



LAWFARE AND LEGAL ETHICS IN GUANTÁNAMO

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INTRODUCTION

In January 2007, Charles “Cully” Stimson gave an early morning interview on a local talk radio station in Washington, D.C. Stimson was Deputy Assistant Secretary of Defense for Detainee Affairs, and his subject was Guantánamo.¹

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1. The audio interview is on the website of Federal News Radio. *Guantanamo Bay: Five Years Later* (Federal News Radio broadcast Jan. 11, 2007) (interview by Jane Norris with Charles Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in Washington, D.C. (Jan. 11, 2007)), available at <http://www.federalnewsradio.com/>

After a few innocuous questions and answers, and a dig at Amnesty International, Stimson abruptly changed the subject. “I think the news story that you’re really going to start seeing in the next couple of weeks is this.” He continued:

As a result of a FOIA request through a major news organization, somebody asked, “Who are the lawyers around this country representing detainees down there?” And you know what, it’s shocking. The major law firms in this country—Pillsbury Winthrop, Jenner & Block, Wilmer Cutler Pickering, Covington & Burling here in D.C., Sutherland Asbill & Brennan, Paul Weiss Rifkind, Mayer Brown, Weil Gotshal, Pepper Hamilton, Venable, Alston & Bird, Perkins Coie, Hunton & Williams, Fulbright Jaworski, all the rest of them—are out there representing detainees, and I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. It’s going to be fun to watch that play out.²

Stimson did not have to wait weeks for the story to have “major play.” Within days, newspaper editorials and bar groups denounced Stimson’s crude attempt to pressure the Guantánamo lawyers to abandon their clients; Charles Fried, the conservative former Solicitor General, wrote a blistering op-ed against Stimson; and the Defense Department embarrassedly disowned Stimson’s comments.³ Stimson apologized; and three weeks after the interview he was out of a job.⁴

index.php?sid=1029698&nid=250. A transcript of the relevant portions of the interview may be found on the website of the radio program *Democracy Now!*. See Transcript of interview by Amy Goodman with Stephen Oleskey, Partner at WilmerHale, and Emily Spieler, Dean of Northeastern University School of Law (Jan. 17 2007), available at http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott.

2. *Id.*

3. See, e.g., Charles Fried, Op-Ed, *Mr. Stimson and the American Way*, WALL ST. J., Jan. 16, 2007; John Heilprin, *Views on Detainee Representation Draw Fire; Pentagon Official’s Suggestion of a Boycott Is Irresponsible, Legal Groups Say*, WASH. POST, Jan. 14, 2007, at A5 (quoting Pentagon spokesman who stated that Stimson’s views “do not represent the views of the Department of Defense or the thinking of its leadership” and describing criticism by the head of the American Judicature Society); Editorial, *Round Up the Usual Lawyers*, N.Y. TIMES, Jan. 13, 2007, at 14; Editorial, *Unveiled Threats; A Bush Appointee’s Crude Gambit on Detainees’ Legal Rights*, WASH. POST, Jan. 12, 2007, at A18; Press Release, ABA, Statement by ABA President Karen J. Mathis on Remarks of Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in January 11, 2007 Federal News Radio Interview (Jan. 12, 2007), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=64>.

4. Cully Stimson, Letter to the Editor, *An Apology to Detainees’ Attorneys*, WASH. POST, Jan. 17, 2007, at A18; *Pentagon Official Who Criticized Detainee Lawyers Quits*, WASH. POST, Feb. 3, 2007, at A6. Mr. Stimson currently works at the Heritage Foundation. His idea may have backfired on its own terms: a lawyer involved in Guantánamo litigation has told me of at least one law firm that was initially hesitant to commit time and resources to participating, but decided after Mr. Stimson’s comment that it could not afford *not* to be part of such a distinguished roster of firms. E-mail from Peter Margulies, Professor, Roger

Despite the Defense Department's assurance that Stimson's views are not those of the Department (and his own peculiar assurance that he himself does not hold the views he expressed), the fact remains that he occupied the detainee affairs desk within the department. He was not sandbagged or ambushed by reporters, nor was he the victim of a document leak. He evidently went into the interview planning to raise the suggestion that corporate CEOs pressure lawyers into abandoning their clients, and he clearly brought the list of law firms in with him. Nor was his suggestion out of line with the government's overall policy on habeas corpus rights for detainees. The government's unwavering legal position has been to oppose those rights, and the government has never wanted the detainees to have habeas lawyers. Stimson's downfall was not because his goal of separating the volunteer lawyers from their clients is antagonistic to the Defense Department's policies—for, as we shall see, it is not. Its cause was merely his ham-fisted methods and the embarrassment he occasioned.

This Article is about government policies that have (intentionally or not) made it more difficult for lawyers to provide legal representation to Guantánamo prisoners. In the course of writing the Article, I have had in-depth conversations with several of the Guantánamo lawyers, both military and civilian, and will draw on those conversations, as well as documents and published accounts.⁵ The difficulties the lawyers face include policies designed to reduce their access to their clients; policies that create knotty ethical difficulties for military commission defense lawyers, particularly lawyers in the uniformed armed services; and practices that, in the words of one lawyer, “are designed to drive a wedge between lawyers and their clients.”⁶ My secondary aim is to shed some light on this segment of law practice and the lawyers who engage in it. This is not necessarily an aim that the lawyers themselves welcome; uniformly, those with whom I have spoken prefer a low profile, because they don't want to deflect attention from their clients to themselves.⁷

Williams Univ. Sch. of Law, to author (Feb. 2, 2008) (on file with author).

5. Some of these lawyers do not wish to be identified by name, and I will respect their wishes. Many of the lawyers with whom I have spoken tell me that the examples they cite barely scratch the surface; but their obligation to maintain classified information precludes them from describing all of them. A skeptical reader is, of course, justified in withholding judgment about whether these examples barely scratch the surface. I recognize as well that some readers will be skeptical of information originating with the detainees themselves, or for that matter with their lawyers. Suffice it to say that a great deal of independent information about Guantánamo has appeared in news reports. Ultimately, readers must make up their own minds about the credibility of what I report here.

6. Telephone Interview with J. Wells Dixon, New York, N.Y. (Dec. 6, 2007). Joseph Margulies uses the same phrase. JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 204 (2006).

7. Thus, Clive Stafford Smith begins his book about Guantánamo by saying, “From the start, I have wanted the book to focus on the prisoners, so the legal teams get little credit in the text” CLIVE STAFFORD SMITH, *EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* vii (2007). Stafford Smith reiterated this desire in

Nevertheless, in this symposium on the legal profession it seems entirely appropriate to look at the legal practice from the standpoint of the lawyers, without denying that in the scheme of things it is not nearly as important as the situation of the prisoners they represent.

Before proceeding, it will be useful to lay out some of the broader issues of professional ethics at stake in these cases. In 2003, I published an essay entitled *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*.⁸ What prompted that essay was a disturbing pattern of maneuvers by politicians, jurists, and conservative litigators to degrade the capacity of progressive public interest lawyers to bring cases. The examples I analyzed included draconian restrictions on Legal Services lawyers, legal challenges to Interest on Lawyer Trust Accounts programs used by states to fund legal aid, political attacks on law school clinics, and damaging judicial interpretations of fee-shifting statutes. The effect of all these attacks—and the explicit purpose of at least some—was to win legal battles by eliminating or hobbling the advocates on the other side rather than by offering better arguments.⁹ That is precisely the phenomenon that forms the subject of the present Article.

Such tactics offend a fundamental principle of justice, the due process maxim *audi alteram partem*, “hear the other side.” Drawing on the work of the philosopher Stuart Hampshire, I argued that *audi alteram partem* is not only a principle of procedural justice in the law, but a broader principle of justice as well.¹⁰ Hampshire understood quite clearly that human affairs are riddled with bitter conflict, strong partisan emotions, and Machiavellian ruthlessness. Any realistic theory of justice must admit at its most basic level that conflict, disagreement, and partisanship are fundamental facts of the human condition. But even the fiercest partisans should hear the other side; that minimum level of openness is what stops political hardball from sliding into sheer brutality.¹¹ Within the legal system, taking out the adversary aims to silence the other side. That is at once an issue of professional ethics and access to justice. The theory of legal ethics that comes closest to justifying ruthless partisan tactics rests on the nature and structure of the adversary system; but the adversary system itself can be justified only to the extent that parties actually have representation within it.¹²

Hampshire thought that *audi alteram partem* justifies the adversary system,

our interview. Interview with Clive Stafford Smith, in Washington, D.C. (Oct. 10, 2007).

8. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

9. *Id.* at 210.

10. See generally STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE (1989) [hereinafter HAMPSHIRE, INNOCENCE AND EXPERIENCE]; STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000) [hereinafter HAMPSHIRE, JUSTICE IS CONFLICT].

