage of the Fiscal Year 2010 National Defense Authorization Act conference report, which included the 2009 MCA, made it clear that an age limitation was considered and rejected:

> Mr. Speaker, I rise in support of this conference report with some serious reservations. . . I am concerned . . . about the section dealing with military commissions . . . (A)dditional changes suggested by the Judiciary Committee—which include a sunset provision, a voluntariness requirement for all statements, a different appeals structure, and a prohibition on the trial of child soldiers by military commission—should have been adopted.\textsuperscript{124}

While Congress did not prohibit the trial of child soldiers by military commission, many expected that the Obama Administration would choose not to take advantage of the opportunity to become the first government in modern history to prosecute child soldiers as war criminals.\textsuperscript{125} These expectations were

\textsuperscript{122} Cite letter from civil rights coalition proposing changes to reform MCA

\textsuperscript{123} Cite testimony

\textsuperscript{124} CONFERENCE REPORT ON H.R. 2647, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010 -- (House of Representatives - October 08, 2009) Statement of Representative Jerrold Nadler (D. N.Y.) (Emphasis added) Congressional Record page H11133, available at: http://thomas.loc.gov/cgi-bin/query/F?r111:1:./temp/~r111a9VbxP:e52133:

\textsuperscript{125} In response to my motion to dismiss, the prosecution asserted that both U.S. and Great Britain had prosecuted children in war crimes tribunals after World War II. They identified a grand total of three instances where they asserted juveniles were prosecuted in military tribunals. In one of the cases they cited, known as the Belsen case, they alleged that one of the perpetrators, Antoni Aurdzieg, was 16 at the time of his offenses. However, documents produced at Aurdzieg’s trial indicated that Aurdzieg was actually 20 when he was transferred to the Belsen concentration camp. Trial of Josef Kramer & 44 Others, II L. Rep. Trials of War Criminals 1 (1945).
disappointed in December 2009 when Attorney General Eric Holder announced that he had approved the case against Omar Khadr (the only other juvenile to be charged, and the last juvenile to be held at Guantanamo), to go forward in a military commission. His trial is scheduled to commence in July 2010.\textsuperscript{126}

iii. \textbf{INVENTED WAR CRIMES: \textit{Murder in Violation of the Law of War}}

Mohammed Jawad and Omar Khadr were both charged with spurious war crimes based on the alleged throwing of a hand grenade at U.S. soldiers. My initial impression upon reading the charge was that this didn’t sound like a war crime at all. Rather, it sounded like war. Isn’t this what happens in combat – we try to kill the enemy and they try to kill us? As a Judge Advocate, I was responsible for training other Air Force members in the Law of Armed Conflict,

In another case, the entire Bommer family was placed on trial for theft of goods, and receiving stolen goods belonging to French citizens, a municipal crime. Two of the daughters were convicted and received four month sentences. A third daughter was acquitted on account of her age. Trial of Alois & Anna Bommer & Their Daughters, IX L. Rep. Trials of War Criminals 62 (1947). Finally, the government cited the case of Johannes Oenning, in which a 16 year old was convicted for his role in the murder of a British POW and received a sentence of eight years in prison. In this case, a captured British pilot was marched into the woods and executed instead of being treated as a prisoner of war. Trial of Johannes Oenning & Emil Nix, Case No. 67, XI L. Rep. Trials of War Criminals 74 (1945). Thus, there are a total of two verifiable examples of juveniles being prosecuted for crimes that occurred during World War II in post-war military commissions, one of which was an actual war crime. However, the critically important fact is that these military tribunals were not war crimes tribunals or “law of war commissions,” but rather occupation commissions - tribunals set up by the occupying powers in postwar Germany, including the U.S. and Great Britain - to administer the law until civilian courts could be reestablished. Because these military commissions had jurisdiction over all persons in the occupied territory, they are not useful as an historical precedent to justify the prosecution of minors under the Military Commissions Act, which clearly establishes limited jurisdiction “law of war” commissions. The fact remains that there is not a single instance in modern history of a juvenile being tried as a war criminal in an international war crimes tribunal or law of war military commission. Nevertheless, the military commissions Chief Prosecutor continues to make the misleading claim that there is “a historic basis to charging minors and prosecuting them in commissions.” Peter Finn, Former Boy Soldier, Youngest Guantanamo Detainee, Heads Toward Military Tribunal, Washington Post, February 10, 2010.

and had extensive training in this area of the law and I couldn’t think of a situation where someone was charged with a war crime for an ordinary act of combat. As I began to research the topic, my initial impression was confirmed; the alleged acts of Mohammed weren’t violations of the law of war at all. Although it was clear to me that the alleged crime was not a war crime, the proper legal option to address this issue was not immediately evident. The crime with which my client was charged was clearly authorized by the Military Commissions Act, and the charges correctly stated the elements of the offense as listed in the Manual for Military Commissions. So, on their face, the charges appeared to be proper. Nevertheless, it didn’t seem appropriate to have to go to trial on charges that could not possibly result in a conviction if the law were properly applied. Reasoning that military commissions were courts of limited subject matter jurisdiction restricted to offenses under the law of war, I filed a motion to dismiss on the basis of lack of subject matter jurisdiction. As an alternative ground for dismissal, I alleged failure to state an offense. In effect, the motion was a motion for summary judgment. Essentially, I was arguing that, viewing the evidence in the light most favorable to the government, there was simply no basis upon which a reasonable jury could convict. Between May and November 2008, in a series of briefs, I laid out in great detail the legal basis for this conclusion. Despite multiple indications from the military judge that he agreed with my analysis, the government refused to back down. In fact, even after the judge issued a ruling endorsing the defense analysis and admonishing the government not to go forward with the charges, the government persisted, filing a motion to reconsider, which it also lost.

Mohammed Jawad was not the first detainee to be charged with this offense, nor the first to challenge it. Omar Khadr was charged with it as well, but his efforts to challenge this offense under ex post facto and bill of attainder theories failed.


During the months in which this legal battle was fought, it became clear that the ability to charge detainees with this invented war crime was central to the overall prosecution strategy.

In the Military Commissions Act of 2006, Congress authorized “alien unlawful enemy combatants” to be tried by military commissions for a wide range of offenses. Congress stated that the offenses listed were “declarative of existing law” and did not establish new crimes but simply “codif[ied] offenses that have traditionally been triable by military commissions.” This was not true. Generally speaking, crimes that have traditionally been triable by military commissions are violations of the law of war, commonly known as war crimes. While many of the crimes listed in the M.C.A. were derived directly from Geneva Conventions or are otherwise well-recognized war crimes that match other attempts to codify the law of war, such as in the Rome Statute of the International Criminal Court and the U.S. War Crimes Act, there are several offenses in the M.C.A. which have never been the subject of any military commission or other war crimes tribunal and which appear to be new offenses under the law of war.

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131 D-007 Motion to Reconsider and Reply and Ruling

132 10 U.S.C. § 948a

133 10 U.S.C. § 950p

134 Id.


136 18 U.S.C. § 2441


See also, David Glazier, Precedents Lost: The Neglected History of the Military Commission, 46 Va. J. Int’l L. 5 (2005); Michael O. Lacey, Military Commissions: A Historical Survey, 2002 Army Lawyer 41 (2002).) Presumably, one reason that Congress included the assertion in the MCA that it was not creating new crimes was to preclude claims that the MCA was ex post facto legislation and violated the principle of legality (retroactively punishing conduct that was not previously prohibited). This was a serious concern, as the primary purpose of the military commissions, at least as they were originally envisioned, was to punish those responsible for the attacks of September 11, 2001 and other acts of terrorism, such as the bombings of the U.S.S. Cole and the U.S. Embassies in Tanzania and Kenya. Claims of ex post facto punishment were raised frequently in pre-trial litigation in the earlier military commissions under the President’s order, including in the cases against David Hicks and Salim Hamdan. Thus far, all pre-trial attempts to challenge individual offenses on retroactivity grounds have failed. See, e.g. U.S. v. Khadr, 1 MC 199 RULING ON DEFENSE MOTION TO DISMISS CHARGE ONE FOR FAILURE TO STATE AN OFFENSE AND FOR LACK OF SUBJECT MATTER JURISDICTION (D-008) (2008) For example, whether conspiracy and material support were traditional war crimes properly subject to trial by military commission was the basis of a pretrial motion to dismiss in the case of U.S. v. Hamdan. D-012 Defense Motion to Dismiss (Ex Post Facto). Despite the fact that a plurality of the Supreme Court agreed in Hamdan v. Rumsfeld that conspiracy was not a traditional law of war offense, See, Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2785 (2006). the military commission judge found otherwise. The military judge, Captain Keith Allred, recognized that there was significant merit to the defense claims that these two offenses were newly minted war crimes, but adroitly side-stepped the issue by finding that while the names of the offenses might be new, the conduct proscribed by the offenses has traditionally been considered to be violations of the law of war by other names. D-012 Ruling on Defense Motion to Dismiss (Ex Post Facto) (July 14, 2008) (The ruling can be found as an attachment to a motion that I filed at pages 5-10 of the document at the following link: http://www.defenselink.mil/news/Jawad%20-%20D%20-%20007%20Request%20for%20Judicial%20Notice.pdf)

Mr. Hamdan was acquitted of conspiracy, but was convicted of material support. The question of whether material support is an offense properly within the jurisdiction of a military commission and the correctness of Judge Allred’s ruling is currently being considered on appeal to the Court of Military Commission Review. A similar ex post facto claim is currently being considered on appeal in U.S. v. al Bahlul. See, CITE
The crime of “murder in violation of the law of war,” one of the substantive offenses listed in the M.C.A., actually has some historical basis. Nevertheless, according to a report by the Congressional Research Service, “The crime of ‘murder in violation of the law of war,’ which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, may also be new.” What was new about this crime was not the name, but rather this overly broad interpretation of the offense. Whether this code section “codifies offenses that have traditionally been triable in military commissions” or creates a wholly new war crime depends on how the offense is interpreted. While the Office of Military Commissions-Prosecution argued that “murder in violation of the law of war” merely codified prior law, the defense argued that their interpretation of this offense represented a radical expansion of the conduct subject to trial by military commission.

