

PERSUASION IN CIVIL RIGHTS ADVOCACY:
LESSONS LEARNED IN REPRESENTING
GUANTANAMO DETAINEES

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TABLE OF CONTENTS

INTRODUCTION.....1599
MAY 2008 TO AUGUST 2009—REPRESENTING MOHAMMED
 JAWAD1601
CONCLUSION.....1615

INTRODUCTION

As a career military attorney, at first blush, I probably seem like an unlikely candidate for inclusion in a symposium on “Persuasion in Civil Rights Advocacy.” And indeed, the focus of my professional work, like many Judge Advocate Generals’ (JAGs), has been on military justice, not civil rights. But it turns out that JAGs have been at the forefront of one of the most important civil and human rights struggles of our generation; namely, the fight to extend the rule of law and basic human and civil rights to the detainees of Guantanamo Bay, Cuba. Some of these battles have played out in the courtrooms of the military commissions; while others have been fought in the federal courts, including the United States Supreme Court. In 2008-2009, I was right in the thick of this battle when I was assigned to represent two detainees before the military commissions of Guantanamo. In this Article, I will discuss some of the lessons I learned about civil rights advocacy—and advocacy more generally—from this experience.

Before I delve into my military commission experience, let me give you a little bit of my personal background, which may provide some perspective to my comments. Although I chose to pursue a career in the military, I do have civil rights in my blood. On my mother’s side of the family, my great, great Aunt was Jeannette

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Rankin—the first woman elected to Congress, and a renowned pacifist, suffragette, and early leader in the women’s rights movement.¹ More recently, my father was a civil rights lawyer in the 1960s before becoming a law professor and law school administrator; while my mother, a parks and recreation professional, worked with underprivileged youths in city parks and summer camp programs before herself turning to a career in academia. Both my parents instilled in me a strong belief in the vital importance of civil and human rights, and of standing up against injustice and inequity. Some of my heroes growing up were Justice Robert Jackson, Justice Thurgood Marshall, and Justice William Brennan, whom I had the privilege to meet when I was a teenager. While in law school, I actively explored the possibility of becoming a civil rights attorney. This exploration included spending a summer on the Cheyenne River Sioux Indian Reservation in South Dakota working for the Tribal Attorney General’s Office, where I helped with federal civil rights litigation on behalf of the Sioux Nation. But in the end, influenced in no small part by the movie “A Few Good Men,” which came out while I was in law school, I chose a different path, accepting a commission in the Air Force JAG Corps. Although I chose the Air Force in part because of the wide variety of practice areas in which JAGs are involved, I never expected that one of those practice areas would be civil and human rights. But when the opportunity came, I embraced it.

After clerking for a wonderful federal judge, the Honorable Monroe G. McKay, Chief Judge emeritus of the United States Court of Appeals for the Tenth Circuit, I entered active duty with the Air Force in September 1995. I served as a military prosecutor and military public defender, and I provided legal services to service members and their families, and legal advice to the Air Force on a wide variety of issues. After nearly a decade on active duty, in 2005, I transitioned into the Air Force Reserves and attempted to start a second career as a law professor. I decided to leave active duty in no small part because of my deep dissatisfaction over America’s conduct of the war on terror, particularly our treatment of detainees. I was deeply troubled by the Administration’s decision to disregard the advice of the JAG Corps to follow the Geneva Conventions and its seemingly complete abandonment of the rule of law with respect

1. *Jeannette Rankin*, WIKIPEDIA (Oct. 19, 2015, 8:08 PM), https://en.wikipedia.org/wiki/Jeannette_Rankin.

to detainee treatment, particularly at Guantanamo.² I was also very disturbed by the way that the military commissions had developed. When President Bush initially announced that those responsible for 9/11 would be prosecuted in military tribunals, I was excited and volunteered to be a prosecutor. But when I saw the rules and procedures that were to be used, I was shocked by how incredibly unfair they were. The military commissions created by President Bush's Executive Order had some of the features of a kangaroo court and bore no resemblance to the military justice system with which I was familiar. Thus, I was greatly heartened in the summer of 2006, when the Supreme Court invalidated the Executive Order creating the military commissions in *Hamdan v. Rumsfeld*.³ The Military Commissions Act of 2006—the legislation authorizing the creation of military commissions passed in response to *Hamdan v. Rumsfeld*—was a significant improvement over the Executive Order, but still fell well short, in my opinion, of international fair trial standards.⁴ So, in early 2008 when the Pentagon sent out a request for volunteers to serve as prosecutors and defense counsel in the commissions, I eagerly volunteered for the defense, hoping that through my advocacy, I could expose the shortcomings in this system and possibly help bring about reforms. I was ordered to report to the Office of Military Commissions, Office of the Chief Defense Counsel in late April 2008.