11. HAMPSHIRE, INNOCENCE AND EXPERIENCE, *supra* note 10 at 186-87.

12. Murray L. Schwartz, *The Zeal of the Civil Advocate*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 150, 153-55 (David Luban ed., 1983).

but he is only partly right. To the extent that the adversary system provides a vehicle for parties and arguments to be heard by a decision maker, it is indeed the paradigm of *audi alteram partem*. But lawyers understand that a great deal of litigation practice consists of elaborate maneuvers to exclude evidence, intimidate litigants into dropping cases, or prevail by exhausting the adversary's resources. That aspect of the adversary system mocks *audi alteram partem* and the proceduralized vision of justice it represents. For that reason, I have long been a skeptic of the adversary system as the basis of lawyers' ethics; its double-edged nature makes it a deeply imperfect embodiment of *audi alteram partem*.¹³ Lawyers often appeal to the adversary system to excuse hardball tactics and unsavory representations, and if the adversary system has no better justification than the pragmatic argument that it is no worse than its feasible alternatives, the adversary system excuse fails.

In offering this critique of adversarial legal ethics, I make an exception for criminal defenders, whose zealous advocacy provides an important safeguard of our rights against state power. But other critics of adversarial ethics do not admit even this exception. William Simon sees no essential difference between the criminal defender and any other lawyer. He points out that in most criminal prosecutions "the government" is no Leviathan—it is a harried and overworked district attorney with a small budget and a police witness who may not even show up for the court date.¹⁴ Although I don't accept all of Simon's arguments, I have no doubt that he is right that in the vast majority of criminal prosecutions "The State" is no Leviathan.¹⁵

This Article, however, focuses on a class of cases in which the power of Leviathan can scarcely be exaggerated, even though only a handful are criminal cases: those involving the Guantánamo detainees in the global war on terrorism. In these cases, millions of dollars of resources, and the attention of some of the highest officials of government, have been devoted to capturing, imprisoning, isolating, interrogating, and in some cases torturing a few hundred men and boys. This is not to assume that the prisoners are all, or even mostly, innocent (something that, at this point, literally no one person is in a position to know).¹⁶ Here, as in criminal defense, the purpose of providing lawyers to

13. So I have argued most recently in *LEGAL ETHICS AND HUMAN DIGNITY* 25, 34-37 (2007); see also David Luban, Book Review, 112 *ETHICS* 156, 157 (2001) (reviewing *HAMPSHIRE, JUSTICE IS CONFLICT*, *supra* note 10); David Luban, Book Review, 88 *J. PHIL.* 317, 318-19 (1991) (reviewing *HAMPSHIRE, INNOCENCE AND EXPERIENCE*, *supra* note 10).

14. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 174 (1998).

15. David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1729, 1730 (1993).

16. A well-known study of 516 transcripts of military review board hearings to determine enemy-combatant status at Guantánamo suggests a large number of false positives. Mark Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* 35-36 (2006), available at http://law.shu.edu/news/final_no_hearing_hearings_

individuals in the jaws of Leviathan is to safeguard human dignity against government overreaching and abuse, and that purpose remains valid regardless of client guilt.¹⁷ The triple threats of government malice, government error, and official reluctance to admit mistakes by fixing them justify the zealous advocate's role in representing imprisoned individuals.¹⁸ The importance of this role heightens the injustice of policies and practices that harass, silence, or hamper the lawyers, some civilians and some military, who represent the Guantánamo prisoners. The Stimson episode is merely the crudest of these. Disturbingly, there has been a nearly continuous pattern of such policies.

One important caveat: I am not suggesting an orchestrated conspiracy of lawyer harassment. Some of the policies indeed seem deliberate. Others may be the result of bureaucratic inertia. Still others may be the result of incompetence. As one military defense lawyer said to me, "Before you think there's some big conspiracy going on, don't rule out good old-fashioned government incompetence."¹⁹ Another lawyer illustrated with an example: "Sometimes it's hard to tell whether the problems come from conscious design or incompetence. For example, I show up to meet a client and they bring the wrong client. Is that incompetence or something worse?"²⁰ A third commented ruefully, "The only thing harder than litigating against an adversary with a plan is litigating against an adversary with no plan."²¹ Other harassments may be incidental byproducts of policies designed for other purposes—thus, governmental efforts to break down detainees will also interfere dramatically with their client-lawyer relationships. Finally, some of the harassment may be the result of unauthorized, casual malice against "the enemy" by low-level personnel.

To begin, it will be necessary to sketch out some of the legal and factual background. I will not do so in great detail, because Guantánamo matters have

report.pdf. Analysts at the U.S. Military Academy's Combating Terrorism Center have issued a vigorous methodological critique of the Denbeaux study. LTC Joseph Felner & Jarret Brachman, *A Response to the Seton Hall Study: An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries* (2007), available at <http://www.ctc.usma.edu/CSRT/CTC-CSRT-ANNEX-A.pdf>. Neither of these studies considers classified evidence at the hearings, and so—quite apart from the other arguments in the dispute—uncertainty remains about the number of false positives.

17. See, e.g., Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000).

18. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 60 (1988).

19. Telephone Interview with Anonymous Military Defender A (Nov. 17, 2007).

20. Telephone Interview with J. Wells Dixon, in New York, N.Y. (Dec. 7, 2007). Because of the elaborate security protocols involved in arranging a client/lawyer meeting, bringing the wrong client can cost an enormous amount of time and possibly waste a trip to the island.

21. Telephone Interview with Joshua Dratel, in New York, N.Y. (Nov. 21, 2007).

been intensely debated in the legal academy and the press, and readers of the *Stanford Law Review* need hardly be reminded of them.

I. BACKGROUND

This section begins by describing the relevant categories of detainees and the lawyers who represent them. Guantánamo has contained up to 680 inmates, many of whom were captured in Afghanistan or Pakistan, classified as enemy combatants, and sent to Guantánamo for interrogation and incapacitation. Many of them assert they are cases of mistaken identity: some were captured by Afghani bounty hunters who didn't care if they had the right man, while others were names spewed forth by captives who were tortured. Until the *Hamdi* decision, the government took the position that detainees were entitled to no process to weed out cases of mistaken identity or false information from the genuine enemy combatants; *Hamdi*, however, rejected that argument and found that the detainees are entitled to some such process.²² In response, then-Undersecretary of Defense Paul Wolfowitz set up so-called "Combatant Status Review Tribunals" (CSRTs); but the CSRT procedure does not contemplate giving the detainees lawyers, and in fact prohibits lawyers who represent the prisoners in federal court to consult with their clients about the CSRT proceedings, let alone attend those proceedings.²³ Rather, detainees are assigned a representative who is a non-lawyer military officer. The CSRTs have been subjected to withering criticism, including charges that they have ignored exculpatory evidence and that in some instances the military authorities forced them to redo cases until they found that a prisoner was indeed an enemy combatant.²⁴

However, many of the detainees also filed habeas petitions, and a large number of lawyers have been involved in the habeas effort. *Rasul v. Bush*²⁵ found that federal courts have habeas jurisdiction over Guantánamo; but Congress limited that jurisdiction in the Detainee Treatment Act of 2005, then again in the Military Commissions Act of 2006.²⁶ Most of the habeas cases are currently in limbo, awaiting the Supreme Court addressing this legislation in *Boumediene v. Bush*, which was argued in December 2007.²⁷

22. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

23. MARGULIES, *supra* note 6, at 167.

24. *Id.* at 159-70. The most compelling such criticism is found in a declaration by a former CSRT member, Army Lt. Co. Stephen Abraham, available at <http://www.scotusblog.com/wp/wp-content/uploads/2007/11/sub-new-abraham-declaration.pdf>. See Myron Levin, *O.C. Lawyer Argues Against Tribunals*, L.A. TIMES, Jan. 5, 2008, available at <http://articles.latimes.com/2008/jan/05/local/me-abraham5> (describing Abraham's decision).

25. 542 U.S. 466 (2004).

26. 28 U.S.C.A. § 2241(e) (2008).

27. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting petitions for rehearing and writ of certiorari).

A few of the detainees were designated to be tried before military commissions. Furthermore, in September 2006 President Bush ordered fourteen high-value detainees to be moved to Guantánamo from secret CIA prisons in other countries, preparatory to their trials before military commissions. Military commission defendants are the second category of detainees. They are assigned military defense lawyers, and most also have civilian lawyers, permitted under military commission rules although the government will not pay for them. Some of the defendants have filed habeas petitions as well, so the categories overlap; and these defendants have habeas lawyers as well as defense counsel.