In order to understand the debate about the proper interpretation of this crime, it is important to review it’s history post 9/11. The President established

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According to Howland, the charges related to “the alleged killing, by shooting or unwarrantably harsh treatment, of officers or soldiers, after they had surrendered, or while they were held in confinement as prisoners of war.” Id. Thus, this offense was comparable to the modern day offenses of “murder of protected persons,” which is enumerated in the M.C.A. at 10 U.S.C. § 950v(b)(1) and “Cruel or Inhuman Treatment” 10 U.S.C. § 950v(b)(12). The only other example Howland gives of murder in violation of the laws of war was the 1873 trial by military commission of the Modoc Indians for “a treacherous killing of an enemy during a truce”, id. at n.1. Treachery, or perfidy, and misusing a truce are also prohibited under the law of war and separately punishable under the Military Commissions Act. See 10 U.S.C. § 950v(b)(17) “Using Treachery or Perfidy” and (18) “Improperly Using a Flag of Truce.”

military commissions by executive order on November 13, 2001. Secretary of Defense Rumsfeld later issued a series of implementing regulations. The first outlined the procedures to be applied; this was followed by a regulation outlining the crimes subject to trial by military commission and defining their elements. This instruction, purported to be “declarative of existing law,” and contained the following assertion:

No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission.

This penal code for the original military commissions included an offense denominated “Murder by an Unprivileged Belligerent.” The elements of the offense were:

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons

or

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143 Id. at paragraph 3A.
(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.144

The Instruction included the following comment which provided some additional explanation of the crime: “Unlike the crimes of willful killing or attacking civilians, in which the victim’s status is a prerequisite to criminality, for this offense the victim’s status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy ‘belligerent privilege’ or ‘combatant immunity.’”145

The assertion that this offense was “declarative of existing law” was simply erroneous; there was no support for the proposition that, prior to 2003, any “attack” or homicide by an unprivileged belligerent in the context of an armed conflict was automatically considered a war crime simply by virtue of the status of the attacker. As one commentator noted, “(a) comparison of the enumerated war crimes in each major international convention, court, and statute reveals that murder by an unprivileged belligerent is not listed in any international legal instrument.”146 The validity of this particular crime was never

144 Id. paragraph 6.B.3.

145 Id. paragraph 6.B.3., Comment 2 No citation or authority was provided for this Comment. A related crime “Destruction of Property by an Unprivileged Belligerent” had similar elements. See, paragraph 6.B.4.

tested because the military commissions created by the President’s Executive Order were invalidated in their entirety by *Hamdan v. Rumsfeld* \(^{147}\) before any defendant ever went to trial on this charge.

In response to *Hamdan*, in October 2006, Congress passed the Military Commissions Act of 2006\(^ {148}\) (M.C.A.). The M.C.A. included a list of enumerated offenses which were subject to trial by military commission. Like MCI2, the M.C.A. stated that it was “declarative of existing law,”\(^ {149}\) using similar language to that used in MCI2:

> The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.\(^ {150}\)

The Military Commissions Act largely adopted the list of criminal offenses, complete with elements and definitions from MCI2 with some minor exceptions. The most significant difference between the lists of offenses punishable in the new and old military commissions was that Congress replaced the crimes of “Murder by an Unprivileged Belligerent” and “Destruction of Property by an Unprivileged Belligerent.” In place of these two crimes, Congress substituted “Murder in Violation of the Law of War” and “Destruction of Property in Violation of the Law of War.”

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\(^{147}\) 548 U.S. 557 (2006).

\(^{148}\) 10 U.S.C. § 948a

\(^{149}\) 10 U.S.C. § 950p(b)

\(^{150}\) 10 U.S.C. § 950p(a)
The remarkably brief and unhelpful definition of Murder in Violation of the Law of War, found in Section 950v of the MCA contains no reference to unprivileged belligerency or combatant immunity:

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.

In early 2007, pursuant to authority in the M.C.A. to issue implementing regulations defining the procedures, rules of evidence and elements of the offenses in the statute, the Secretary of Defense published the Manual for Military Commissions. Part IV of this Manual, entitled “Crimes and Elements,” lists the elements for Murder in Violation of the Law of War:

1. One or more persons are dead;
2. The death of the person resulted from the act or omission of the accused;
3. The killing was unlawful;
4. The accused intended to kill the person or persons;
5. The killing was in violation of the law of war; and
6. The killing took place in the context of and was associated with an armed conflict

Once again, there is no mention of “unprivileged belligerency” or “combatant immunity” and no discussion was offered to explain the elements. The definition is essentially circular: murder in violation of the law of war is defined as when a

151 10 U.S.C. § 949a(a)


153 MMC, Part IV, para (15)b.
person is killed during a war in violation of the law of war. The opacity of the
definition has led to a vigorous dispute between the government and the
defense about the scope of conduct covered by the offense. Although the
drafters of the MCM did not provide any direct discussion of the offense, the
drafters cross-referenced a comment to another offense: “Intentionally Causing
Serious Bodily.”\textsuperscript{154} This offense is another previously unknown war crime which
requires that the actor cause serious bodily injury to someone “in violation of the
law of war.”\textsuperscript{155} 156 The comment to this offense in the MMC includes this key
sentence: “For the accused to have been acting in violation of the law of war,
the accused must have taken acts as a combatant without having met the
requirements for lawful combatancy.”\textsuperscript{157} This nonbinding, misleading and
inaccurate comment\textsuperscript{158} was the apparent basis of the Office of Military
Commissions efforts to resuscitate the rejected crime of “murder by an
unprivileged belligerent” by interpreting “murder in violation of the law of war”
as identical with its moribund predecessor.

\textsuperscript{154} MMC, Part IV, ¶ (15)c.
\textsuperscript{155} MMC, Part IV, ¶ (13).
\textsuperscript{156} The crime has been determined to be a lesser included offense of “attempted murder in
violation of the law of war” in litigation before the military commissions. My client, Mohammed
Jawad, was charged with both “attempted murder in violation of the law of war” and
“intentionally causing serious bodily injury.” Sworn Charges U.S. v. Jawad available at:
dismiss the latter charge on the basis that it was a lesser included offense and therefore
multiplicitious. D-006 Motion to Dismiss Charge II available at:
http://www.defenselink.mil/news/Jawad%20%20D%20%206Motion%20to%20DismissChargeII.pdf The motion was granted orally on June
19, 2008 during a motions hearing at Guantanamo.

\textsuperscript{157} MCM, Part IV, ¶ (13)d.
\textsuperscript{158} The entire comment is discussed more fully below.
As I previously indicated, it was my view that throwing a hand grenade at uniformed enemy soldiers “in the context of an armed conflict” did not violate the law of war. In the motion to dismiss that I filed in May 2008, I argued that if Mr. Jawad had indeed thrown a grenade, it was simply a common law attempted murder or aggravated assault and had to be prosecuted in domestic criminal court. Furthermore, if there were such a war crime as “attempted murder in violation of the law of war” it did not encompass Mr. Jawad’s alleged conduct. The government’s response to this motion expressed the view that Mr. Jawad’s status as an unlawful enemy combatant (due to not wearing a uniform or distinctive insignia and not carrying arms openly) converted the attempted murder into the war crime of “attempted murder in violation of the law of war.”

Before this motion could be decided, the meaning of murder in violation of the law of war became an issue in another case, U.S. v. Hamdan. Hamdan, the first military commission case to go to trial, commenced July 21, 2008. Salim Hamdan, Osama bin Ladin’s driver, was charged with, inter alia, conspiracy to commit murder in violation of the law of war. The judge’s instructions defined the offense in much the same terms as “murder of

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160 The government’s response is also available at the link in the prior footnote.

161 Cite

protected persons” (another specifically enumerated offense under the MCA) thereby drastically limiting the potential scope of the offense. The government submitted proposed findings instructions, but these instructions simply restated the elements of murder in violation of the law of war from the Manual for Military Commissions and did not provide any further explanation of the offense. The defense also submitted proposed instructions. Judge Allred adopted the defense proposal and provided the members the following instruction defining “murder in violation of the law of war”:

A killing violates the law of war where a combatant (whether lawful or unlawful) intentionally and without justification kills:

(i) civilians not taking an active part in hostilities;

(ii) military personnel placed hors de combat by sickness, wounds, or detention; or

(iii) military medical or religious personnel.

The prosecution did not object to the judge’s instructions prior to the jury being instructed, but lodged an objection immediately thereafter, prior to giving the closing argument, and requested that the instructions be modified. According

163 Manual for Military Commissions, Part IV, Paragraph 6(1)
164 U.S. v. Hamdan, Prosecution’s Proposed Instructions, June 20, 2008
167 Judge Allred’s instruction was consistent with the definition of the war crime of murder in the U.S. War Crimes Act, 18 U.S.C. §2241:

(D) Murder.— The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.
to the prosecutor: “In regard to murder in violation of the law of war, sir, and how it was instructed … (the instructions) neglect to state that if an unlawful combatant were to kill a lawful combatant that that would also be a violation of the law of war.” Judge Allred responded: “I don’t think I’ll give that instruction … if an unlawful combatant kills a lawful combatant, that’s murder than can be punished by the domestic legal system of the detaining power, but it’s not murder in violation of the law of war. It’s just a murder in violation of domestic law.” The prosecutor had a valid argument in so far as it reflects the statute; the text of the statute is very clear on this point, authorizing punishment by military commission of any unlawful enemy combatant “who intentionally kills one or more persons, including lawful combatants, in violation of the law of war. . .” (Those who are hors de combat, are, by definition, no longer lawful combatants.) But, rather than offering specific examples of murders of lawful combatants which might violate the law of war, the prosecution argued that any killing of a lawful combatant by an unlawful combatant would violate the law of war, stating: “The U.S. government’s position has always been that . . .unlawful belligerency is a per se violation of the law of war.” Judge Allred rejected this argument. He ruled “There is no offense under the law of war of murdering a lawful combatant. . .(u)nless it’s done in an unlawful way, such as a way that inflicts undue suffering or uses a prohibited weapon.” This was precisely the position that I had argued in my motion. I immediately filed a

168 U.S. v. Hamdan, Record of Trial p. 3727
169 Id. p. 3728
170 Id.
171 ROT p. 3785.
supplement to my motion citing Judge Allred’s instruction in *U.S. v. Hamdan* as additional persuasive authority.\textsuperscript{172}

Less than 10 days after the conclusion of the Hamdan trial, “murder in violation of the law of war” once again took center stage in *U.S. v. Jawad*. A hearing on my motion to dismiss was held on August 13, 2008. Although the issue was basically a matter of law that could be decided on the briefs, I thought it might be helpful for the judge to hear from an expert on the subject. I invited Professor Madeline Morris of Duke University School of Law, an internationally renowned authority to testify in support of the defense position that throwing a hand-grenade at lawful combatants, even if done by an unlawful combatant, was not a violation of the law of war.\textsuperscript{173} The government did not introduce any expert who disagreed with her, nor did it offer any evidence in support of its position, relying on the prosecutors’ briefs and oral argument. Judge Henley indicated that he was skeptical of the government’s position, as the following exchange between the trial counsel (Air Force Lieutenant Colonel Douglas Stevenson), the military judge and me, demonstrates:

TC (LTC STEVENSON): So you ask are you conceding. . . that, unlawful enemy combatants committing a particular act, attempted murder against a lawful combatant, would that alone be a violation of the law of war? Our position is yes that would . . .