MAY 2008 TO AUGUST 2009—REPRESENTING MOHAMMED JAWAD

Immediately upon my arrival I was detailed (assigned) as lead defense counsel to two detainees, Mohammed Jawad and Ali Hamza al Bahlul. I was told to get on the next plane to Guantanamo to prepare for the arraignments of both detainees, which were to take place the following week. Because Mr. al Bahlul, a loyal member of Al Qaida, refused to allow me to do any advocacy on his behalf (other than a failed effort to get the military commissions to

2. See *The Military Commissions and the Abandonment of the Rule of Law, Before the Subcomm. on Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 5 (2009) (statement of Major David J.R. Frakt), reprinted in *THE MILITARY COMMISSIONS ACT AND DETAINEE TRIALS* 133-54 (Joshua Segel & Soto Kimura eds., 2011).

3. 548 U.S. 557, 635 (2006).

4. See David J.R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315, 343-44 (2007).

recognize his right to represent himself), this essay will focus on my efforts on behalf of Mohammed Jawad.

Mohammed was captured in December 2002 in Kabul by Afghan security forces. He was suspected of throwing a hand grenade at two United States Special Forces soldiers and their interpreter, who were riding in a military jeep. All three passengers were injured when the grenade exploded, but all survived. After a few hours of interrogation by Afghan authorities, Mohammed was turned over to United States custody and initially taken to Bagram Prison; then, in February 2003, he was transferred to Guantanamo where he remained until his repatriation to Afghanistan on August 24, 2009. Mohammed was the fourth person to be charged under the 2006 Military Commissions Act. Charges were sworn on October 9, 2007, and referred to trial by the Convening Authority on January 30, 2008. I met him at Guantanamo on May 2, 2008. He was arraigned before the military commission on May 7, 2008, charged with three counts of “Attempted Murder in Violation of the Law of War” for allegedly throwing the hand grenade.⁵ I entered a plea of not guilty on his behalf.

When we think about advocacy, we always need to consider our goal, our desired end state. The normal goal for a defendant and his or her counsel is to get an acquittal. If that is not possible, then the goal is to minimize the punishment, to get the lightest possible sentence. But the goal for Guantanamo detainees is slightly different. The goal is to get out of Guantanamo. And at Guantanamo, even an acquittal does not guarantee release. In fact, the Bush Administration made it clear that they reserved the right to continue to hold detainees as enemy combatants even in the event of an acquittal. So, I had to quickly adjust my strategy, stop thinking purely as a criminal defense counsel, and start considering alternate approaches and tactics to get Mohammed out of Guantanamo. And that brings me to my first lesson learned:

Lesson 1: There is more than one way to skin a cat, or
“Think Outside Your Toolbox.”

One of my favorite sayings is “to the person who only has a hammer, every problem looks like a nail.” The Air Force, for

5. Charge Sheet, United States v. Jawad (Military Comm’n Guantanamo Bay, Cuba Oct. 9, 2007), [http://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20\(AE001\).pdf](http://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(AE001).pdf).

example, is very good at strategic and tactical use of aggressive air power, so we tend to see dropping bombs as the major part of the solution to most military problems. As lawyers, we tend to specialize in one kind of case or a particular subject matter or issue. Although specialization has its advantages, advocates with a narrow practice focus run the danger of becoming one tool wonders. The most effective advocates are versatile, flexible, and highly creative problem solvers. They have more than one tool in their toolbox, and they can even think outside their toolbox to come up with creative solutions to advance their client's objectives.

So what was Mohammed's objective, his desired end state? Probably, like almost every other Guantanamo detainee, his desired end state was simply to go home (in his case, to Afghanistan). But he did not merely wish to be transferred to prison or continued detention in his home country, but rather hoped to be returned to his family, as a free man. Needless to say, this was easier said than done, for there were considerable obstacles standing in the way of this desired end state. Not only was Mohammed detained as an alleged alien unlawful enemy combatant at Guantanamo (for which he could ostensibly be held until "the end of hostilities"), but he was also facing three felony charges for which the maximum authorized sentence was confinement for life.