There are, therefore, three relevant groups of lawyers: (i) civilian habeas lawyers (who I will sometimes refer to as “DTA lawyers,” since that is how they often designate themselves), some hired by detainees’ families but most working pro bono or for public interest law firms such as the Center for Constitutional Rights (CCR) and Reprieve; (ii) civilian defense lawyers of potential defendants in military commission proceedings; and (iii) military defense lawyers. The criminal defense lawyers’ numbers fluctuate, but are in the vicinity of 10 military and 10 civilians.²⁸

There is one overwhelming difference between the DTA lawyers and the defense counsel. The military commissions require that counsel be provided for defendants. Thus the government wants and needs criminal defenders. But, as mentioned earlier, the government has consistently opposed habeas rights for Guantánamo prisoners, and by no means wants the prisoners to have habeas lawyers. Thus, the DTA lawyers, unlike the criminal defenders, are in every sense *persona non grata* by the government.

II. THE DTA LAWYERS

No lawyers were allowed to meet with Guantánamo prisoners until *Rasul* confirmed the existence of habeas jurisdiction over Guantánamo. However, *Rasul* was itself the result of a protracted legal effort that began two and a half years earlier, when President Bush first announced the military commissions. A group of public interest lawyers, including death penalty lawyers Joseph Margulies and Clive Stafford Smith, and lawyers from CCR, a New York-based public interest organization, began planning a litigation strategy in January 2002.²⁹ Among the initial difficulties they faced was that the prisoners

28. As of May 2007, the Office of Defense Counsel was fully staffed with eleven military lawyers: a chief defense counsel, deputy chief defense counsel, and nine others. Interview with Anonymous Military Defender A, *supra* note 19. The estimate of civilian defense counsel comes from an interview with Clive Stafford Smith, *supra* note 7. The OMC-D will gain at least five new attorneys in early 2008 and, after four years, has finally hired a defense investigator. E-mail from Lt. Col. Yvonne Bradley (Dec. 19, 2007) (on file with author).

29. MARGULIES, *supra* note 6, at 9-10. On the beginning of Margulies’s involvement, see *id.* at 7-10.

they hoped to represent were all held incommunicado. That made it necessary to locate their relatives to consent to next friend status for the lawyers—a difficult task because the government would not release a list of prisoners. The only sunlight came because the United States permitted the Red Cross to notify captives' families. Unsurprisingly, locating relatives proved easiest to do with detainees from the U.K. and Australia, whose families were eager to find legal representation. It was more difficult with those from Arab countries. As Red Cross postcards went out to families of detainees, Stafford Smith and lawyer Steven Watt traveled to Jordan, Bahrain, and Yemen to meet with human rights groups that helped put out the word that lawyers were seeking families who wanted legal representation for their relative; eventually they got several dozen next friend permissions.³⁰ Shearman & Sterling lawyers became involved in the case of Fawzi Khalid Al-Odah because they knew his father through their Kuwait business practice; eventually Shearman & Sterling lawyers represented ten Kuwaitis.³¹ But the process was haphazard until a major breakthrough in 2005, when a JAG stationed in Guantánamo anonymously mailed a CD with the list of the detainees to CCR.³² Soon after, the government released the list of names.

At first, private lawyers were reluctant to represent detainees, and the lawyers representing Rasul initially had a hard time recruiting a Washington, D.C. lawyer to serve as local counsel.³³ That reluctance gradually changed, and five years into the process Stafford Smith estimated the total number of lawyers involved in detainee representation at almost five hundred.³⁴

A. *The Mechanics of Access*

The mechanics of meeting with their clients comprise one important set of policies that make these representations unusually difficult. To begin with the obvious, it is not easy to get to Guantánamo. There is one flight a day, four days a week, in an eight-to-ten seat plane, where often the seats are taken by civilian contractors or military personnel on leave; unlike the military defense lawyers, civilian counsel cannot fly down on military planes.³⁵ The scarcity of seats and the need to bring an interpreter means that an entire legal team can

30. *Id.* at 158; Telephone Interview with Gitanjali Gutierrez, in New York, N.Y. (Dec. 2, 2007).

31. Interview with Gutierrez, *supra* note 30. Currently they are represented by Pillsbury Winthrop.

32. Navy Lt. Cmdr. Matthew Diaz, who had become incensed at the treatment of the detainees, described his action as “the right decision, the moral decision, the decision that was required by international law.” Brooks Egerton, ‘Moral Decision’ Jeopardizes Navy Lawyer’s Career, DALLAS MORNING NEWS, May 17, 2007. He was convicted of crimes, sentenced to six months imprisonment, and dishonorably discharged.

33. MARGULIES, *supra* note 6, at 146.

34. STAFFORD SMITH, *supra* note 7, at vii.

35. MARGULIES, *supra* note 6, at 203; Interview with Gutierrez, *supra* note 30.

seldom make the trip; CCR's Gitanjali Gutierrez, the first habeas lawyer to visit Guantánamo, was able to bring a full complement of lawyers and paralegals only once out of many visits. She reserves her flights two months in advance. Telephone access to the clients is prohibited, and mail is extremely slow. It is vetted by a privilege team and a staff judge advocate, and initially took two to four months to be delivered (the time is now reduced to two or three weeks when the lawyers provide Federal Express mailers).³⁶ Sometimes, the detaining authorities withhold client letters from their lawyers, which erodes client trust when the lawyers don't reply.³⁷ At the end of an interview, the lawyers must leave their notes behind for review by a privilege team; eventually the notes will be sent to Washington and then on to the lawyer. If a page contains classified information, it is confiscated. Stafford Smith once asked what the classification criteria are, so that he might know what to leave out of his notes to avoid having them confiscated; in response, he was told that the classification criteria are themselves classified. To avoid losing valuable information, he now sometimes writes only one sentence per page, unable to guess what will and will not be deemed a threat to national security.³⁸ At the end of a day's interviewing, and temporarily divested of their notes, the lawyers are not given a secure space to confer with each other.³⁹

Some of these difficulties are the byproducts of security procedures and Guantánamo's geographical isolation. Other difficulties of access seem to be the result of deliberate harassment. One lawyer says:

They don't tell the detainee that his lawyer is there to see him. Instead, they tell him that he "has a reservation," which means an interrogation. The detainee says he doesn't want to go, so then they tell the lawyer that his client doesn't want to see him. But they will allow lawyers to write notes to the client trying to change their minds.

I was scheduled to meet with one of my clients, Abu Abdul Rauf Zalita. Zalita had already been cleared for release, but he didn't want to go back to his home country of Libya because he's afraid he will be tortured. They tried twice to put him on a plane to Libya. His case is pending in the Supreme Court. I went to the base to visit him in April. I had written to him first, so he knew he was supposed to meet with me in the morning.

But when I got there first thing in the morning (with my two Navy escorts,

36. Interview with Gutierrez, *supra* note 30.

37. For example, when Feroz Abbasi was repatriated to the U.K. from Guantánamo, he was given a series of letters he had written to his lawyers at the time of his CSRT hearing. The letters were increasingly frantic because his lawyer was not responding; she was not responding because the letters were never delivered. Interview with Gutierrez, *supra* note 30; *see also* MARGULIES, *supra* note 6, at 204-05.

38. Interview with Stafford Smith, *supra* note 7.

39. Interview with Gutierrez, *supra* note 30. For other accounts of the difficulties of client access, see Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 *FORDHAM INT'L L.J.* 491, 502-03 (2007); Martha Rayner, *Roadblocks to Effective Representation of Uncharged, Indefinitely Imprisoned Clients at Guantanamo Bay Military Base*, 30 *FORDHAM INT'L L.J.* 485 (2007).

my paralegal, and my interpreter), I was told he didn't want to meet with me. I wrote him a note, handed it to the JAG lawyer, who took it into the prison. We waited in a van outside Camp Delta, which wasn't necessarily the same place I would meet the client. We aren't allowed to go in while the note is delivered. The JAG major came back a few minutes later, and said, "Your client still refuses to see you." I asked, "Did you have an interpreter with you when you asked him?" and he said, "No I didn't, I just handed him your note."

So my meeting with my client doesn't happen that morning. Later that day I meet up with Zachary Katznelson [senior counsel at Reprieve, also a DTA lawyer], who tells me that his client Sami al-Haj witnessed the incident with the JAG and Zalita. The guards told Zalita that he was going to a "reservation," then they put on the cuffs so tightly that they hurt him. He complained about the cuffs, and they took that as a refusal to meet me and tossed him back in his cell. And there *was* an interpreter present.

The next day, I met with another client who told me exactly the same thing that Sami al-Haj told Zachary. Both clients were right there; they had cells next to Zalita. I asked whether I could meet Zalita that evening, and was refused. So I confronted the JAG major, who said, "Are you accusing me of wrongdoing?" I said no, I was just pointing out to him that the things he told me weren't true.