MJ (COL HENLEY): So you are not misled. . . as for that first point, whether or not you concede, that’s the issue I raised. Status alone would be

\textsuperscript{172} Cite Supplemental motion.

\textsuperscript{173} An affidavit of Professor Morris and her CV, which I included as attachments to my motion to dismiss, can be found at: [http://www.defenselink.mil/news/d20080528Defense%20Motion%20To%20Dismiss%20for%20Failure%20to%20State%20an%20Offense%20-%20Lack%20of%20Jurisdiction%20-%20D-007.pdf](http://www.defenselink.mil/news/d20080528Defense%20Motion%20To%20Dismiss%20for%20Failure%20to%20State%20an%20Offense%20-%20Lack%20of%20Jurisdiction%20-%20D-007.pdf) at pp. 11-30.
insufficient to establish violation of the law of war. If you intend to rely in whole or in part on that, then that issue should and will be addressed before we begin the trial, if we ever get that far.

TC (LTC STEVENSON): Yes, Sir.

MJ (COL HENLEY): Are you clear?

TC (LTC STEVENSON): We are clear on that.

MJ (COL HENLEY): It is incorporated, I believe, in the subject matter jurisdiction motion, that's why I asked it.

TC (LTC STEVENSON): Right. And that's our position, Sir.

MJ (COL HENLEY): Major Frakt?

DC (MAJ FRAKT): Well I would concur that that has been the government's position all along. That unprivileged belligerency alone, status alone is enough . . .

MJ (COL HENLEY): Well it should be clear now that, the court, the commission is not joined in that position.

DC (MAJ FRAKT): Crystal, Your Honor.174

Although the judge clearly was skeptical of the government’s position, he was determined to give the government every opportunity to make its case. At the close of the hearing, he ordered additional briefing by both parties on the elements of “murder in violation of the law of war” and whether merely being an unlawful combatant was sufficient to establish a violation of the law of war.175 He set a due date of September 9, 2008 for these briefs.

The original motion to dismiss had been focused on why Jawad’s acts did not violate the law of war rather than on what murderous acts might constitute

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174 U.S. v. Jawad Record of Trial pp. 583-4

175 Id. at pp. 642-3
murder or attempted murder in violation of the law of war. In the court-ordered brief, I expanded on this latter point and explained that there are a number of facts and circumstances which would theoretically support a finding by members that a given murder or attempted murder was a violation of the law of war, but the mere status of being an unlawful enemy combatant at the time of the offense is not one of them. The government continued to assert that any hostile act committed by an unlawful combatant violated the law of war; in other words, that the unlawful combatancy (engaging in any form of combat without the privilege to do so) itself violated the law of war.

The key flaw in the government’s argument was a conflation of two very distinct concepts: unlawful combatancy and war crime. By equating these two separate categories of acts, the government was also attempting to conflate two different categories of people: unlawful combatants and war criminals. Professor Yoram Dinstein has written extensively on the distinction between unlawful combatants and war criminals in his book The Conduct of Hostilities under the Law of International Armed Conflict and in other articles. In a section of his book headed “The distinction between war criminal and unlawful combatants” he cites “eight respects in which the concepts of war crimes

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176 The court-ordered briefs and replies are not yet posted on the military commission website.


179 Dinstein, supra, note 64 at p. 233.
and unlawful combatancy diverge sharply” including “a war criminal is tried by virtue of international law (the law of international armed conflict), whereas an unlawful combatant is prosecuted under domestic law.” Of course, if an unlawful combatant “intentionally commits a serious breach” of the law of war “an unlawful combatant may simultaneously be a war criminal” in which case “the enemy State has an option whether to proceed against him” under international law or domestic law. But, “(a)s long as unlawful combatants do not commit any crime under international law, their prosecution can only take place before domestic courts.”

If the distinction between unlawful combatants and war criminals is so clear, why did the government believe that the two terms are synonymous? The germ of the concept, frequently cited by the government, is found in *Ex Parte Quirin*, particularly in the final misleading sentence of this dicta:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Unfortunately, the Supreme Court’s explanation is only partially correct. According to Professor Yoram Dinstein: “With the exception of the last few

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180. *Id.*

181. *Id.* at 234

182. *Id.* at 234

183. *Id.* at 236.

184. *Ex parte quirin et al*, 317 U.S. 1, 30 (1942)
words, this is an accurate reflection of the (Law of International Armed Conflict).”

Professor Dinstein elaborates:

It is true that sometimes the act which turns a person into an unlawful combatant constitutes by itself an offense (under either domestic or international law) and can be prosecuted and punished as such before a military tribunal. But the fulcrum of unlawful combatancy is that the judicial proceedings may be conducted before regular domestic (civil or military) courts and, significantly, they may relate to acts other than those that divested the person of the status of lawful combatant.

Professor Dinstein is not alone among legal scholars in disputing the Supreme Court’s language. Professor George Fletcher sums up the crucial sentence this way: “In one of the greatest legal fallacies I have ever encountered, the Quirin court makes the giant leap from the status of failing to qualify as a lawful combatant to the crime of being an unlawful combatant.”

There is no indication that Congress, in drafting the M.C.A., was adopting the fallacy of Quirin. Congress’ repudiation of the crimes of “Murder by an Unprivileged Belligerent” and “Destruction of Property by an Unprivileged Belligerent” in favor of murder and property destruction “in violation of the law of war” strongly suggests that the drafters understood that unlawful combatants could be tried in military commissions only for violations of the laws of war. Unfortunately, the drafters of the Manual for Military Commissions (these regulations were prepared by the Department of Defense with input from the

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187 Because the M.C.A. grants jurisdiction only to military commissions over unlawful combatants, if Congress wanted to punish all murders committed by unlawful combatants, it could have simply included the crime of murder.
Justice Department) did attempt to incorporate the fallacy of Quirin through the comment to “Intentionally Causing Serious Bodily Injury.” This comment begins:

For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.

The comment continues:

It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war. 188

These last sentences add little to our understanding of the meaning of Murder in Violation of the Law of War, being largely a restatement of the principle of combatant immunity, which is irrelevant. It is true that lawful combatants enjoy combatant immunity and may not be prosecuted for lawful acts of combatancy. But it is also true that lawful combatants may be prosecuted for violations of the law of war, just like unlawful combatants. It is also true that unlawful combatants may be prosecuted for “offenses associated with armed conflicts, such as murder”. What the comment implies, but which is not “generally accepted international practice” is unlawful combatants may be prosecuted for any and all homicides which occur in the context of an armed conflict as a violation of the law of war. The comment simply fails to distinguish between domestic crimes and war crimes, which, as Professor Dinstein noted, is one of the distinctions between unlawful combatants and war criminals. Offenses which are not specifically in violation of the law of war may nevertheless be violations of domestic criminal law, and may be prosecuted in domestic criminal courts.

188 MMC, Part IV, para. 6(a)(13)(c).
As I attempted to explain in my briefs, not all crimes committed by unlawful combatants are war crimes. Suppose that an Afghan citizen, a member of the Taliban, wearing plain clothes, shoots and kills three civilian countrymen, also members of the Taliban, in Kabul during the time when the United States is engaged in a conflict with the Taliban and al Qaeda. This obviously would be a violation of domestic criminal law and a matter for the Afghan criminal courts. Now suppose that moments later the same Taliban member shoots and kills three armed uniformed U.S. soldiers patrolling the streets of Kabul. The Taliban member (according to the U.S.) is an unlawful combatant and has clearly participated in hostilities and engaged in an act of combat. According to the official Department of Defense position, the murders of the Americans would be war crimes. But the only difference between the two sets of homicides is that the second victims were lawful combatants. Combatants are lawful targets under the law of war. Logically, the selection of a lawful military target should not convert an ordinary domestic crime to a war crime, but that is the position the government has taken. In truth, the unlawful combatant has not violated the law of war and may be tried only in domestic court.

The term “unlawful combatant” itself is misleading and may add to the confusion because it implies the actor is in violation of the law of war. This is why the term “unprivileged belligerent” which has replaced “unlawful combatant” in the 2009 MCA is preferable and more accurate. The lawful combatant gets the privilege of combatant immunity and the privilege of being treated as a prisoner of war under the Geneva Conventions if captured. The unprivileged belligerent gets neither. The acts of the unprivileged belligerent are “unlawful” in the sense that participation in the activity of war is not officially sanctioned, but is not necessarily “unlawful” in the sense of violating the law of war. Professor George Fletcher has described unprivileged belligerency as
“practicing war without a license,” Just as one can drive without a license, but otherwise comply with the rules of the road, one can practice war without a license and still comply with the laws of war.

Under the government’s view, there would have to be more than one “law of war” -- the law of war for unlawful combatants and the law of war for lawful combatants. This is simply untrue; the law of war is the same for all combatants, unlawful or lawful. All combatants may be tried for war crimes. Combatant immunity (immunity from prosecution for acts which would be criminal in peacetime) is extended to soldiers in an armed conflict operating within the constraints of the laws of war. There is no combatant immunity for soldiers who operate outside the parameters of the laws of war. Soldiers who are entitled to combatant immunity (lawful combatants) have been prosecuted for their acts which are in violation of the law of war. Lt. Calley’s act of murdering innocent civilians did not make him an unlawful combatant, it made him a war criminal. Thus, war crimes may be defined as acts for which even lawful combatants would not receive combatant immunity.