With this in mind, one of my first steps was to consider the possible pathways out of Guantanamo.

Pathway 1: Voluntary Release/Repatriation

The United States government ultimately sends the vast majority of Guantanamo detainees home voluntarily. The detainee's home country could formally request or otherwise pressure the United States government to send home a particular detainee, or all of its nationals, which could hasten release. If the country was an ally, particularly a coalition partner in the war on terror, this was particularly effective. For example, several British detainees were sent home at the request of the United Kingdom government.

But my client was from Afghanistan. And as of the summer of 2008, Afghanistan had not asked for any of its detainees to be returned. But Afghanistan clearly was an ally in the war against Al Qaida and the Taliban, so it seemed worth an attempt to try to get the Afghan government to seek Mohammed's release. Accordingly, I made an appointment to see the Afghan Ambassador to the United States and tried to persuade him to do so. He said, in diplomatic

fashion, that he would take the matter under advisement and consult with his home government, but frankly, he did not seem very sympathetic. However, in the process of setting up the meeting, we met a young diplomat in the embassy who was very sympathetic to Mohammed and pledged to do what he could to help. And this turned out to be very valuable. He made introductions for us to other top officials in Afghanistan, which proved to be important when Mohammed was ultimately sent home.⁶

Our efforts to use diplomatic channels did not end with Afghanistan. We learned, through Omar Khadr's⁷ defense team, that the European Union was deeply concerned about the presence of alleged child soldiers—detainees who were captured as juveniles, but who were detained under the same condition as adults in violation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,⁸ to which the United States was a party. So we met with representatives from the European Union at the French Embassy to enlist their support to bring pressure on the United States to release our client and other juveniles through diplomatic channels.

Everyone whom we talked to agreed that in order to get Mohammed released, it would be helpful if the charges were dropped. So, how could that be accomplished? There were two persons with the clear authority to dismiss the charges: the Military Commissions Convening Authority and the Military Judge.

The most obvious way to get the charges dropped would be through motions to dismiss, something that was more in the line of typical criminal defense work. I tried a number of different approaches to get the charges dismissed.⁹ First, I claimed there was a

6. See Andy Worthington, *The Military Lawyers Who Helped Free One of Guantanamo's Youngest Detainees*, PUBLIC RECORD (Sept. 21, 2009), <http://pubrecord.org/world/5377/guantanamos-youngest-detainees/>.

7. Omar Khadr was one of the first three detainees—and the only other person besides Mohammed also captured as a juvenile—to face charges in the military commissions. He ultimately pled guilty in 2010 in a deal that enabled him to return to his home country of Canada to serve the remainder of his sentence. Khadr was recently released on bail pending the outcome of an appeal of his conviction. See Spencer Ackerman, *Canada Frees Omar Khadr, Once Guantánamo Bay's Youngest Inmate*, THE GUARDIAN (May 7, 2015, 2:16 PM), <http://www.theguardian.com/world/2015/may/07/canada-free-bail-omar-khadr-guantanamo-bay-youngest>.

8. G.A. Res. 54/263, at 4, U.N. Doc. A/RES/54/263 (Mar. 16, 2001).

9. See David J. R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L. J. 1367, 1372-73 (2011).

lack of personal jurisdiction, asserting that the Military Commissions Act (MCA) did not authorize jurisdiction over juveniles. Second, I claimed a lack of subject matter jurisdiction, asserting that the crime for which Mohammed was charged was not a war crime, and therefore it could not be tried in a law of war military commission. I argued that throwing a hand grenade at uniformed military personnel in a military vehicle in a combat zone was not a war crime, but simply an ordinary part of fighting a war. The government's response was that any hostile act committed by an unlawful combatant, a civilian, was per se a war crime. The court rejected the government's theory and was on the verge of dismissing the charges, but the prosecution asked the court to delay, claiming that they had additional evidence of a law of war violation.¹⁰ The court agreed to give them an additional opportunity to present this information, but before they got around to doing so, the charges were dismissed for other reasons. I also claimed that the charges should be dismissed because of the government's own violations of the law of war by subjecting Mohammed to cruel and inhumane treatment and torture, including sleep deprivation and beatings.¹¹ In essence, I argued that the United States had forfeited the right to try Mohammed because of its own outrageous conduct. The government said the judge did not have the power to dismiss charges on this basis. The judge disagreed, concluding that dismissal was within his power. But although he found that Mohammed was tortured, he declined to dismiss the charges.¹²