Then, the next morning, I'm told, "You can see Zalita—but only if you cancel your other client appointment." By then, my Arabic interpreter had left—which they knew. So they deliberately gave me a time when I couldn't make the meeting and had no interpreter.⁴⁰

Access to the "ghost" detainees is even more problematic. For a year, the government fought efforts by CCR lawyers to meet their client Majid Khan, on the astonishing ground that Khan might tell them about the top secret "alternative interrogation procedures" that were used on him.⁴¹ The government then attempted to undercut the CCR lawyers by offering Khan counsel as though he were unrepresented. When a court order finally granted access, the two lawyers and one paralegal were forced to accept a draconian gag order that stipulates, among other provisions, that the executive can take (unspecified) unilateral steps against them if it believes that the order was violated and national security information is at risk.⁴² Their interview notes are classified at a level too high for even the privilege team to review, which delays access to them—only one CIA officer may review the notes, which are then couriered to Washington rather than mailed. The lawyers cannot discuss factual or legal issues involving classified information with anyone else who isn't also

40. Telephone Interview with J. Wells Dixon, in New York, N.Y. (Dec. 10, 2007); Interview with Dixon, *supra* note 6.

41. See the tenth paragraph of the affidavit filed by CIA officer Marilyn Dorn in the government's opposition to the motion to compel lawyer access to Majid Khan, *available at* <http://balkin.blogspot.com/khan.dorn.aff.pdf>. See also Posting of Marty Lederman to Balkinization, You Call It "Torture"; We Call It "Coming into Possession of Classified Information," <http://balkin.blogspot.com/2006/11/you-call-it-torture-we-call-it-coming.html> (Nov. 4, 2006).

42. Interview with Gutierrez, *supra* note 30.

security cleared and determined by the government to have a “need to know”—two independent requirements.⁴³ Unable to consult with other lawyers and witnesses, they are forced to litigate in a vacuum.

The need for face time with clients is enormous. Because of the innate slowness of speaking through an interpreter, and the frequent cross-cultural misunderstandings to resolve, client interviewing is a painfully slow process.⁴⁴ Moreover, as time passes, the need for additional hours with clients increases. That, explains Gutierrez, is because so many of the clients have been mentally affected by four years of imprisonment. Furthermore, the government has moved prisoners into greater isolation in Camp Five and Camp Six, and in Gutierrez’s estimation the regime of extreme isolation has made the prisoners increasingly irrational, so that effective communication becomes more time consuming. In recent months, however, the government has cut down the length of the visits from full workdays to four hours.⁴⁵

To make matters worse, the prison authorities sometimes appear to punish detainees for meeting with their lawyers. Dixon recalls instances where he had a 9 a.m. meeting with a client, but the guards woke the client in the middle of the night, took him to the cell where the meeting would take place, and shackled him so that he couldn’t sleep or go to the bathroom. By the time of the meeting, the clients were deeply and understandably upset. On other occasions, they were left in isolation in the cell where they had met their lawyer for days after the meeting.⁴⁶

B. *Sowing Mistrust*

Telling prisoners that they have “a reservation” when their lawyers come to see them is not just a way of interfering with access. It is also a means of sowing mistrust of the lawyers among the clients. This observation raises perhaps the most important difficulty confronting the lawyers—the defense counsel as well as the DTA lawyers. This involves the issue of trust, and practices designed to disrupt the client-lawyer relationship altogether.

All criminal defenders know that nothing matters more for effective assistance of counsel than a client-lawyer relationship in which the client trusts the lawyer, at least somewhat. Without trust, the client won’t share information

43. E-mail from J. Wells Dixon to author (Dec. 15, 2007) (on file with author).

44. For an important study of the difficulties that language barriers pose to attorney-client relations, see Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007).

45. Interview with Gutierrez, *supra* note 30; *see also* STAFFORD SMITH, *supra* note 7, at 188 (“[I]ndefinite solitary confinement without a trial was driving some of the prisoners insane.”). Dixon emphasizes that almost all the detainees are in complete isolation in Camps Five and Six, which in his opinion were “created to destroy them.” Interview with Dixon, *supra* note 20.

46. Interview with Dixon, *supra* note 20.

with the lawyer, won't take the lawyer's advice, and may, in desperation, try to negotiate directly with his captors and prosecutors in order to go around his own counsel—often with disastrous results. Admittedly, the constitutional standard for effective assistance does not require a “meaningful relationship” between lawyer and client;⁴⁷ but that merely illustrates the debased level of the courts' effective-assistance jurisprudence, which also denies that assistance is ineffective unless it demonstrably prejudices the outcome, and permits lawyers to sleep through their clients' death-penalty trials, so long as the sleep is not deep and the lawyer stays awake during the good parts.⁴⁸ The real-world standard, and the ethical standard, demand far more trust than the constitutional minimum.

Under the best of circumstances, establishing trust with the Guantánamo prisoners presents a special challenge. Lt. Col. Yvonne Bradley, an Air Force JAG officer detailed to represent Binyam Mohamed before a military commission, states, “They are trying to establish mistrust; everything is set up to create mistrust.” She explains, “There was no cultural reason why Binyam didn't trust me. He's lived in the West. But I had a harder time getting him to trust me than I ever had with other clients, including inmates on death row. Even the death row inmates can check you out to see who you are. But at Guantánamo, he has no resources to check anything out. The detainees are completely sealed off from information sources in the outside world.”⁴⁹ She elaborated in an e-mail: “the camp prohibits all avenues that are usually relied on to establish trust (i.e., family, news, media, TV, communicating with other people/inmates, reading relevant information, open and free attorney-client dialogue, etc.).”⁵⁰ Stafford Smith reports a conversation with his client Shaker Aamer:

“You know, Clive, maybe you are with the CIA,” he would say with an enigmatic smile. It was never a matter of joking; he simply wanted to dull the sharper edge on his words. . . . “But then maybe you're not with the CIA. Maybe you don't even know that you're being used by them. They let you in here, they listen in to what we discuss and bingo, they learn how to manipulate me.”⁵¹

Wells Dixon's clients think he is with the FBI. “I'm a white male, 36 years

47. *Morris v. Slappy*, 461 U.S. 1, 12-14 (1983).

48. *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984) (no ineffective assistance without prejudice). On the “jurisprudence of sleep,” see sources cited in DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 321 (4th ed. 2004).

49. Telephone Interview with Lt. Col. Yvonne Bradley, Swarthmore, Pa. (Nov. 19, 2007). In her civilian life, she worked for a while in Pennsylvania's Capital Defense Resource Center, and she estimates that she has worked on thirty to forty death penalty defenses. *Id.* Her civilian law office is in Swarthmore, Pennsylvania.

50. E-mail from Lt. Col. Yvonne Bradley to author (Nov. 30, 2007) (on file with author).

51. STAFFORD SMITH, *supra* note 7, at 192. For a similar story, see MARGULIES, *supra* note 6, at 183.

old, and I dress like they think the FBI dresses.”⁵² Interrogators have masqueraded as lawyers, so the clients’ fears are not baseless.⁵³ Winning client trust is excruciatingly difficult within the narrow confines of camp rules. Dixon notes that there is one basic rule for building client trust: never promise anything you can’t deliver. “If you told them you would bring a cold Coke next visit, you can’t forget that cold Coke—because your client will remember, and he’s watching how you behave.”⁵⁴ Cold Cokes and kept promises are a slender basis for overcoming paranoia.

One crucial obstacle to establishing trust with clients is the protective order governing attorney-client contacts, which (among other restrictions) prohibits lawyers from sharing any classified information with their clients. Classified information is “anything written or oral that the government has in its possession or has ever had in its possession that it marks as classified or tells the attorney is classified; this includes most of the information relating to the facts of the client’s detainment and information necessary to defend the client.”⁵⁵ As a result, Hamdan’s lawyer Charles Swift cannot show Hamdan the transcripts of his own interrogation.⁵⁶ Not only does the protective order create enormous and obvious practical difficulties in preparing a legal case, it also precludes the lawyers from communicating information that might allow them to establish trust.⁵⁷

Interrogators actively try to disrupt client-lawyer relationships. They told one of Stafford Smith’s clients that he is gay—which happens to be untrue—to exploit the client’s disapproval of homosexuality, and told another client that Stafford Smith is Jewish.⁵⁸ Other clients and lawyers had similar experiences. Shearman & Sterling partner Thomas Wilner was told by his client Fouad Mahmoud Al Rabiah that Al Rabiah’s interrogator said to him, “Your lawyers are Jews. How could you trust Jews? Throughout history, Jews have betrayed Muslims. Don’t you think your lawyers, who are Jews, will betray you?”⁵⁹ This became a persistent theme; on other occasions, the interrogator told Al

52. Interview with Dixon, *supra* note 20.

53. MARGULIES, *supra* note 6, at 204.

54. Interview with Dixon, *supra* note 20.

55. Denbeaux & Boyd-Nafstad, *supra* note 39, at 500. For a detailed analysis of the protective order and the issues surrounding it, see Brendan M. Driscoll, Note, *The Guantánamo Protective Order*, 30 *FORDHAM INT’L L.J.* 873 (2007).