According to the government’s briefs in U.S. v. Jawad, failure to comply with any of the four conditions for being a lawful combatant equates to a violation of the law of war. The logical fallacy of that position can be easily demonstrated by examining the criteria. Under the Geneva PW Convention, Article 4, Paragraph 2, members of militias and organized resistance movements can be lawful combatants if they comply with all four of the following conditions:

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(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.\textsuperscript{190}

These four criteria for lawful combatancy were paraphrased in the Military Commissions Act of 2006 in one of the three definitions of a “lawful enemy combatant”.

The term ‘lawful enemy combatant’ means a person who is— . . .

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and \textit{abide by the law of war};

An unlawful combatant is a person who engages in hostilities who does not comply with all four of the conditions for being a lawful combatant. Therefore, a member of a militia, volunteer corps, or organized resistance movement which (in the words of the Geneva Convention) “conducts their operations in accordance with the laws and customs of war” or (using the language of the M.C.A.) “abides by the law of war” is nevertheless considered an “unlawful combatant” by virtue of non-compliance with the other conditions, such as wearing a fixed distinctive sign or carrying arms openly. Thus, there is no

\textsuperscript{190} Geneva Convention Relative to the Treatment of Prisoners of War, Article 4, Paragraph 2 (emphasis added).
question that one can be an unlawful combatant and abide by the law of war
(or “conduct their operations in accordance with the laws and customs of
war”). Merely failing to wear a fixed distinctive sign or failing to carry arms
openly, “the acts which render the belligerency unlawful” in the words of Quirin,
do not subject the “unlawful combatants to trial and punishment by military
tribunals” unless a war crime is committed. Unlawful combatants are not
automatically war criminals. As Professor Fletcher has written, “If an
unprivileged combatant kills someone, it is not clear why the homicide should
be regarded as violation of the law of war.”

In addition to arguments based on the law of war, I also argued that the
plain language of the statute precluded the government’s view. The definition
of Murder in Violation of the Law of War from Section 950v of the MCA is quite
general, (“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”). There is at least one important point which can be
gleaned from this definition. Congress recognized that not all murders
committed by unlawful combatants are in violation of the law of war. By
necessary implication, the definition recognizes that some murders by “persons
subject to this chapter” (alien unlawful enemy combatants) are not punishable
under the M.C.A, namely murders not “in violation of the law of war.” Therefore,
murders “in violation of the law of war” are a specialized subset of homicides
which an unlawful combatant might commit.

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191 George P. Fletcher, On the Crimes Subject to Prosecution in Military Commissions, ICJ 51
Judge Henley issued his ruling on September 24, 2008. He adopted the defense position, holding that "the propriety of the charges in this case must be based on the nature of the act" and ordering the government to prove "that the method, manner or circumstances used violated the law of war." Judge Henley pointedly rejected the government’s theory, stating 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." Judge Henley also dismissed the government’s argument that murder in violation of the law of war was equivalent to the discarded crime of "murder by an unprivileged belligerent": "If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation, they could have said so. They did not. . . ." Although Judge Henley endorsed the defense interpretation of the offense, he declined to dismiss the charge at that time because the government had indicated at an earlier hearing that it could prove that there were facts and circumstances which violated the law of war. However, in a hearing shortly after issuing the ruling, the judge instructed the government that if they did not have sufficient evidence to support the charge,

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193 Id. ¶ 3.

194 Id. ¶ 4.

195 Id. ¶ 3.

196 Assistant Trial Counsel Lt Col Stevenson: “We’ll play out a lot more facts and circumstances to show that it goes beyond just a mere status as the basis of the charge” U.S. v. Jawad, Record of Trial, p. 583 (August 14, 2008);

Military Judge Col Henley: “At one of the previous sessions, Colonel Stevenson, my recollection is, when asked by myself, you offered a position that the government would be able to prove a law of war violation without reference to status.” U.S. v. Jawad, Record of Trial, p. 706 (September 25, 2008);
consistent with his ruling, then they had an ethical obligation to voluntarily dismiss the charge. Recognizing that this ruling virtually precluded any chance of successfully prosecuting Mohammed Jawad, the government filed a motion to reconsider the ruling on October 9, 2008. The defense submitted our response on October 16, 2008. The government then submitted a reply brief on October 21, 2008, in which it made this rather extraordinary admission:

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.

According to the government, this issue was of such “central importance to this case, specifically, and to the military commissions process, in general” that if the military judge was not willing to reconsider his ruling and adopt the government’s position, then the judge should dismiss the charge in order to permit an interlocutory appeal and allow the Court of Military Commission Review to weigh in on the issue. In its motion to reconsider Judge Henley’s ruling, the government argued that his interpretation would render this statutory provision meaningless, because all possible murders in violation of the law under his interpretation were already covered by other more specific provisions of the

197 Military Judge Col Henley: “the government always has an ethical obligation to not proceed to trial, knowing that it can’t prove a case beyond a reasonable doubt.” U.S. v. Jawad, Record of Trial, p. 708 (September 25, 2008)


199 For some reason, the defense response has not yet been posted on the military commission’s website.


201 Id.
MCA. To rebut this argument, I provided several examples of murders that would violate the law of war that were not clearly covered by other more specific offenses. Interpreting “murder in violation of the law of war” as a catch-all provision designed to encompass murders that violated the law of war that were not covered elsewhere in the statute also had the benefit of being consistent with Congress’ claim that this crime was merely a codification of existing offenses under the law of war.

A comparison of the offenses listed in the M.C.A. with the other primary sources listing war crimes reveals several potential homicides that violate the law of war but which are not specifically covered under the M.C.A. by other offenses, and includes murders of lawful combatants. For example, the killing of lawful combatants attempting to surrender, particularly after declaring that no quarter will be given, is a clear violation of the law of war which arguably is not covered by any other M.C.A. offense. A death through “medical experimentation” would also be in violation of the law of war and is not specifically covered by any other offense.

Murders using illegal weapons would also violate the law of war, even if the targets were otherwise lawful (i.e. lawful combatants). It is a settled principle

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202 See, Rome Statute, Article 8, War Crimes, 2(b)(vi) “Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion.”

203 See, 10 U.S.C. § 950v(b)(6) “Denying Quarter.”

204 Soldiers attempting to surrender are arguably not covered within the M.C.A.’s definition of protected persons because they may not be deemed to be “persons taking no active part in the hostilities.”

205 Rome Statute, Article 8, War Crimes, 2(b)(x) “Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.”
of the international law of war that weapons which cause unnecessary suffering are prohibited. The Rome Statute of the International Criminal Court identifies several examples of prohibited weaponry.

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

The offense of “employing poison or similar weapons” is enumerated in the M.C.A., but does not cover the use of weapons which cause unnecessary suffering generally. Killing or attempting to kill someone with such weapons, such as hollow point bullets, banned by the Hague Conventions of 1899 or explosives with non-detectable fragments such as glass, banned by the Protocol on Non-Detectable Fragments of 1980, are examples of murders which would

206 10 U.S.C. § 950v(b)(8)

207 Rome Statute, Article 8, War Crimes, 2(b)(xix) “Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”

208 Rome Statute, Article 8, War Crimes 2(b)(xx) “Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict.”
fall under “murder in violation of the law of war.” The use of a hijacked civilian airliner as a weapon also violates the law of war. Deaths resulting from such an attack would be murder in violation of the law of war, even if the target, such as the Pentagon, were deemed to be lawful.

Judge Henley denied the motion for reconsideration on October 29, 2008, ruling “The Government’s additional legal precedent and argument submitted in support of its request for reconsideration is unpersuasive.” Based on the prosecutors’ official admission to the court that they could not prove the charges, I requested that they dismiss them. They refused.

Judge Henley was not the only judge to reject the government’s interpretation of this offense. While the motion to reconsider Judge Henley’s ruling was pending, I had another opportunity to litigate the meaning of “murder in violation of the law of war.” Ali Hamza al Bahlul, the second detainee to be tried by military commission, was charged with conspiracy to commit murder in violation of the law of war and solicitation to commit murder in violation of the law of war. His trial commenced on October 27, 2008. The week prior to the trial, on October 22, 2008, the government submitted proposed jury instructions to the commission which outlined the government’s

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210 I was appointed to represent Mr. al Bahlul, but he refused to accept my assistance and was denied the right to represent himself. I respected his wishes and put on no defense in court. David McFadden, Guantanamo prisoner and lawyer boycott, USA Today, October 28, 2008.

211 Salim Hamdan was the first. An Australian, David Hicks, was sentenced by a military commission, but he reached a plea agreement with the government, obviating the need for a trial.

view of what would be required to prove murder in violation of the law of war. The pertinent provisions follow:

In order to find that the accused conspired to murder in violation of the law of war, you must find beyond a reasonable doubt that the accused agreed to intentionally kill one or more persons in violation of the law of war.

A murder in “violation of the law of war” may be established by proof of the status of the accused as an unlawful combatant or by proof of the character of the victim.

A killing violates the law of war where an unlawful combatant intentionally and without justification kills any person in association with an armed conflict, including a member of United States or allied combatant forces.

A lawful (as opposed to an unlawful) combatant violates the law of war when he intentionally and without justification kills protected persons. Protected persons means civilians not taking an active part in hostilities; military personnel placed hors de combat by sickness, wounds, or detention; and military medical or religious personnel.