My next strategy was to get so much of the evidence suppressed that the government could not prove the case and would voluntarily dismiss the charges. The primary pieces of evidence against Mohammed were two purported confessions, one made to the Afghan authorities and one to United States military interrogators. I filed motions to suppress these statements on the basis that the

10. For an extended discussion of this subject, see David J. R. Frakt, *Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War*, 46 VAL. U. L. REV. 729, 745-47 (2012).

11. See David J. R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammed Jawad*, 22 HARV. HUM. RTS. J. 1, 18-19 (2009); see also David Frakt, *Closing Argument at Guantanamo II: The Torture of Mohammed Jawad, Continued*, PEN AM., <http://www.pen.org/nonfiction/closing-argument-guantanamo-ii-torture-mohammad-jawad-continued> (last visited Dec. 10, 2015).

12. Ruling on Defense Motion to Dismiss – Torture of the Detainee, *United States v. Jawad*, 1 M.C. 334, D-008 (Military Comm'n Guantanamo Bay, Cuba Sept. 24, 2008).

confessions were the product of torture.¹³ Both motions were granted.¹⁴ Realizing that they could not proceed without at least one of the confessions, the government filed an interlocutory appeal to the Court of Military Commission Review.¹⁵

I also attempted, through various ways, to convince the Convening Authority to drop the charges. The Convening Authority at the time was Susan Crawford, a protégé of Dick Cheney. In January 2009, she gave an interview with Bob Woodward of the *Washington Post*,¹⁶ in which she explained that she had dismissed the charges against Mohammed al Qatani, the alleged twentieth hijacker from 9/11 because he had been subjected to torture. Armed with the judge's ruling that Mohammed had also been tortured, I started an intense lobbying campaign to get her to drop the charges, sending her a series of memos. I also set up an online petition through which I gathered signatures and comments urging her to withdraw the charges.¹⁷

Another way to get the charges dismissed would be through legislative action that would deprive the military commissions of jurisdiction. Along with a number of human rights groups, including the ACLU, Amnesty International, Human Rights Watch, Human Rights First, and the Brennan Center for Justice, I lobbied sympathetic members of Congress, including Senator Dick Durbin, to amend the MCA to put in a minimum age requirement, to exclude minors from the reach of the MCA. Although such an amendment

13. Defense Motion to Suppress Out-of-Court Statements by the Accused due to Coercive Interrogation, Jawad, 1 M.C. 345 (Military Comm'n Guantanamo Bay, Cuba Sept. 18, 2008).

14. Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities, Jawad, 1 M.C. 345, D-022 (Military Comm'n Guantanamo Bay, Cuba Oct. 28, 2008); Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody, Jawad, 1 M.C. 349, D-021 (Military Comm'n Guantanamo Bay, Cuba Nov. 19, 2008).

15. See Brief on Behalf of Appellant, United States v. Jawad, No. 08-004 (Ct. Military Comm'n Rev. Guantanamo Bay, Cuba Dec. 4, 2008). I argued this appeal on January 13, 2009, but the Court of Military Commission Review never issued a ruling, as the issue was subsequently mooted by external events.

16. Bob Woodward, *Guantanamo Detainee was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

17. See David J. R. Frakt, *Support Defense Request for Guantanamo Detainee Mohammad Jawad*, CARE2 PETITIONS <http://www.thepetitionsite.com/46/support-the-defense-request-for-reconsideration-of-the-referral-of-charges-against-guantanamo-detain/> (last visited Dec. 10, 2015).

was actually proposed in 2009 when the MCA was revised, it did not pass.¹⁸

Pathway 2: Plea Bargain

A more realistic approach to getting out of Guantanamo for those facing charges before the military commissions is to try to work out a plea deal. The MCA gives the Convening Authority, the person overseeing the Commissions, the power to negotiate plea bargains.¹⁹ That power includes the power to make release or return to one's country to complete a jail sentence a term of the agreement. In 2007, under pressure from the Australian government,²⁰ the Convening Authority negotiated a plea bargain with Australian David Hicks by which he would plead guilty to one count of Material Support to Terrorism for joining the Taliban and would get a nine-month sentence, which he would be sent home to Australia to serve.²¹ (Hicks's conviction was recently vacated on the basis that Material Support to Terrorism is not a war crime and therefore the military commissions had no subject matter jurisdiction over that offense.²²) Several other detainees have subsequently negotiated plea bargains that included repatriation.²³