56. Lt. Cmdr. Charles Swift, *The American Way of Justice*, *ESQUIRE*, March 2007, at 197.

57. Thus, Martha Rayner reports that guards confiscated the photographs and documents she had brought to her initial client interview to reassure her client that she was bona fide. Rayner, *supra* note 37, at 489-90.

58. STAFFORD SMITH, *supra* note 7, at 11-12. Stafford Smith is of Jewish descent, but he did not learn that fact from his father until shortly before the client meeting, so there was no way that the military knew; they were just saying it. Interview with Stafford Smith, *supra* note 7.

59. Declaration of Thomas Wilner, *Al Odah v. United States*, CV 02-0828 (CKK), April 20, 2005, para. 11 (copy on file with author).

Rabiah, “Don’t ever believe that a Jew will help a Muslim unless he gets more out of it than he gives,”⁶⁰ and asked him, “What will other Arabs and Muslims think of you Kuwaitis when they know the only help you can get is from Jews?”⁶¹ The same interrogator said to Al Rabiah, “Your lawyers are Jews. They are from one of the world’s biggest law firms, which is Jewish and represents the Government of Israel.”⁶²

This last example deserves thought. Shearman & Sterling had represented the Government of Israel once, in a minor trade dispute, fifteen years earlier.⁶³ It is conceivable that the other disparaging comments originated as brainstormings of the interrogators.⁶⁴ But it is highly unlikely that Guantánamo interrogators had personally researched Shearman & Sterling’s client roster of yesteryear. This tidbit of information almost certainly came from Washington; this, in turn, suggests that the entire strategy was devised at a higher level than the interrogators.

Very little jurisprudence exists on the disparagement of opposing counsel, and all of it appears in the context of post-conviction Sixth Amendment claims in criminal cases.⁶⁵ Unfortunately, that means it is inapplicable, except by analogy, to interrogators’ disparagement of DTA lawyers. These are not criminal cases; consequently, there is no constitutional right to counsel, let

60. *Id.* at para. 12.

61. *Id.* at para. 14.

62. *Id.* at para. 13. Joseph Margulies reports the same story, but notes that the Pentagon has denied the accusations that interrogators have interfered with the attorneys. MARGULIES, *supra* note 6, at 204. Charles Swift, Salim Hamdan’s detailed defense counsel, also confronted the issue of client suspicion of Jewish lawyers. He said that he always made sure to tell Hamdan when the lawyers he brought with him were Jewish; they would then tell Hamdan about relatives who perished in German concentration camps, to let him know why they were working to get him out of the camp. Telephone Interview with Charles Swift, Atlanta, Ga. (Dec. 10, 2007).

63. Wilner Declaration, *supra* note 59, at para. 13. Wilner adds that Shearman & Sterling is a firm of “diverse membership,” not a Jewish firm. *Id.*

64. It is clear, I trust, that when I use the word “disparaging” to refer to comments about homosexuality or Judaism, I mean “disparaging in the eyes of a detainee who disapproves of both.” I am not endorsing the judgment that such comments are disparaging.

65. *See, e.g.*, United States v Amlani, 111 F.3d 705, 710 (9th Cir. 1997) (finding deprivation of constitutional right to counsel of choice when prosecutor’s disparagement of defense counsel caused defendant to switch lawyers); Boulas v. Superior Court, 233 Cal. Rptr. 487, 492-94 (Cal. App. 1986) (holding that defendant’s right to counsel of choice was violated where police officers, with the involvement of the deputy district attorney, contacted defendant without his retained counsel present, told him that his attorney was a drug user, and persuaded him to hire someone else; the appropriate remedy was dismissal of the case because the government’s conduct was “outrageous in the extreme, and shocking to the conscience”). *See generally* Martin Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values Defining the Scope of Privacy Protection*, 90 J. CRIM L. & CRIMINOLOGY 397, 456 (2000) (examining the role of privacy values underlying the Sixth Amendment and advocating recognition of “violations of Sixth Amendment privacy when the government intentionally or negligently induces deterioration of an accused’s relationship with his lawyer”).

alone counsel of one's choice, and the prisoners have not been convicted or even tried. Moreover, the disparagement-of-counsel cases generally involve other misconduct as well, usually prosecutors violating the no-contact rule with represented parties.⁶⁶ The interrogators are not lawyers, and therefore not subject to the no-contact rule—though the possibility cannot be ruled out that the disparagement strategy originates with CIA or DOD lawyers, in which case the no-contact rule would apply.⁶⁷

Illegal or not, however, the disparagement of counsel is plainly an effort to drive clients away from their lawyers. Interrogators have tried to talk detainees out of accepting habeas representation because participating in the American legal system is un-Islamic.⁶⁸ Worse, interrogators have bluntly told prisoners that if they work with lawyers they will not be released, and that “the lawyers are stopping people from being sent home.”⁶⁹

This latter comment proved particularly difficult for the lawyers to deal with, because it was half true. The government tried to send some of the detainees who had been cleared for release back to countries where they faced imprisonment, torture, or death, and their habeas lawyers litigated to prevent this. By spreading the half-truth around the camp, interrogators aimed to poison the client-lawyer relationships.

Lt. Col. Bradley adds:

I was thinking about how the camp instills fear and misinformation in the detainees by placing inappropriate posters, pictures, and articles on bulletin boards in the camps. For example during the Saddam Hussein trial and his execution, the camp placed pictures of the hangings on the boards around the camp. . . . My client told me about the pictures (his story was confirmed by another detainee who informed his attorney) and how he and others were worried about why the pictures were being displayed and what they meant. . . . However, this was not the first time nor the last time that the JTF [Joint Task Force] has posted inappropriate or questionable materials in the camps. Such unethical behavior interferes with the attorney-client relationship, especially when counsel has no ability to stop the misconduct. Moreover, attorney-client trust is also impossible to establish when the JTF spreads misinformation against the attorneys. For example, as you may already know, the JTF has blamed counsel for the suicides on Gitmo as well as have accused counsel of encouraging the detainees to go on hunger strike. . . . Again, all this misinformation and blame-shifting puts a strain (and I would say by design) on the attorney-client relationship and our ability to ever establish a trusting working relationship.⁷⁰

66. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

67. It forbids contact via non-lawyer agents as well as direct contact. *Id.* at cmt. 4; 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 99, cmt. b. (2000).

68. Interview with Stafford Smith, *supra* note 7; Interview with Gutierrez, *supra* note 30.

69. Interview with Gutierrez, *supra* note 30.

70. E-mail from Bradley, *supra* note 50. For clarity, I have slightly changed the original punctuation of this email and added explanatory brackets.

C. Making the Lawyers Look Powerless in Their Clients' Eyes

In addition to sowing mistrust of the habeas lawyers, interrogators take advantage of camp rules to make the lawyers appear as powerless as possible. The lawyers are forbidden from discussing any events in the outside world with detainees, including information about their own families—already a major obstacle to winning client trust. In addition, the lawyers cannot bring comfort items to their clients, except for food, and only if the client eats it before the end of the interview. Interrogators have no such limitations, and the giving and withholding of news and comfort items is part of their stock in trade. The contrast is strikingly noticeable to the prisoners. A client of Gutierrez, who has been wearing the same pair of flip-flops for five years, seeing that an interrogator has given his neighbor new shoes and socks, complains, “If you can’t even get me a pair of socks, how can you get me out of here?”⁷¹ Gutierrez believes that “It’s very deliberate. They want to tell clients that their lawyers are impotent.”⁷² When DTA lawyers complained to the Justice Department about such interrogator antics, they were told that “DOJ will not interfere with intelligence gathering.”⁷³

Lt. Cmdr. Charles Swift (now retired from the military) is Salim Hamdan’s defense counsel. He recalls:

When I came into *Hamdan*, I argued (with success) that I should have the same privileges as interrogators: I could wear civilian clothes, I could bring comfort items—food, newspapers. They agreed. Same with Dan Mori [David Hicks’s detailed defense counsel]. It was absolutely crucial to building a cooperative attorney-client relationship with Salim that there was a period when we could do the kind of rapport-building with clients that you automatically do with inmates in criminal defense practice. But this became a sore point later, because when the habeas counsel came along, we could continue to do these things, and they couldn’t. The habeas lawyers noted with some unhappiness that there was a double standard. The government’s response was to take it away from everybody.

It was a problem when they switched the rules over in fall 2004 and early 2005. Hamdan had been used to getting things from me, and now I have to say

71. Interview with Gutierrez, *supra* note 30. She adds, “Clients don’t understand all the things we’re doing until they get out and get on the Internet; then they’re stunned.”