The proposed instructions stated that all murders by an unlawful combatant were murders in violation of the law of war. It is unclear why the government included the last paragraph referencing murders in violation of the law of war by lawful combatants. The government provided no authority for the proposed instructions, which were diametrically opposed to the instructions provided by Capt Allred and the ruling issued by Col Henley. Regrettably, I had been

specifically instructed by Mr. al Bahlul not to represent him in court and not to file any motions on his behalf, so I was not in a position to file formal proposed instructions for the defense or objections to the government’s proposed instructions. However, believing it was important that the jury be properly instructed on the law, and being concerned about creating a precedent which might adversely affect the other detainees charged with this offense, I provided informal input on the proper definition of this crime to the judge through one of the commission clerks, pointing him to the briefs and Judge Henley’s ruling in U.S. v. Jawad. Fortunately, the judge, Air Force Colonel Ronald Gregory, was persuaded by Judge Henley’s reasoning. He disregarded the government’s proposal and crafted instructions which were a hybrid of Judge Allred’s instructions and Judge Henley’s ruling. Here is the relevant portion of the instruction ultimately given to the jury:

A violation of the law of war may be proven by either the killing of protected persons or by using a means, weapon, or technique considered illegal under the laws of war. The killing violates the law of war where a combatant, whether lawful or unlawful, intentionally and without justification kills, one, civilians not taking an active part in hostilities; two, military personnel placed hors de combat by sickness, wounds, or detention; or three, military medical or religious personnel.

A killing may also violate the law of war where an accused, regardless of status as a lawful or unlawful combatant, intentionally and without justification kills any person by a method, manner, or under circumstances that violate the law of war.

Such method, manner, or circumstances may include but are not limited to attacking the United States and allied forces by means of perfidy or

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214 Mr. al Bahlul was boycotting the proceedings and objected to being represented by a member of the U.S. Armed Forces.
treachery, improperly using a flag of truce or a distinctive symbol (for example, a Red Cross or Red Crescent) or in the course of spying.

Once again, the commission rejected the government’s theory that the “status of the accused as an unlawful combatant” was sufficient to prove a violation of the law of war. Importantly, the instruction made it clear that there was no distinction between lawful and unlawful combatants as to what constitutes a law of war violation. The government was deeply unhappy with these instructions and voiced their objections on the record. However, because Mr. al Bahlul was convicted of all charges (not surprisingly, given that no defense was offered), the prosecution will have no occasion to challenge the instructions on appeal.

Refusing to accept the emerging consensus among the military judges, the government reiterated and refined their position in U.S. v. Khadr. Omar Khadr, a 15 year old Canadian, was charged with, *inter alia*, attempted murder in violation of the law of war, murder in violation of the law of war and conspiracy to commit murder in violation of the law of war. The murder charge relates to an alleged killing of a U.S. soldier with a hand-grenade. The attempted murder charge references an alleged effort to kill U.S. and coalition forces with “improvised explosive devices” made from land mines. Thus, both charges relate to killings or attempted killings of lawful combatants with lawful weapons. The defense filed multiple briefs moving to dismiss the murder charges based on a failure to state an offense, all of which were denied. However, on

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September 11, 2008, shortly after Colonel Henley ordered the parties in U.S. v. Jawad to brief the meaning of murder in violation of the law of war, his Army colleague, Colonel Patrick Parrish, issued a similar order to the counsel in U.S. v. Khadr.\(^ {217}\) Going a step further than his counterpart, Col. Parrish also directed the parties to provide proposed jury instructions. The first round of briefs was filed on October 6, 2008. The government’s brief conceded they were relying solely on Omar Khadr’s alleged status as an unlawful combatant and they could not prove an independent violation of the law of war, as evident from the following proposed instruction:

> For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.

This language is from the Comment to “Intentionally Causing Serious Bodily Injury”\(^ {218}\) previously discussed.

The proposed instruction continued:

> The term "lawful enemy combatant" means a person who is:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities which meet all of the following criteria:

(1) are under responsible command,
(2) wear a fixed distinctive sign recognizable at a distance,

\(^ {217}\) This order was made via e-mail and has not yet been publicly released. The order is on file with the author.

\(^ {218}\) MCM, Part IV, ¶(13)d.
(3) carry their arms openly, and 
(4) abide by the law of war; or 

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

This language, defining a “lawful enemy combatant” is taken verbatim from the Military Commissions Act itself.\textsuperscript{219} The M.C.A. definition of a lawful enemy combatant is derived from Geneva Convention III,\textsuperscript{220} which defines those persons entitled to be treated as prisoners of war.

The government’s proposed instruction concluded:

Failure to meet at least one of the above three criteria renders an individual an unlawful combatant making any combatant acts by that individual violations of the law of war.\textsuperscript{221}

This was the clearest statement yet by the government equating acts of an unlawful combatant with violations of the law of war. As it did in the motion for reconsideration in \textit{U.S. v. Jawad}, the government requested that the judge (if he rejected the government’s legal theory as reflected in the proposed instructions) dismiss the charges alleging murder in violation of the law of war so the government might file an interlocutory appeal with the Court of Military

\textsuperscript{219} 10 U.S.C. § 948a(2)

\textsuperscript{220} Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Article 4. The Geneva Convention language was adapted from the Hague Conventions, specifically Regulations Respecting the Laws and Customs of War on Land, annexed to Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, Article 1.

\textsuperscript{221} Government Proposed Instructions on Charges I-III, filed November 14, 2008 \textit{U.S. v. Khadr}. 
The military judge declined to rule on the motion and did not issue his proposed findings instructions prior to trial, which was scheduled to commence on January 26, 2009. Before the trial began, President Obama ordered a halt to all military commission activity by Executive Order, and the case was suspended indefinitely.

On July 30, 2009, when I testified before Congress, I recommended to them that they clarify the meaning of Murder in Violation of the Law of War by adding the following definition into the M.C.A.:

IN VIOLATION OF THE LAW OF WAR – The term ‘in violation of the law of war’ means in a method or manner or under circumstances which violate the law of war. The mere status of being an unprivileged enemy belligerent, without more, is insufficient to establish that an act was ‘in violation of the law of war’.223

Disappointingly, Congress did not add the suggested language. However, it may be argued that since Congress was aware of the way the crime had been interpreted by Judge Allred, Judge Henley and Judge Gregory224 and saw no reason to change the definition of this crime in the MCA of 2009, we must

222 Government’s Motion: Request for Findings Instruction On Charge I, II and III (as it pertains to Murder in Violation of the Law of War) November 14, 2008 U. S. v. Khadr (“dismiss these three Charges as a matter of law in order to permit the Government to appeal this critical issue to the Court of Military Commission Review (CMCR), to allow the appellate process to fully resolve this important legal issue prior to trial.”)


224 I specifically discussed their rulings in my testimony. Id. at pp.14-15.
presume that Congress acknowledged their interpretation. Khadr’s case will provide an opportunity to test this theory once again. His trial is likely to be the first military commission to be held under the Military Commissions Act of 2009, in July 2010. It will also be interesting to see if the new implementing regulations for the 2009 MCA, currently being prepared by the Department of Defense, continue to reflect the Bush Administration’s flawed interpretation of this offense, or conform to the views of the three military judges who have grappled with this offense, or simply leave the question open to continue to be litigated.

One thing that is clear is that the government was relying heavily on “murder in violation of the law of war” and “attempted murder in violation of the law of war” to prosecute detainees as war criminals simply for participation in hostilities with coalition forces, even though there was little or no support for expanding the concept of war crimes so broadly. If the prosecution’s expansive interpretation of this offense continues to be rejected, the number of detainees potentially prosecutable in the military commissions will be substantially smaller.

iv. TORTURE

President Bush’s intentional decision to jettison the Geneva Conventions and the now well-documented decisions of senior Bush Administration officials to authorize cruel, abusive and degrading treatment and torture created an atmosphere in which abuse of detainees, both officially sanctioned or simply ignored by higher authority, was pervasive. Unfortunately, Mohammed Jawad had extensive personal experience of physical and psychological abuse, both at Bagram prison and at Guantanamo. These abuses provided the grounds for perhaps the most important motion that I filed, a motion to dismiss the charges on the basis of torture. In this motion, I alleged that the government’s

225 See e.g. Jane Mayer, the Dark Side, Jordan Paust’s book, SASC report, etc., ACLU Torture Report

226 D-012 Motion to Dismiss Based on Torture of Detainee Pursuant To RMC 907 (May 28, 2008). The motion, attachments, government response and initial defense reply can be found at:
conscience-shocking conduct toward my client, including extensive physical and psychological abuse amounting to torture, should preclude the government from prosecuting him. The legal basis of the motion was the constitutional doctrine of “outrageous governmental conduct”\textsuperscript{227} and the closely related military doctrine of illegal pretrial punishment,\textsuperscript{228} which provides a remedy for mistreatment of an individual in a pretrial confinement status. In support of this motion, I provided hundreds of pages of documents, many from the government’s own records, and hours of testimony detailing the extent of the abuse Mohammed Jawad had suffered, especially the “frequent flyer” program which was particularly well-documented in the official Guantanamo prison logs. Mohammed Jawad also testified, both directly and indirectly. He testified in the courtroom describing the experience of undergoing the sleep deprivation program,\textsuperscript{229} and a statement that he had provided about his treatment was also introduced; this statement was corroborated by an Army CID agent who had investigated dozens of cases of detainee abuse at Bagram, including two homicides.\textsuperscript{230} The officer responsible for administering the frequent flyer program also testified, acknowledging that the program was a “standard operating procedure” to which dozens of detainees had been subjected, but asserting that the program was “humane.”\textsuperscript{231}

The government’s response\textsuperscript{232} attempted to downplay the seriousness of the abuses that Jawad had suffered, denying that he had been tortured. Conceding that he may have been subjected to some coercive treatment, the

\textsuperscript{227} See, Rochin v. California, 342 U.S. 165 (1952); see also, U.S v. Russell, 411 U.S. 423, 431-2 (1973) “we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”

\textsuperscript{228} See, U.S. v. Fulton, 55 M.J. 88 (CAAF 2001)

\textsuperscript{229} Transcript June 19 hearing.

\textsuperscript{230} Transcript August 13-14 hearing.

\textsuperscript{231} Cite transcript August 13-14 hearing.

\textsuperscript{232} Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to RMC 907 (June 4, 2008)
government argued that the judge had no power to dismiss the charges, even if the defense’s factual allegations were true. The government insisted that the sole remedy available under the MCA for coercion, even torture, was the suppression of statements obtained by such torture.\footnote{233} The government argued, in the alternative, that “(i)f the Military Judge determines, notwithstanding the MCA’s clear provisions, that it possesses some inherent or unstated equitable power to dismiss otherwise proper charges based upon alleged coercion, the Military Judge should decline to do so based upon the facts of this case.”