18. See Frakt, *supra* note 9, at 1380 n.72.

19. See MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. 705 (2012).

20. Geoff Elliott, *Hicks Case 'Pushed to Suit Howard'*, THE AUSTRALIAN (Feb. 25, 2008), <http://www.theaustralian.com.au/news/nation/hicks-case-pushed-to-suit-howard/story-e6f6rg6nf-1111115636668>; Tom Allard, *Prisoner of Political Fortune Set Free*, SYDNEY MORNING HERALD (Dec. 29, 2007), <http://www.smh.com.au/news/national/prisoner-of-political-fortune-set-free/2007/12/28/1198778703367.html>.

21. Michael Melia, *Australian Gitmo Detainee Gets 9 Months*, WASH. POST (Mar. 31, 2007, 5:06 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033100279.html> (describing plea deal and sentence of David Hicks).

22. See *Hicks v. United States*, 94 F.Supp.3d 1241 (C.M.C.R. 2015); see also Matt Apuzzo, *Guantánamo Conviction of Australian is Overturned*, N.Y. TIMES, Feb. 19, 2015, at A15.

23. Omar Khadr Leaves Guantánamo to Return to Canada, THE GUARDIAN (Sept. 29, 2012, 10:58 AM), <http://www.theguardian.com/world/2012/sep/29/omar-khadr-guantanamo-canada> (describing plea bargain of Omar Khadr); Charlie Savage, *Sudanese Detainee to be Sent Home from Guantánamo*, N.Y. TIMES, Dec. 5, 2013, at A21 (describing plea bargain of Noor Uthman Mohammed); Charlie Savage, *Guantánamo Prisoner is Repatriated to Sudan*, N.Y. TIMES, July 12, 2012, at A9 (describing plea deal of Ibrahim al-Qosi).

I thought if I could get an agreement similar to what David Hicks's defense counsel had negotiated, that would be a positive result for my client. My first step was to try to convince the prosecutor that a plea bargain was in order. Accordingly, I started a personal campaign to convince my opposing counsel, Lieutenant Colonel (LTC) Darrel Vandeveld, that a plea was in the interests of justice. The terms that I suggested were time served, plus a six- to nine-month period of rehabilitation to prepare Mohammed for reintegration into society. I argued that providing a period of rehabilitation would be consistent with the requirements of the Optional Protocol on Child Soldiers, which the United States had blatantly disregarded. I noted that at that point, Mohammed had already been in United States custody for over five and one-half years without any contact from his family, and I reminded LTC Vandeveld that he had been tortured and abused in United States custody. Hadn't he been punished enough, I asked? LTC Vandeveld, a deeply ethical and principled officer, agreed. So LTC Vandeveld and I went together to talk to his boss, Chief Prosecutor Colonel Lawrence Morris, and try to sell him on the deal. He said he was not opposed to a plea bargain, but he felt six to nine months was a little low. So I asked him what kind of deal he could support and he said, "twenty years, with no credit for time served." Needless to say, this was not an acceptable offer. So the plea bargain route did not succeed. But my efforts to persuade LTC Vandeveld of the unfairness of prosecuting Mohammed did bear fruit. He became convinced that prosecuting Mohammed was unjust. In fact, he started to believe that Mohammed might actually be innocent. And he tried to get his superiors to drop the charges, but they refused. Convinced that he could not ethically prosecute Mohammed, he did the honorable thing and resigned.²⁴ But he went beyond merely resigning, he became an outspoken critic of the military commissions and an effective advocate for Mohammed,²⁵ providing sworn testimony before Congress²⁶ and to the United States District Court²⁷ that he believed Mohammed was innocent and should be sent home.

24. William Glaberson, *Guantánamo Prosecutor is Quitting in Dispute Over a Case*, N.Y. TIMES, Sept. 25, 2008, at A20.

25. Stacy Sullivan, *Confessions of a Former Guant*, SALON (Oct. 23, 2008, 6:19 AM), <http://www.salon.com/2008/10/23/vandeveld/>.