72. *Id.* Interrogators’ “gifts” to detainees seems like the most likely explanation of the ludicrous episode dubbed “Speedo-gate.” Camp authorities wrote a chastising letter to Stafford Smith, accusing him of smuggling Speedo swim trunks and Underarmour underwear to his clients. In a testy reply, Stafford Smith pointed out that he was always searched before entering the cell, and would therefore have to have “stripped off” to smuggle Speedos to his client—who, he pointed out, has no place to swim except his privy. Stafford Smith pointed out that Underarmour is much favored by military personnel at Guantánamo, and that perhaps that is where the investigation ought to focus. For the text of Stafford Smith’s letter, see HARPER’S MAG., Dec. 2007, at 25-26.

73. Interview with Gutierrez, *supra* note 30. It is worth noting that after years of imprisonment, the odds that the detainees still have useful intelligence to gather are quite remote.

I can't leave them—but he's still demanding them. I asked the government to explain that it was their doing, not mine. But they wouldn't.

The government was never willing to publish standing rules for the camp. One thing you always want to do with your clients is show them the prison rules so they know why you can't do things for them. That's not possible here. At one point, they moved Omar Khadr to Camp Four—where conditions are better—as an inducement so he would accept representation in his criminal case. I was given a direct order not to tell Hamdan about Khadr. But of course Hamdan knew about it, because prisoners always know where everybody is. Hamdan wanted Camp Four also—and I'm under orders not to talk about it. You can't tell the client that you're under orders not to tell him something. They should issue a protective order to defense counsel in writing—but they refuse to put anything in writing, and refuse to have set rules, which is normal in a prison. The result is that it really undermines you in the eyes of your client. Fortunately, I had already had the chance to build my credibility with the detainees.⁷⁴

Swift adds that the effect on the habeas lawyers has been powerful.

In Guantánamo itself, they have interfered dramatically with the right to counsel, again and again. What bothers me the most is that it's done in the name of national security. Boxer shorts from a defense attorney undermines national security. Boxer shorts from an interrogator helps national security. The only good news that came out of it is that the detainees were firing their habeas lawyers; and when they figured out that that's exactly what the government wants, they stopped. But even now, I think most habeas attorneys would say to you "I hang by a thread in my attorney-client relationship." An attorney for one of the Uighurs got fired because the client said, "If I don't have an attorney, I can have a blanket, and I'd rather have a blanket because you can't do anything for me."⁷⁵

In one sense, the clients are right. So far, habeas lawyers' efforts to gain detainees' release through the legal process have failed; even victories in court have yet to get anyone off the island—a point that is not lost on the prisoners. In another sense, however, the lawyers have played a crucial role, one that their clients very likely do not realize. Much of what we know about Guantánamo—about hunger strikes, about prisoner abuse and isolation, about the deteriorating mental condition of the inmates, about the cases themselves—comes from the lawyers. Without the lawyers, the outside world would have little understanding of Guantánamo and its prisoners beyond whatever carefully managed images the government chooses to convey. The lawyers have successfully fulfilled their role as, quite literally, their clients' representatives—their voices to the outside world. If public opinion now regards Guantánamo as a scandal, that is in no small part because the lawyers continue to have access to what would otherwise be an informational as well as legal black hole.

74. Interview with Swift, *supra* note 62.

75. *Id.* Many incidents similar to those discussed here are detailed in William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES, May 5, 2007, available at <http://www.nytimes.com/2007/05/05/washington/05gitmo.html>.

III. THE MILITARY COMMISSIONS DEFENSE COUNSEL

A. *Who Are the JAGs?*

The “detailed defense counsel”—detailed, that is, by the government to represent Military Commission defendants—are lawyers in the uniformed services: judge advocates, or JAGs.⁷⁶ JAGs date back to the Continental Army. They serve as prosecutors and defense lawyers in the military’s own criminal justice system, which is based on the Uniform Code of Military Justice (UCMJ)—the body of criminal law regulating the uniformed services—and conduct courts-martial in military courts outside of and parallel to civilian courts.⁷⁷ Originally there was no requirement that a judge advocate be a lawyer, but when Congress adopted the UCMJ after World War II, it required JAGs to be trained lawyers and members of state bars.⁷⁸ From then on, JAGs have shared a dual professional identity, as military officers and lawyers. As we shall see, some of the problems faced by military counsel at Gitmo arise from this dual identity and the multiple regulatory structures that the lawyers must negotiate.

Originally, the principal job of JAGs was prosecuting and defending at courts-martial; and today, the typical career path of a newly-minted JAG begins with criminal prosecution, then moves to criminal defense, and then branches out to other areas of law. In recent years, JAGs have had a second prominent role of advising combatant commanders on law of war issues in the theater of combat. Two factors have joined to make this role increasingly prominent. The first is the growing complexity of the international law of war in the last century. Of necessity, the fundamentals of the laws of war must be simple enough that a stressed out, fatigued 20-year-old can apply them in the heat of battle—and indeed, the basics are printed on a plastic wallet card issued to U.S. troops. But the lawyer’s law of war is far more complicated, and for better or worse, military commanders rely on the JAGs to advise them about it. Second, the “CNN effect” means that if U.S. forces blow up a building and civilian

76. The acronym “JAG” stands for “Judge-Advocate General,” but only the commander of each service’s JAG Corps actually bears that title. (Occasionally, to keep the distinction straight, the commander is referred to as “TJAG,” “The Judge-Advocate General.”) Members of the corps are judge-advocates, but they are commonly called JAGs and I will call them so.

77. An excellent comparison of the court-martial system to the military commissions is David Glazier, Note, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003).

78. 10 U.S.C. § 827(b)(1) (2000); see C. Peter Dungan, *Avoiding “Catch-22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31, 37-38 (2006). Congress began to reform the military justice system with the Elston Act, Pub. L. No. 80-759, 62 Stat. 604, 627-644 (1948). The UCMJ originated as a Defense Department initiative, which Congress adopted with minor amendments.

casualties result, the world will see the images within a matter of hours, bringing with it cries of “War crimes!” For that reason, from Kosovo on, it has become important to send JAGs out into the field to help make targeting decisions in real time.⁷⁹

Criminal litigation and theater law-of-war advising are not the only roles JAGs play. They deal with an enormous variety of legal matters, from environmental law to drafting wills and powers of attorney, to government contracting. But their primary roles as criminal litigators and military advisors converge to make JAGs staunch and faithful rule of law devotees, possibly to an extent greater than many civilian lawyers. This may explain the striking, gut-level revulsion that Gitmo JAGs have so often expressed toward the opaque and often lawless military commissions.⁸⁰

The JAG Corps is a fascinating segment of the legal profession, and it cries out for a detailed ethnography. The major histories of the Corps are not that, but rather celebratory histories written by JAGs largely for JAGs.⁸¹ In obvious ways, JAGs’ identities as lawyers sets them apart from other military officers. Some, to be sure, began their careers as warriors. Thus, Maj. Michael “Dan” Mori, David Hick’s defense counsel, went to law school only after serving in the Marines for four years.⁸² More commonly, JAGs join the military after law school; and, while they receive some military training during their summers, they are not always what other military personnel recognize as warriors. While many JAGs regard themselves proudly as warriors *and* lawyers, common-sense psychology suggests that their dual identity may make them more, rather than less, zealous than civilian lawyers in their defense of rule-of-law values. After all, it is these values rather than combat skills that represent the core of their unique professional competence as military officers.

In the war on terrorism, at any rate, the JAGs have often been stubborn rule of law defenders, to the frustration of hawkish civilian lawyers in the Defense Department and White House who see the law as an impediment to tough policies. One well-known example is the outraged responses of the four head

79. Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877 (2007). For a good description of the role of the Air Force JAG in the theater of operations, see Col. (now Major General) Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 16-29 (2001), available at <http://www.ksg.harvard.edu/cchrrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

80. Perhaps the best overall description of the military commissions and their shortcomings is David W. Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, LEWIS & CLARK L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1019361>.

81. See, e.g., THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1995 (2005); FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).

82. Telephone Interviews with Major Michael “Dan” Mori (Nov. 17, 2007 and Jan. 9, 2008).

JAGs when they belatedly learned about the Working Group report on interrogation techniques prepared by civilian lawyers in the Pentagon, incorporating verbatim large chunks of the notorious Office of Legal Counsel torture memorandum.⁸³ It was by design that the JAGs had been left out of the loop on the torture memo; the lawyers in the president's "war council" did not want pushback on their procedures.⁸⁴ In response, the Marine TJAG notes that "OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion."⁸⁵ Torture, the Air Force TJAG reminds the civilians, "simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral 'high-road' in the conduct of our military operations regardless of how others may operate."⁸⁶ News reports throughout the war on terrorism have suggested that military lawyers have frequently been among those most resistant to pushing the envelope in detainee treatment.