In his ruling, the military judge made factual findings that Jawad had been abused:

the accused was subjected to the “frequent flyer” program and moved from cell to cell 112 times from 7 May 2004 to 20 May 2004, on average of about once every three hours. The accused was shackled and unshackled as he was moved from cell to cell. . . (T)he scheme was calculated to profoundly disrupt his mental senses.

The “frequent flyer” program was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations, by March 2004 the accused was of no intelligence value to any government agency. The infliction of the “frequent flyer” technique upon the accused thus had no legitimate interrogation purpose.

The conditions experienced by the accused while confined at Guantanamo Bay included excessive heat, constant lighting, loud noise, linguistic isolation (separating the accused from other Pashto speakers), and, on at least two separate occasions, 30 days of physical isolation.

Although finding it unnecessary to rule specifically whether Jawad had been tortured, the military judge came very close:

This Commission finds that, under\footnote{234} the circumstances, subjecting this accused to the “frequent flyer” program from May 7-20, 2004 constitutes abusive conduct and cruel and inhuman treatment.

\footnote{233} The government conveniently ignored the fact that Jawad had not been subjected to any interrogations during the frequent flyer program or for several months thereafter, so that there were no statements to suppress resulting from that abuse.

\footnote{234} I filed an official law of armed conflict violation report relating to the frequent flyer program with the Department of Defense in May 2008, and followed up with a copy of the
This finding was perhaps the first American judicial pronouncement that U.S. personnel had committed a war crime against a detainee. Under the U.S. War Crimes Act\textsuperscript{235}, a “war crime” is defined as “any conduct...defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949.” It is a “grave breach” of the Geneva Conventions, to submit a detainee, a protected person\textsuperscript{236} to “inhuman treatment.”\textsuperscript{237} Violations of Common Article 3, which precludes “cruel treatment” are also defined as war crimes. The opinion also echoes language from the U.S. anti-torture statute, which defines torture, in part as “procedures calculated to disrupt profoundly the senses or the personality.”\textsuperscript{238} The ruling offered the following recommendation, “those responsible should face appropriate disciplinary action.”

Perhaps even more significant than his affirmation that cruel, abusive and inhuman treatment had occurred, the military judge resoundingly rejected the government’s assertion that he had no power to grant the remedy sought, stating definitively, “It is beyond peradventure that a military commission may dismiss charges because of abusive treatment of the accused.”\textsuperscript{239} The importance of this statement can’t be overstated. This ruling implicitly opened the door to every other detainee facing trial by military commission to seek to have the charges dismissed on the basis of abuse. For those who suffered abuse and torture far worse than Mohammed Jawad, such as the so-called “high value detainees”, dismissal of charges suddenly became a real possibility, and the defense’s right to discovery of all the various forms of mistreatment to which

Judge’s ruling. To my knowledge the DoD never investigated. (CITE story in Washington Independent which provides links to the report I filed)

\textsuperscript{235} 18 U.S.C. § 2441

\textsuperscript{236} President Bush’s assertion that Guantanamo detainees were not protected by even Common Article 3 of the Geneva Conventions was rejected by the U.S. Supreme Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

\textsuperscript{237} See, GC 1 Art. 50, GC 2 Art 51, GC 3 Art. 130, and GC 4, Art. 147, all of which define “grave breaches” of the Convention to include “inhuman treatment.”

\textsuperscript{238} 18 U.S.C. § 2340(2)(b)

their clients were subjected (evidence the government frequently sought to withhold) was greatly strengthened.

Despite these clear victories for the defense (and, more importantly, for the rule of law), the judge ultimately declined to grant the requested remedy, stating that other adequate remedies were available, including granting sentence credit towards any adjudged sentence, another remedy that the government had claimed did not exist.\textsuperscript{240} Combined with Captain Allred’s decision in the Hamdan trial to grant him day for day credit for time served at Guantanamo,\textsuperscript{241} this decision created a very real possibility that a lengthy and expensive trial might produce a sentence to time-served, at least for low-level figures like Hamdan. This forced the government to recalculate whether it was worth pursuing less serious charges.

\textbf{v. SUPPRESSION}

Although the torture of Mohammed Jawad did not result in the dismissal of charges on the basis of outrageous conduct, his mistreatment did ultimately lead to rulings that forced the government to abandon the prosecution.

Under the original schedule proposed by the military judge after the May 7 arraignment, my one pretrial hearing on “law motions” was to be followed a few weeks later by a pretrial session to hear evidentiary motions. Confronted with the number and complexity of the legal motions to be considered at the first motions hearing on June 19\textsuperscript{th},\textsuperscript{242} the new military judge granted me an additional session to hear motions to dismiss on August 13-14. At the conclusion of the August 13-14 hearing, the judge set the next hearing date for September

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{240} CITE
  \item \textsuperscript{241} cite
  \item \textsuperscript{242} I informed the military judge prior to the hearing that we would not be able to complete all the motions in one day and requested that he extend the June 19 hearing to a second day, but due to a scheduling conflict, he was unable to do so. Instead, he directed that we would get as much done as we could and continue the hearing if necessary. Although the session went late into the night, concluding after 10 p.m., we were unable to present evidence and argument on all the motions that had been filed.
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and ordered that any motions to suppress or other evidentiary motions be litigated at that time.

Although in over 50 interrogation sessions at Bagram and Guantanamo, Mohammed Jawad had steadfastly denied that he had thrown the hand-grenade that injured the Americans, he had allegedly made several statements which were self-incriminating during his first 24 hours in custody, both while in the hands of the Afghan police and later, when turned over to U.S. Forces. It was the view of the defense team (now expanded to three attorneys) that every self-incriminating statement he had made was the product of torture, or at least coercion. Certainly, none of the statements he had made would have been admissible in a civilian court or even a court-martial, where a “voluntariness” standard would be applied. But under the Military Commissions Act of 2006, involuntariness was not the standard against which confessions were judged. Under Supreme Court jurisprudence, the terms “involuntary” and “coerced” were essentially synonymous. Coerced statements were per se inadmissible in a U.S. court of law. In the Military Commissions, this was not so; the potential admissibility of a statement hinged upon whether it was determined to be the product of torture or merely the product of coercion. If a statement was deemed to be the product of torture, it was inadmissible. Coerced statements, however, were potentially admissible. Where the “degree of coercion” was disputed by the government, the military judge was instructed to apply a totality of the circumstances approach to determine whether the statement was “sufficiently reliable and probative and if the interests of justice” would be served by admitting the statement.

At the time the MCA was drafted in 2006, the Bush Administration was still clinging to the claim that the U.S. had never tortured any detainees. Therefore, they did not object to the inclusion of an exclusionary rule in the MCA for statements derived from torture. Indeed, the U.S. was clearly obligated by

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243 MCRE 304(a)(1)

244 MCRE 304(a)(2)

245 Cite

246 Cite Bush claim of no torture
the Convention Against Torture\textsuperscript{247} to include such a rule. Article 15 of the Convention states:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Complying with this Article, the MCA included the following provision:

EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by torture shall not be admissible in a military commission under this chapter except against a person accused of torture as evidence that the statement was made.

In the implementing regulations for the M.C.A., the Manual for Military Commissions, the following rule of evidence was adopted:

A statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made. M.C.R.E. 304(a)(1).

The rule continues in a subsequent paragraph to explain that,

A statement produced by torture...may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule. M.C.R.E. 304(a)(3).

Citing this rule, we filed two separate motions to suppress, one addressing the alleged confession made to the Afghan police, and a second motion directed at statements made to U.S. authorities. Complicating our efforts was the fact that the prosecution refused to identify the specific statements allegedly made by Jawad that they intended to use at trial, or the facts and circumstances under which the statements were taken, even after we filed a motion and

\textsuperscript{247} United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, signed on behalf of the United States by Deputy Secretary of State John C. Whitehead on April 18, 1988. The United States Senate ratified the CAT on 21 October 1994. The Convention entered into force for the United States on November 20, 1994.
numerous discovery requests seeking this information. Lacking these specifics, we took the unusual step of filing a “general” motion to suppress all statements made in U.S. custody. Such a motion was explicitly permitted under the Rules for Military Commissions. In this motion, we highlighted all of the mistreatment and abuse suffered by him at the hands of the U.S. and what few details we had about the interrogation sessions during which the statements were made. Much to our surprise, when the hearing commenced, the lead prosecutor announced that the government no longer planned to introduce any statement made by Mohammed Jawad Bagram or at Guantanamo, but would limit themselves to statements he allegedly made on the day and night of his capture (December 17, 2002), before he was transported to Bagram Prison the next morning. The military judge pressed the prosecutors on this point to make sure that they understood that the government would be permanently barred from offering any statements for any purpose unless they were introduced at the hearing.

Why did the government abandon their reliance on statements made during interrogations at Bagram and Guantanamo? Although it is possible that the prosecutors thought they didn’t need any statements from these interrogations and could get a conviction without them, it is highly unusual for prosecutors to voluntarily waive the right to use potentially helpful evidence if they believed such evidence was likely to be admissible. Perhaps they concluded that the conditions to which Mohammad was subjected at Bagram and Guantanamo were so bad that any self-incriminating statements made by him lacked sufficient reliability and probative value to make them admissible. Or perhaps this was more of a strategic decision, to put the focus on what they considered to be their strongest evidence rather than give the defense another opportunity to put the entire detention process on trial. Whatever their motivations, the decision to limit their evidence to the statements made immediately after capture definitely provided a clear focus for the suppression hearing.

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248 D-019 (Sept 12, 2008) Defense Request for Permission to File General Suppression Motion
At the hearing, the defense offered uncontradicted\textsuperscript{250} evidence from Mohammad Jawad that he had initially denied being involved in the hand grenade attack but that the Afghan police had threatened to kill him or a member of his family unless he confessed. Indicating that such treatment might be construed as torture, the military judge ordered additional briefing from both parties on the matter. According to the government’s brief, even if Jawad’s version of the events were credited, the resulting confession still should not be considered the product of torture. Therefore the judge should admit the subsequent statements. They offered two arguments why these death threats did not constitute torture. First, they argued that only “imminent” death threats qualify, and these were not imminent.\textsuperscript{251} Second, they asserted that in order for his statement to be the product of torture, Jawad would have had to actually suffer “prolonged mental harm” and the burden was on the defense to prove such suffering. In response, I argued that “it is not necessary for the defense to allege or prove harm in order to demonstrate that torture has occurred under MCRE 304.”\textsuperscript{252} As for the imminence of the threat, I noted that “the police clearly had the present ability to carry out the threat to kill him, and Mr. Jawad quite reasonably presumed that the numerous high-ranking police and security officials involved in his interrogation would be capable of locating and arresting his family members.”