26. *Legal Issues Surrounding the Military Commissions System: Hearing Before the Subcomm. on the Const., Civil Rights & Civil Liberties of the Comm. of the Judiciary*, 111th Cong. 16-23 (2009) (statement of Lieutenant Colonel Darrel J. Vandeveld, Former Prosecutor, Guantanamo Bay Military Comm'ns).

And that brings me to my next lesson learned:

Lesson 2: Opposing Counsel is not the Enemy.

During my career, I have seen a troubling tendency of lawyers to view opposing counsel as the enemy and treat them accordingly, sometimes with outright hostility. While this may seem natural in an adversarial justice system, this tendency should be avoided. Rather, you should view your opposing counsel as a potential ally in your crusade for justice.

Of all the people involved in your case, your opposing counsel has probably the greatest power of anyone to help you achieve the desired outcome. In a civil case, this could be through exerting influence on his or her client to agree to an equitable outcome, perhaps settling the case on favorable terms or voluntarily changing unlawful or questionable practices. In the criminal context, it could be through voluntarily dismissing charges or agreeing to a pretrial diversion or some other favorable disposition. So be civil, be courteous, and cultivate a cordial relationship with your opposing counsel. Ask them out to lunch or for a drink and get to know them a little. Do not assume just because they represent evil corporation X or evil government agency Y, that they themselves are evil, or even that they personally support whatever position their client has directed them to advocate. Chances are that they were once just as idealistic as you before they joined what you now consider to be “the dark side.” Assume that they are acting in good faith. While it may be unlikely that you will persuade your opposing counsel to publicly resign and renounce his former positions as LTC Vandeveld did, a positive relationship with opposing counsel can bear fruit in many more subtle ways.

Pathway 3: Habeas Corpus

Getting back to Mohammed Jawad—since the plea bargain route was foreclosed and voluntary release by the United States government seemed extremely unlikely, we needed to find another way to get him out of Guantanamo. The third route home from

27. Exhibit B, *Bacha v. Obama*, 653 F. Supp. 2d 32 (D.D.C. 2009) (No. 05–2385 (ESH)), https://www.aclu.org/sites/default/files/field_document/vandeveld_declaration.pdf.

Guantanamo is by a court order through a petition of habeas corpus. On June 12, 2008, the Supreme Court, in *Boumediene v. Bush*, ruled that detainees had the right to file a writ of habeas corpus in the U.S. District Court for the District of Columbia, challenging the lawfulness of their detention and seeking an order of release.²⁸ The problem for Mohammed Jawad was the D.C. District Court had repeatedly ruled that if there were active military commission charges pending, a habeas corpus petition was not ripe, and the District Court would not hear it. Thus, at the time of the Supreme Court decision, Mohammed was not eligible for habeas corpus relief. However, in the fall of 2008, on the hope that newly elected President Obama would put an end to the military commissions (or at least drop the cases against Mohammed and Omar Khadr, the two juvenile defendants), I enlisted the aid of the ACLU National Security Project to assist me in filing a habeas corpus petition on Mohammed's behalf.

I am reasonably certain that this was the first time that a serving military officer has ever employed the ACLU to sue the United States to gain the release of a declared unlawful enemy combatant. But I did not know the first thing about habeas corpus, and I had never practiced in federal district court. In contrast, the ACLU lawyers I had met, Hina Shamsi and Jonathan Hafetz, were subject matter experts with extensive federal court experience. Fortunately, they were willing to help.

And that brings me to my next lesson learned:

Lesson 3: Know your own limitations as an advocate.

And do not be afraid to ask for help.

Lawyers take great pride in their ability to master new areas of law through self-study. And lawyers are reluctant to relinquish or share control over litigation in which they are involved. But your duty is to your client, and you have to do what is in the client's best interest. You may not have the time to become an expert in a new area of law during an ongoing case. You may not have the resources to pursue the best litigation strategy on your own. You have to be willing to put your ego to the side and reach out for assistance. Your client is counting on you.

As we know, President Obama did not end the military commissions; but he did, on his first day in office, temporarily

28. 553 U.S. 723, 771 (2008).

suspend them. Thanks to the ACLU, we were poised to take advantage of this hiatus. Citing the suspension of military commission activities and the uncertain future of the commissions, we prevailed upon District Court Judge Ellen Segal Huvelle to take up the habeas corpus petition and order the government to respond to it on the merits.