In fact, proponents of the "unitary executive" theory have aimed for years to subordinate the independence of JAGs to politically-appointed civilian lawyers in the Department of Defense.⁸⁷ Professors John Yoo and Glenn Sulmasy (Sulmasy is a JAG and law professor at the Coast Guard Academy)

83. These are reprinted in *THE TORTURE DEBATE IN AMERICA* 377-91 (Karen J. Greenberg ed., 2006).

84. On the "war council," see JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* 22-23 (2007). On the desire to avoid pushback, see Jane Mayer, *Annals of the Pentagon: The Memo*, *NEW YORKER*, Feb. 27, 2006, at 32, 32-41, available at http://www.newyorker.com/fact/content/articles/060227fa_fact.

85. Memorandum from Brigadier General Kevin M. Sandkuhler, in *THE TORTURE DEBATE IN AMERICA*, *supra* note 83, at 383.

86. *Id.* at 378.

87. See CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 279-89 (2007). The two latest rounds of this struggle concern the failed effort by the Bush Administration to enact a regulation requiring JAGs to "coordinate" with civilian lawyers, and resistance by some administration figures to new legislation promoting the four TJAGs from two-stars to three-stars, which would give them greater stature and therefore greater independent clout. President Bush's signing statement to this legislation questioned its constitutionality, and then-DOD General Counsel William J. Haynes II requested an opinion on it from the Office of Legal Counsel in the Justice Department. OLC concluded that the legislation did not automatically confer a third star on the TJAGs, and that they could continue to serve out their terms as two-stars. See Promotion of the Judge-Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008, Memorandum from Steven G. Bradbury to Acting General Counsel, Dep't of Defense (Apr. 14, 2008), available at <http://www.usdoj.gov/olc/2008/dod-op-re-tjags-041408.pdf>. On the "coordination" regulation, see Charlie Savage, *Control Sought on Military Lawyers*, *BOSTON GLOBE*, Dec. 15, 2007, available at http://www.boston.com/news/nation/washington/articles/2007/12/15/control_sought_on_military_lawyers/. On the TJAG promotion, see Scott Horton, *Jim Haynes's Long Twilight Struggle*, *HARPER'S MAG. ONLINE*, Feb. 8, 2008, <http://www.harpers.org/archive/2008/02/hbc-90002336>. A link to Mr. Haynes's request to OLC is available at <http://www.harpers.org/media/image/blogs/misc/dod-gcmemotomil-1deptsecr3-stargfortjags012008.pdf>.

have argued that JAG intransigence on the Bush Administration's legal novelties, including the military commissions, represents a challenge to civilian control of the military.⁸⁸ Elsewhere, Yoo wrote that the commissions "became another flash point in the struggle pitting the military establishment against Rumsfeld and his civilian advisers in his effort to transform the military in order to address twenty-first-century challenges."⁸⁹ However, JAG independence is required by both civilian and military rules of professional conduct.⁹⁰ In any event, civilian control of the military is entirely consistent with the obligation of military advisors to render independent and candid advice.⁹¹ Indeed, Sulmasy and Yoo acknowledge that independent advice from the JAG Corps can be regarded "as an example of military experts preventing civilians from making serious strategic or tactical mistakes."⁹² Far from challenging civilian control, preventing civilian leaders from making serious military mistakes is a traditional part of the American conception of civilian control as, in the words of one historian, "civil control and military direction."⁹³

In decades past, the military justice system came in for significant criticism—in the words of an old saying, military justice was to justice as military music is to music.⁹⁴ In the 1950s and 1960s, the Supreme Court decided a string of cases prohibiting the trial of U.S. civilians in military courts, on the basis that these trials lacked fundamental constitutional protections.⁹⁵

88. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 (2007).

89. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 208 (2006).

90. ABA Model Rule 2.1 requires lawyers to offer candid and independent advice to clients; this rule appears in all three sets of rules of conduct for the JAG Corps. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983). (Marine Corps JAGs are governed by the Navy's rules.) For discussion of the independent-advice requirement, see LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 13, at 153-58, 197-204 (2007).

91. Thus, the Joint Chiefs of Staff are statutorily required to advise the president on military matters. 10 U.S.C.A. § 151(b) (2008). If a member of the JCS disagrees with the Chairman's advice, he or she may submit the dissenting opinion and the Chairman is required to transmit it to the President. See 10 U.S.C.A. § 151(d)(1)—a portion of the statute that plainly presupposes that the Chiefs' advice is supposed to be independent.

92. Sulmasy & Yoo, *supra* note 88, at 1821.

93. DAVID HACKETT FISHER, *WASHINGTON'S CROSSING* 143-44 (2004). For further discussion, see David Luban, *On the Commander-in-Chief Power*, 81 S. CAL. L. REV. (forthcoming 2008), available at <http://ssrn.com/AbstractID=1026302>.

94. For an influential critique of the older military justice system, see LUTHER C. WEST, *THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM* (1977).

95. *O'Callahan v. Parker*, 395 U.S. 258 (1969) (forbidding military trial of soldier for a non-service-connected crime), *overruled by Solorio v. United States*, 483 U.S. 435 (1987); *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960) (forbidding military trial of civilian employee for a noncapital crime); *Grisham v. Hagan*, 361 U.S. 278 (1960) (forbidding military trial of civilian employee for a capital crime); *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234 (1960) (forbidding military trial of military spouse committing a noncapital crime);

Since that time, military lawyers and Congress labored energetically to bring court-martial procedure in line with constitutional criminal procedure; one major step was the 1983 decision to provide Supreme Court review of decisions of the Court of Appeals for the Armed Forces. Today, military lawyers believe strongly that court-martial procedures are at least as fair as civilian criminal justice. Lt. Col. Bradley, speaking of the JAG Corps, says simply, “They practice litigation the way it should be.”⁹⁶ This belief helps explain why the Guantánamo defense lawyers object so fiercely to the military commissions. One of the Guantánamo JAGs, asked what he would propose in place of the military commissions, instantly snapped, “Court-martial. We know it works, and it’s fair.”⁹⁷

As defense counsel, the JAGs view themselves as traditional zealous advocates of their client. This is, in fact, a requirement of the ethics regulations governing JAGs, all versions of which require “unfettered loyalty” to the individual client.⁹⁸ But JAGs are also military officers—honor bound to defend that government even at risk of their own lives, subject to military discipline and hierarchy, and subject as well to the UCMJ. Most JAGs will say that ordinarily they experience no role conflict, because their duty as military lawyers is to do their duty as defense lawyers; they serve their government by opposing “the government.”

But the latent tensions between these roles are always simmering beneath

Reid v. Covert, 354 U.S. 1 (1957) (forbidding court-martial of military spouses in capital crime).

96. Interview with Bradley, *supra* note 49.

97. Interview with Anonymous Military Defender B, at Georgetown University Law Center (Apr. 2005).

98. The phrase and virtually the identical rule appear in the rules of conduct of the Army, Navy, and Air Force, in a clause of Rule 5.4 that does not appear in civilian codes. “Notwithstanding a judge advocate’s status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.” U.S. DEP’T OF NAVY, JAG INSTRUCTION 5803.1C, PROF’L CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, R. 5.4(a) (2004) [hereinafter NAVY RULES]. With slight changes in phrasing, the same rule appears as Rule 5.4(e) of the Army’s Rules of Professional Conduct for Lawyers and Rule 5.4 of the Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct. *See* U.S. DEP’T OF ARMY, ARMY REGULATION 27-26, RULES OF PROF’L CONDUCT FOR LAWYERS R. 5.4(e) (1992) [hereinafter ARMY RULES]; U.S. DEP’T OF AIR FORCE, TJS-2, AIR FORCE RULES OF PROF’L CONDUCT R. 5.4 (2005) [hereinafter AIR FORCE RULES]. Although the Navy’s rule is, by its terms, restricted to representation of members or employees of the Department of the Navy, the same rule applies in the Military Commissions where the clients are captured aliens. *See* Rules for Military Commissions R. 109, available at [http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20\(FINAL\).pdf](http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20(FINAL).pdf). One lawyer described Rule 5.4 as his “hole card,” to be used if he ever found it necessary to violate military commission procedures. Interview with Anonymous Military Defender B (Dec. 3, 2007).

the surface. Consider the most famous statement of the criminal defender's obligation, Lord Henry Brougham's speech in the Trial of Queen Caroline in 1820:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁹⁹

Years later, Brougham explained that he intended this speech as a veiled threat that if the King continued to press his charge of adultery against Brougham's client, the Queen, then Brougham might be compelled to reveal the king's secret marriage to a Catholic, which would cost him the crown.¹⁰⁰ So Brougham was not merely indulging in hyperbole when he spoke of throwing his country into confusion. The questions this ideal raises for JAGs should be obvious, however: How can a military officer separate the duty of a patriot from that of an advocate? How can a military officer follow a duty that risks throwing his country into confusion?