In his ruling suppressing the statements, Judge Henley explicitly rejected the government’s attempts to increase the burden on the defense to prove that a statement was the product of torture. “The actual infliction of physical or mental injury is not required.” Rather, the “relevant inquiry is whether the act of torture was specifically intended to inflict severe physical or mental pain or suffering upon another person within the actor’s custody or physical control.”\textsuperscript{253}

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\textsuperscript{250} Curiously, the government did not bother to bring any of the alleged witnesses to this confession to testify, nor did they bother to have them available to testify remotely via video teleconference, preferring to rely on the liberal hearsay rules under the Military Commission Rules of Evidence to offer second-hand summaries of their accounts.
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\textsuperscript{251} Government Brief on the Issue of Torture Under M.C.R.E. 304 October 3, 2008
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\textsuperscript{252} Defense Response to Government Brief on the Issue of Torture Under M.C.R.E. 304 (October 10, 2008) paragraph I.
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\textsuperscript{253} D-022 Ruling on Defense Motion to Suppress Out-Of-Court Statements of the Accused to Afghan Authorities (28 October 2008)
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Having determined that the initial “confession” to the Afghan authorities was the product of torture, Judge Henley then turned to the subsequent self-incriminating statements made by Mohammad Jawad later that evening elicited during interrogations by U.S. personnel. The defense, citing Clewis v. Texas, argued that these statements must also be suppressed because the effects of the earlier torture had not dissipated and there was no “break in the stream of events” between the two interrogations. The government disputed that the effect of torture could carry over from one interrogation to the next, arguing that “M.C.R.E. 304(b)(3)’s definition of torture is based on acts of specifically intended consequences done by a specific actor to a person within that actor’s custody, which implies a narrow focus on each individual interrogator or interrogation.”

Once again, the military judge rejected the government’s efforts to narrowly construe the scope of the phrase “obtained by torture.” In his ruling suppressing the statements made to the U.S. interrogators, Judge Henley held that the effects of torture can carry over from one interrogation to the next, and found that they had done so in this case. Quoting Clewis v. Texas and also citing Oregon v. Elstad, he wrote:

Where a confession is obtained after an earlier interrogation in which a confession was acquired due to actual coercion or duress, the subsequent confession is presumptively tainted as a product of the earlier one. To overcome this presumption, the Government must demonstrate by a preponderance of the evidence intervening circumstances which indicate the coercion surrounding the first confession had sufficiently dissipated “to insulate the (subsequent) statement from the effect of all that went before.”

Judge Henley’s ruling represented a major setback for the government. They knew that they could not hope to get a conviction without a single admission,

254 368 U.S. 707 (1967),

255 470 U.S. 298 (1985),

256 R-021 Ruling on Defense Motion to Suppress Out-Of-Court Statements by the Accused Made While in U.S. Custody (19 November 2008).
but the implications of this ruling went far beyond the immediate prospect that they would have to abandon the effort to prosecute Mohammad Jawad. Of far greater significance was the impact that a “presumption of taint” rule was likely to have on the more important commission cases, especially the alleged 9-11 co-conspirator case.

By the fall of 2008, it was no longer a secret that the U.S. had used highly coercive interrogation methods on Khalid Shaikh Muhammed and many of the other so-called “high value detainees” especially at CIA Ghost prisons, but also at Guantanamo. Indeed, there was clearly a consensus in the international human rights community that KSM and his brethren had been subjected not merely to abuse, but to torture. Details about the torture of one of the alleged 9/11 co-conspirators, Mohammed al-Qahtani had been leaked to Time magazine and caused a national sensation. More importantly, the Convening Authority had refused to refer charges against Mr. al-Qahtani to trial specifically because he had been tortured. Although the full extent of the torture methods employed against most of the high value detainees had not been publicly disclosed, the prosecutors were certainly privy to the information. In fact, the prosecution had recognized very early that the statements made under the enhanced interrogation methods were likely to be inadmissible in any court, even in a military commission. For this reason, considerable efforts had been expended to get a new set of “voluntary” confessions from these individuals using new “clean” teams of interrogators.

Prosecutors hoped that by simply introducing these later confessions and forgoing the use of the earlier coerced confessions, they could avoid the issue of the earlier mistreatment altogether. Ideally, the government would not even have to provide discovery about the torture to the defense, since it would be irrelevant for any purpose at trial. However, under Judge Henley’s ruling, they would be forced to confront the issue of torture and coercion head on. Each confession could be challenged on the basis that it was tainted by earlier torture and the burden would be on the government to prove the taint had dissipated. Given that all the detainees had remained continuously in U.S. custody under

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257 See, “Inside the Interrogation of Detainee 063” and “Extracts from an Interrogation Log”, TIME, June 12, 2005.

very harsh conditions of confinement, it was clearly going to be an uphill battle to prove a “break in the circumstances” which would mitigate the effects of the earlier torture. Of course, Judge Henley was just one of many trial judges in the military commissions, and other judges were not bound to follow his ruling, but he was the Chief Trial Judge of the U.S. Army and was well-respected by the other judges on the bench. More germane to the issue, on November 18, 2008, the day before he issued his ruling, Judge Henley had been assigned to preside over the 9/11 trial.259

Faced with losing not only the Jawad case, but with a debacle in the making in the 9/11 trial, the government filed an interlocutory appeal of Judge Henley’s ruling to the Court of Military Commission Review seeking to have the ruling reversed, arguing that he had applied the wrong legal standard in excluding the confession to the U.S. interrogators and had placed an unfair burden on the government by forcing them to overcome a “presumption of taint.” The level of desperation in the government’s appeal was almost palpable, as they were forced to take extreme and unsupported positions in order to try to salvage the military commissions. The central argument of their brief was that the prohibition on the use of statements obtained by torture in military commissions only applied to statements obtained during specific interrogation sessions in which torture was used. Under the government’s view, in assessing whether a statement was the product of torture, the Military Commission Rules of Evidence would not allow the military judge to consider any circumstances beyond the “four corners” of the interrogation itself.260 As stated in the government’s brief:

The frame of reference for assessing whether a particular statement is “obtained by use of torture” is whether the interrogator to whom it was made used torture to get it. Otherwise, if the analysis includes actions that happened outside the particular interrogation that produced the statement . . . then “obtained by use of torture” takes on the aura of a derivative evidence rule, which M.C.R.E. 304 was specifically drafted to exclude, or else it blurs into the coercion analysis governed by M.C.R.E.

259 Carol Rosenberg, With Guantanamo War Court in Doubt, 9/11 Case Gets New Judge, Miami Herald, November 18, 2008.

260 Counsel for the government used this term at the oral argument on this appeal.
304(c). . . (L)inking subsequent confessions, temporally or otherwise, to a previous confession made to different interrogations—simply does not fall with the meaning of “obtained by use of torture” under M.C.R.E. 304(a)(1).

The logic of the government’s argument is appalling. Logically, a government interrogator could torture a detainee during interrogation sessions for months on end to elicit a confession. Once the confession had been secured, if a new interrogator then questioned the detainee the very next day in a coercive manner not rising to the level of torture, and the detainee confessed again, the confession, could not, by law, be considered obtained by torture.

On January 13, 2009, oral argument was held on the motion. The panel of three judges seemed very skeptical about the government’s position, and my defense team felt confident that the suppression ruling would be upheld. We never got the chance to find out if we were right. The week after the oral argument, President Obama was inaugurated. Among his first acts in office was to order a suspension of all military commission cases. Pursuant to his direction, the prosecutors asked the Court of Military Commission Review to stay the issuance of their opinion for 120 days while the new Administration worked out its detention policies. Over my written objection, the stay was granted. On May 15, the prosecution requested an additional 120 day extension of the stay.261 Again, over my objection,262 the stay was granted. Before this stay expired, the charges against Mr. Jawad were dismissed and the appeal was dismissed as moot.

c. HABEAS CORPUS

After the Boumediene decision in the summer of 2008 reaffirmed the right of detainees to file writs of habeas corpus, Mohammad Jawad authorized me


to file a petition on his behalf, not knowing that the Center for Constitutional Rights (CCR) had already filed a petition on his behalf in 2005, based on a next friend authorization from a member of Jawad’s family. Since I had never litigated a writ of habeas corpus and was not admitted to the DC Bar, I knew that I needed help and started looking for qualified counsel to assist me. To my and Mohammad’s good fortune, the ACLU National Security Project offered to serve as lead counsel on the case. The CCR was representing dozens of detainees and was more than happy to allow us to substitute in as counsel on the case.

On January 13, 2009, we filed an amended petition of habeas corpus, including all the facts that we had developed through discovery and pretrial litigation in the military commission.\(^263\) The government’s response was not to respond to the petition on the merits, but to seek to have the case dismissed or held in abeyance on the basis that Mr. Jawad was facing trial by military commission.\(^264\) Both Salim Hamdan and Omar Khadr had sought to have their habeas petitions heard while military commission charges were pending and the District Court had granted the government’s request to stay their petitions until after military commission proceedings were held. On February 18, 2009, shortly after the initial stay was granted by the CMCR, we requested once again that the District Court take up the petition, as the military commission charges were stayed and uncertain to resume.\(^265\) Indeed, the Court of Military Commission Review had


indicated in their ruling granting the stay their view that the habeas corpus petition could go forward during the stay.

On April 22, 2009, D.C. District Court Judge Ellen Segal Huvelle, who had recently been assigned to take over the case, denied the government’s motion for dismissal and ordered a status conference for the following week. At the status conference, she ordered the government to respond on the merits to the petition by providing a “factual return” or a statement of material facts upon which the government intended to rely.