Our petition asserted there was no lawful basis to hold Mohammed. The Department of Justice (DOJ) was supposed to explain in their response why they believed they did have a lawful basis to hold him. One would have thought that, more than six years after detaining Mohammed, the government would readily be able to explain their basis for doing so. But the DOJ claimed that they could not. They requested an extension to respond to the petition, asserting that it would take several months to search all the databases and gather all the records from the various agencies that maintained information about the detainees.

Judge Huvelle did not like DOJ's answer. She said, in essence, "You've had him in custody for six and one-half years. And you can't tell me why?" She gave the government a short deadline to respond to the petition. When they did, the principle evidence they cited in support of detention were the two purported confessions to throwing the hand grenade, the very same confessions that the judge in the military commissions had ordered suppressed as the product of torture. Judge Huvelle expressed incredulity that the government would rely on evidence that had previously been found inadmissible. When the DOJ attorney responded that military commission rulings were not binding on her, she announced that she would hold her own suppression hearing to determine their admissibility. Just before the suppression hearing, the DOJ changed course and informed the court they now agreed that the statements were the product of torture and were no longer relying on them. The government requested additional time to provide a revised response to the habeas petition. Judge Huvelle became so frustrated with the government's dilatory tactics that, when they next appeared before her, she gave them a judicially rare excoriation.

Unfortunately, there were no journalists present to witness Judge Huvelle's scolding. But fortunately, there was a court stenographer recording it. So we paid a small fee to get an expedited transcript and immediately forwarded it to a friendly reporter at the *New York Times*. He wrote a story about it and managed to get it on the front page. A few excerpts from the story provide a sense of the Judge's displeasure and the general tenor of the article:

Judge Ellen Segal Huvelle of Federal District Court . . . criticized the government's case against the detainee as "an outrage" that was "riddled with holes."

. . . .

Judge Huvelle expressed fury at the government for "dragging this out for no good reason" after "your case fell apart," according to a transcript of the hearing.

. . . .

. . . Judge Huvelle has given the government until the end of the week to tell the court whether it would produce any witnesses and suggested that she might rule that Mr. Jawad should be returned to Afghanistan.

"You'd better go consult real quick with the powers that be, because this is a case that's been screaming at everybody for years," Judge Huvelle said.²⁹

And that brings me to my next lesson:

Lesson 4: Do not antagonize the judge, or "Hell hath no fury like a federal judge scorned."

In addition to building a positive rapport with your opposing counsel, you should try very hard to maintain your judge's respect and good will. While you should not invite your judge out for drinks, you can earn the judge's willingness to positively consider your arguments by carefully proofreading your filings, submitting your filings in a timely manner, being courteous to clerks and court personnel, and otherwise studiously complying with the rules of court. Surprisingly, too many lawyers submit sloppily researched and poorly drafted materials that may earn a judge's disdain. If you think you are going to need a continuance or extension, do not wait until the last minute to ask for it. Most critically, always be candid with the tribunal. Always cite adverse precedent up front and forthrightly acknowledge shortcomings or weaknesses in your case. If the judge considers you to be a decent, honest, ethical, and hard-working attorney, there is a good chance she will give your client the benefit of the doubt when there is a close call or a discretionary judgment to be made in your case. On the other hand, if you submit poorly drafted or late filings, continuously seek extensions, constantly make excuses, fail to cite clearly adverse precedents, and

29. William Glaberson, *U.S. Judge Challenges Evidence on a Detainee*, N.Y. TIMES, July 22, 2009, at A22.

make frivolous arguments, you are likely to invoke the judge's wrath, and your time before her will be uncomfortable for you and will negatively impact your client.

Shortly after the *New York Times* story ran, “the powers that be” were consulted and the DOJ abruptly changed course; the government informed Judge Huvelle that they no longer considered Mohammed Jawad an enemy combatant and joined us in asking her to grant the petition for habeas corpus and order his release, a request that she was only too happy to oblige. On July 30, 2009, she ordered his release, giving the government three weeks to arrange Mohammed’s transfer in order to comply with a recently enacted provision requiring advance notice to Congress for the release of a detainee.³⁰ I promptly forwarded the court order to the Convening Authority for the military commissions. I explained that because the U.S. government no longer considered Mohammed an enemy combatant, the military commissions no longer had jurisdiction over him, and therefore, the military commission charges had to be dismissed. Shortly thereafter, the Convening Authority grudgingly complied with my demand. Three weeks later, Mohammed Jawad went home to his family in Afghanistan a free man.

And that brings me to my next lesson:

Lesson 5: Use the press to your advantage, or “There’s nothing like a front page story in the *New York Times* to get the attention of powerful people.”

Although I believe I ultimately would have prevailed in earning Mohammed’s release, I am quite certain that our victory and his repatriation were significantly hastened by the *New York Times* story. This demonstrates that the right kind of news coverage or publicity can create pressure on the opposing party to resolve a dispute on favorable terms to your client. To the extent permitted by the relevant rules of professional responsibility on pretrial publicity in your jurisdiction, you should consider whether press coverage would potentially be helpful to your case and how to utilize the

30. The constitutionality of this notice requirement in the context of a court-ordered release was extremely doubtful. Subsequent statutory notice requirements of detainee transfers provided an exception for court-ordered releases. For a full discussion of these provisions, see David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179 (2012).

media to your advantage. Of course, there is always a risk that a journalist will not report the story in the way that you envision, so you must assess your ability to shape the coverage to create the desired result. In Mohammed's case, as with all the military commissions, there was a considerable degree of media interest, and I had the opportunity to get to know several of the journalists who regularly covered the Guantanamo beat, so I had a good sense of how a particular journalist would likely report the information I provided to him or her.

Of course, not every case is newsworthy and you cannot count on getting a story in the front page of the *New York Times*. But all media outlets are looking for "content," so if there is anything interesting about your case at all, it is likely that you can use the press as part of your advocacy strategy. In my time at the commissions, I learned some valuable lessons about how to best utilize the media.

If you think you have got a good story, there is a tendency to want to share it with everyone by issuing a press release and blasting it out to every news organization. Unless your story is truly sensational, that is a recipe for getting a one paragraph blurb buried in the back pages of the publication or on their website. If you give a journalist an exclusive, you stand a much better chance of getting a major story published; and if you choose the right reporter, you have a greater likelihood of ensuring that the tone of the story is to your liking. This was the strategy we employed to get the story in the *New York Times*. We sent the transcript to one reporter and offered him an exclusive if he promised to get the story published. I also used this strategy at other times to get well-placed stories in other major newspapers, including the *Los Angeles Times*³¹ and *Washington Post*.³² Although it is obviously preferable to get your story in a major news outlet, that is not critical. If it is a really good story, other news outlets will pick it up, and other journalists will end up calling you for follow-up stories.

31. Josh Meyer, *For Lawyer, Trial Was Tribulation*, L.A. TIMES (Oct. 12, 2008), <http://articles.latimes.com/2008/oct/12/nation/na-gitmo12> (reporting on Lt. Col. Darrel Vandeveld's resignation from the military commissions).

32. Josh White, *Detainee's Attorney Seeks Dismissal Over Abuse*, WASH. POST (June 8, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/07/AR2008060701904.html>.

CONCLUSION

On the day that I arrived at the Office of Military Commissions, I was assigned an office. When I walked in, a senior officer was in the process of packing up some boxes. He said to me, “You must be my replacement. Let me give you some friendly advice. Don’t ever start thinking that you can win a case at Guantanamo. It doesn’t matter if the facts are on your side. The deck is so stacked against the detainees and the process is so slanted that you can’t possibly win. So do yourself a favor and don’t get your hopes up and, whatever you do, don’t give your client any hope that he might have a chance to go home because it is never going to happen.” I am happy to say that I did not follow this advice. I never gave up my belief that in the end, justice and the rule of law would prevail. I had faith that determined, zealous, and creative advocacy could make a difference for my client and that our system, however flawed, would ultimately deliver a fair outcome. And while I was candid with Mohammed about the obstacles in our path and did not sugarcoat his chances, I always tried to project optimism and encouraged him not to give up hope. It was very important for Mohammed that I believed in him and his case, and it boosted his spirits when he was in a very bleak situation. Fifteen months later, my faith in the system was vindicated. With the help of my military co-counsel, the ACLU, Lieutenant Colonel Darrel Vandeveld, and the *New York Times*, I did win a case at Guantanamo. And that brings me to my final lesson learned.

Lesson 6: Keep the Faith. Justice will prevail.