When the government finally produced this document in late May 2009, the contents were quite surprising. The primary items of evidence cited by the government to justify holding Jawad were the torture-derived statements that Judge Henley had suppressed in the military commissions. Disturbingly, the government failed to note in their filing that they were relying upon previously suppressed evidence. The government also cited numerous statements made by Jawad at Bagram prison and Guantanamo – the very statements that the prosecution had abandoned reliance upon at the suppression hearing in September, 2008. The Judge was not amused by the government’s tactics. She suggested that the best way forward would be for the petitioner’s counsel to file a new motion to suppress, which we did. In our petition, we argued that every statement made by Jawad, including those at Bagram and Guantanamo should be suppressed as the product of torture. On July 15, 2009, the government abandoned its reliance on any statements made by Mohammed Jawad and informed the court that it would not oppose our motion to suppress. The next day, at a status hearing, in a famous judicial scolding that made the front page of the New York Times, Judge Huvelle excoriated the government


267 Al Halmandy, et al v. Obama, Civil Action 05-2385, Petitioner Mohammed Jawad’s Motion to Supress his Out-Of- Court Statements July 1, 2009,


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for their handling of the case. She granted the defense motion in its entirety, ruling that all of Mr. Jawad’s statements were the product of torture.

It was clear that the government could not prove that there was a lawful basis to detain Mr. Jawad, much less prove criminal charges against him, without any of his statements. In case there was any doubt, Judge Huvelle laid it to rest: “I don’t need to put too fine a point on it. The case, without the statements, has been gutted.” Nevertheless, Judge Huvelle offered the government the opportunity to prove the case against Mr. Jawad, ordering a trial on the merits for August 5, 2009, and granting the government until July 24, 2009 to file an amended statement of facts. On the day the amended statement of facts was due, the government instead filed a notice indicating that they had decided to drop their opposition to the case and informing the court that “respondents will no longer treat petitioner as detainable under the Authorization for Use of Military Force.” Although the government conceded there was no lawful basis to detain Mr. Jawad under the laws of war, they nevertheless claimed that there was an ongoing criminal investigation and that his release was not certain.

Justice Department officials said they were studying whether to file civilian criminal charges against Mr. Jawad. If they do, officials say, he could be transferred to the United States to face charges, instead of being sent to Afghanistan, where his lawyers say he would be released to his mother. “It is a very real possibility,” a Justice Department official said in an interview, “but whether we can compile enough evidence to support a case is a question we don’t yet know the answer to.”

On July 30, 2009, Judge Huvelle signed the order granting the writ of habeas corpus and ordering Jawad’s release on or immediately after August 21, 2009.

269 Transcript at page 6, line 11-13.
The government could not “compile enough evidence” to support a criminal case and was forced to release him. And so, on August 22, 2009, Mohammed Jawad found himself being flown back to Afghanistan. Justice was delayed, but ultimately was not denied.

III. Conclusion

The Jawad case exemplifies the government’s inability to convict detainees without using coerced confessions and without novel and unsupported expansions of crimes subject to military commission. Two other well-known examples of detainees who were released after the cases against them imploded are Binyam Mohammed and Fouad Al Rabia. In Mr. Mohammed’s case, the charges against him were based entirely on stories that he had made up, or accusations that he had agreed to, under torture, after the United States, with the complicity of the United Kingdom, had rendered him to Morocco. The military commission charges against Mr. Mohammed were dropped in October 2008.273 Under pressure from the U.K., Mr. Mohammed was the first detainee to be released during President Obama’s tenure in February 2009.274 According to an opinion by Federal District Court Judge Kollar-Kotelly granting Mr. Al Rabia’s petition for a writ of habeas corpus, all of the evidence upon which the United States was relying to detain him consisted of unreliable coerced statements.275 Mr. Al Rabia had also been facing charges in the military commission.276

Under the original MCA, the Chief Prosecutor announced plans to try as many as 75-80 detainees, or about 10% of the total population to pass through Guantanamo.277 On January 29, 2010, the Obama Administration announced the results of an exhaustive year long review of all of the detainees. “Only 35 of the men should face trial, either in civilian or military courts, the review
concluded.” In other words, there was sufficient admissible evidence to prosecute only 35 detainees. Adding the three detainees already convicted, this represents half the original total that were to be prosecuted. What caused such a dramatic drop?

Shortly after Jawad’s release, in October 2009, Congress passed a revised Military Commissions Act into law. The new law substantially improved its predecessor, particularly in the areas of the admissibility of hearsay evidence, and the admissibility of evidence obtained by coercion. The 2009 MCA imposes “voluntariness” as the basic standard for admissibility of statements, with a potential limited exception for evidence obtained through battlefield interrogations. If this rule of voluntariness (a rule of evidence which applies in criminal trials in the district courts of the United States) were in place originally, perhaps the charges against Mohammed Jawad case never would have been sworn.

Although the 2009 MCA introduced some significant reforms, the list of prosecutable crimes in the MCA remains unchanged, despite the Administration’s admonishment to Congress that “material support to terrorism” was very likely to be determined by the courts not to be a crime triable by military commission. Perhaps the reason Congress decided to retain this dubious crime was in response to the reasoning in my testimony if not the testimony itself:

If one were to review the charges brought against all of the approximately 25 defendants charged in the military commissions, as I have, one would conclude that 99% of them do not involve traditionally recognized war crimes. Rather, virtually all of the defendants are charged with non-war crimes, primarily criminal conspiracy, terrorism and material support to terrorism, all of which are properly crimes under federal criminal law, but not the laws of war.  

278 Carol Rosenberg, Review: Most Guantánamo detainees should be released, The Miami Herald, Jan 29, 2010.

279 Cite code section

280 Cite – refer to David Kris testimony and opinion provided to Nadler’s committee

281 Prepared testimony of Frakt
Thus, as I explained, if Congress were to “go ahead and reform the military commissions, and create ones that are limited to law of war offenses and provide a fair trial,. . . there is not going to be anybody to try.”

By partially reforming the military commissions, to provide a reasonably fair trial but retaining non law of war offenses, Congress only eliminated half the potential defendants.

It might be tempting to conclude that the reason for the lower figure is that the new administration had decided to focus on only the most serious terrorists or, if one accepts current political propaganda, particularly promulgated by groups such as Keep America Safe, that the new Administration is just “soft” on terrorism. The decision to permit the prosecution of teenager Omar Khadr suggests that these are not the reasons for the shrinkage. Even more tellingly, at the same time the Administration announced that only 35 detainees would be prosecuted, they also announced that there were approximately 50 detainees determined to be too dangerous to release, but who could not be prosecuted. Prior to this announcement, this was simply a theoretical category of detainees. How many of these 50 detainees were among the 75-80 planned to be prosecuted under the old MCA?

There is another factor in the failure of the military commissions that should not be overlooked. Indeed, the military commissions might have succeeded despite their flaws but for one critical human element the Bush Administration never anticipated: a number of the military lawyers assigned the roles of prosecutors, defense counsels and judges in the military commissions refused to acquiesce in the substantial modification of traditional international and U.S. Military law. Many of these judge advocates, officers with decades of expertise in the law of

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282 Mohammed Jawad was the only detainee to be charged under the 2006 MCA who was not charged with either terrorism, conspiracy, or material support to terrorism.

283 I did note that one detainee, had been charged with a “legitimate war crime” -- “the charge of “perfidy” against Abdal-Rahim Al-Nashiri for his alleged role in the attack on the U.S.S. Cole in October 2000.” However, “even though perfidy is a traditional offense under the law of war, convicting Mr. Al-Nashiri of this offense requires accepting the dubious legal fiction that the United States was at war with Al Qaeda nearly a year before 9/11, for the law of war only applies during a war.”
war, considered the military commissions an affront to the military justice system to which they had devoted their careers.

Ethical and courageous military prosecutors, such as former Chief Prosecutor Colonel Morris Davis and Lieutenant Colonel Darrel Vandeveld who took their oaths to defend the Constitution as solemn mandates, resigned rather than be party to trials using coerced evidence or to allow political considerations to interfere with their prosecutorial judgment. Professional military judges refused to be bullied into endorsing the Administration’s strained interpretations of the law of war. Tenacious military defense counsel challenged the government at every turn, exposing the many flaws in this concocted legal system and the disgraceful brutality with which their clients had been treated. Through patient, professional advocacy both inside and outside the commissions, these lawyers managed to put the brakes on the military commission freight train, slowing prosecutions to a crawl. Although the goal of many of these counsel to persuade senior political and military leaders to abandon the military commissions altogether was not realized, the efforts of these lawyers undeniably had a significant impact in creating a wide political consensus that military commissions, if they were to be continued at all, required significant reform, as reflected both in changes to the MMC voluntarily proposed by the Obama Administration in the spring of 2009 and in the Military Commissions Act of 2009.

Even with the undeniable improvements in the 2009 MCA, the new law and new implementing regulations will undoubtedly present new opportunities for the defense counsel to make legal challenges that could mire the commissions in delay for many years to come. Those who advocate the use of military commissions under the belief that they will provide an easier forum in which to obtain convictions must recognize that the military commissions are still largely untested.

The Administration is understandably eager to empty Guantanamo and quite reasonably feels a sense of urgency to provide trials for detainees who have been held and denied a fair trial for so long. Although Congress has given the

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284 Cite Articles by Morris and Vandeveld piece in Washington Post

285 Cite proposed regulatory changes.
new Administration the option to utilize military commissions, the President would be wise to follow his stated preference for trial in Article III courts, rather than continuing to experiment with military commissions. The military commissions of the Bush Administration were created to provide a forum in which it would be possible to convict detainees for invented war crimes using coerced evidence. Although this plan ultimately failed, the use of military commissions for Guantanamo detainees has been irremediably tainted by the effort, as exemplified by the case of Mohammed Jawad. Although in theory military commissions could be amended to provide a full and fair trial, the political will to do so does not exist. If the current Administration is truly committed to providing fair trials that will be internationally accepted as legitimate, the best solution would be to end military commissions, not mend them, and try detainees suspected of terrorism offenses in federal court, where they should have been tried all along.

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286 Senators John McCain and Joe Lieberman have gone as far as to introduce legislation mandating the use of military commissions for suspected foreign terrorists. CITE

287 Cite national security speech at National Archives

288 Insert reference to Frakt article on CNN.com