To the Guantánamo defenders with whom I've spoken, worries such as these are purely academic. One, whose public criticisms of the military commission system led the prosecutor to warn that he risked court-martial, replied: "I didn't have any conflict. Saying someone deserves a fair trial is what being an American and a military officer is all about."¹⁰¹ Much the same reaction appeared in the better known case of Swift, the naval JAG appointed to represent Salim Hamdan.

In January [2004], he and his colleagues filed an incendiary friend-of-the-court brief with the Supreme Court in which, among other things, they compared their commander in chief, President Bush, to the villain of the American Revolution, King George III. In April, Swift went even further, suing Defense Secretary Donald Rumsfeld and Bush in federal court in Seattle on the grounds that their plan for a military tribunal for his client—who has still not been charged or given a trial date—violates the Constitution, federal law, the Geneva Conventions and the Uniform Code of Military Justice.

...

The Defense Department tried shrugging it off, telling reporters that it had always expected the JAG's to defend their clients vigorously. But according to sources in Defense who are involved in the military tribunal process, officials inside the White House and the Pentagon were stunned. Whatever the Bush

99. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., London, J. Robins & Co. Albion Press 1821).

100. DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188 (1973).

101. Interviews with Mori, *supra* note 82.

administration may have had in mind for prisoners in the war on terrorism, this was definitely not part of the program.¹⁰²

Swift explains:

Defense counsel think about the world differently. They never understood that, and they never understood what zealous representation meant. They thought that our defenses would be entirely factual. They couldn't conceive that U.S. lawyers would attack rules issued by the president. They were stunned by the amicus brief, but to us it made perfect sense because that is what a zealous defense is. To me what was stunning is that they always cite *Quirin*, which got to the Supreme Court only because a military defense counsel was doing everything he could to challenge the process.¹⁰³

Eventually, Swift (and his civilian co-counsel, my colleague Neal Katyal) would press Hamdan's case before the U.S. Supreme Court and have the military commissions declared unlawful.

I don't mean to suggest that these lawyers' attitudes are representative of JAGs in general; that is more than I know. Although Swift once described himself as "pretty anti-authoritarian for a military guy,"¹⁰⁴ military guys are generally not anti-authoritarian. Representative or not, however, it is striking that the Guantánamo defenders are, with no exceptions I have discovered, deeply contemptuous of the military commissions. At his initial hearing, one of the detainees testified that his military counsel told him, "'I don't believe in the whole process. It's illegitimate, and it's again, I call it' and he says 'It's a black eye.' And he kept saying these things."¹⁰⁵ Lt. Col. Bradley says with vehemence, "I never thought it would be political, but it's all political, not legal. The military is better than this, and our government is better than this."¹⁰⁶ Nor are these views confined to JAGs on the defense side: Col. Morris Davis, the former chief prosecutor of the military commissions, has now leveled the same accusation. Explaining why he resigned, Davis wrote:

I was the chief prosecutor for the military commissions at Guantánamo Bay, Cuba, until Oct. 4, the day I concluded that full, fair and open trials were not possible under the current system. I resigned on that day because I felt that the system had become deeply politicized and that I could no longer do my job

102. See Jonathan Mahler, *Commander Swift Objects*, N.Y. TIMES MAG., June 13, 2004, at 42, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0DEFDC1E31F930A25755C0A9629C8B63&sec=&spon=&pagewanted=5>.

103. Interview with Swift, *supra* note 62. The reference is to *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the validity of military commissions established by President Roosevelt to try captured German saboteurs. The case reached the Supreme Court through a challenge filed by the defendants' military lawyer, Col. Kenneth C. Royall.

104. Mahler, *supra* note 102.

105. For testimony of Ghassan Abdullah al Sharbi, see Transcript of Record at 18, U.S. v. al Sharbi, Session of April 27, 2006, available at [http://www.defenselink.mil/news/Apr2006/Vol%203%20-%20al%20Sharbi%20-%20\(R.%201-58\)%20\(27%20Apr%2006%20session\)%20\(R\).pdf](http://www.defenselink.mil/news/Apr2006/Vol%203%20-%20al%20Sharbi%20-%20(R.%201-58)%20(27%20Apr%2006%20session)%20(R).pdf).

106. Interview with Bradley, *supra* note 49.

effectively or responsibly.¹⁰⁷

Davis charges that his new superior officer, Air Force Brig. Gen. Thomas Hartmann, put pressure on him to bring “sexy” cases before the military commissions in time for the 2008 election, rather than more solid cases.¹⁰⁸ Curiously, politicization was exactly one of the criticisms of the commissions that defense counsel Maj. Dan Mori leveled in Australian speeches that led Col. Davis to threaten him with court-martial.¹⁰⁹ At least three other JAG prosecutors have resigned after concluding that the commissions would not be fair, while a fourth made headlines when he refused to bring charges based on evidence tainted by torture.¹¹⁰

B. *Conflicts of Interest*

1. *Structural problems in the Office of Military Counsel-Defense*

From the very beginning, the military defense counsel found themselves in an awkward role. Philip Sundel and Charles Swift were the first two detailed defense counsel (Sundel had originally requested to be a prosecutor), with Mark Bridges, Dan Mori, and Sharon Shaefer joining them soon after. Initially, Sundel and Swift had no clients, and DOD General Counsel William J. Haynes II regarded them as pool attorneys in his office. They were told to help improve the military commission process—in Swift’s case, by helping get material into the Federal Register, and in Sundel’s to work on criteria for selecting review panel members. They objected to no avail. Swift recalls:

We raised it early and often, but we were told that we weren’t defense counsel until we had clients. I could do my assignment, because it wasn’t actually legal services, but how could Phil do his? He would be building a better mousetrap for his future clients. We were in an impossible conflict here, except when we were performing scrivener-type actions.

We talked about it continuously—what was our role? This office [of

107. Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, available at <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-rihtrail>.

108. See Jess Bravin, *Dispute Stymies Guantánamo Terror Trials*, WALL ST. J., Sept. 26, 2007, available at http://online.wsj.com/public/article_print/SB119076761746939436.html; Josh White, *Pressure Alleged in Detainees’ Hearings; Ex-Prosecutor Says Pentagon Pushing ‘Sexy’ Cases in ‘08*, WASH. POST, Oct. 21, 2007, at A15. In late April 2008, Col. Davis testified for the defense in Hamdan’s motion to dismiss, or in the alternative, to remove Gen. Hartmann from the case on the basis of unlawful command influence. Military Commission Judge Keith J. Allred granted the motion to remove Gen. Hartmann. *United States v. Hamdan*, Ruling on Motion to Dismiss (Unlawful Influence), May 9, 2008, available at <http://www.nimj.org/documents/Hamdan%20Hartmann%20Ruling.pdf>.

109. See *infra* Part B.3.

110. STAFFORD SMITH, *supra* note 7, at 92 (three prosecutorial resignations); Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1 (noting the refusal of Lt. Col. V. Stewart Crouch to prosecute).

defense counsel] cannot exist to help make the procedure better at its inception. Obviously, if you say you'll do it, you can't build in a poison pill—you have to do a good job for the government. But that damages the position of our future clients. We were well aware of why we were here. We cannot serve two masters.¹¹¹

Another defender recalls that “the whole initial set of instructions was one ethical quagmire after another. I practiced military law for fourteen years without ever needing an ethics opinion. Here, I needed several of them before I ever got a client.”¹¹²

Another problem, according to one defender, was a pattern of insufficiently staffing the defense office—a consequence, he believes, of the fact that the Appointing Authority controls the staffing.¹¹³ At one point, only the defense office head, Col. Dwight Sullivan, and one other lawyer remained. The defender notes that “they didn't give people with LL.M.s in international law to us, only to the prosecution.” He adds, “There was no initiative to make it easy for the defense lawyers.”¹¹⁴

2. Lt. Col. Bradley's conflict

In March 2006, however, the Office of Military Counsel-Defense (OMC-D) was fully staffed, and that turned out to generate its own difficulties. There were thirteen lawyers and ten clients, and several of the clients had deeply conflicting interests—they were accused of being co-conspirators, and some of them had implicated others, at least one under torture by a “friendly” foreign government. This group of clients, therefore, all had an interest in discrediting statements made by others implicating them; and all had an interest in preserving the credibility of their own statements in the hope of cutting a deal. Their lawyers shared office space—at that time located in Virginia, and currently in Washington, D.C.—a budget, an administrative staff, and above all a chief defense counsel, Col. Sullivan, who was in privilege with all the lawyers and was supposed to advise them. Lt. Col. (at that time Major) Yvonne Bradley complained that it was next to impossible to discuss even the common legal issues in the office without revealing or receiving confidential information about clients with adverse interests. She also objected that her funding requests

111. Interview with Swift, *supra* note 62.

112. Telephone Interview with Military Defender B (Dec. 3, 2007).

113. When the military commissions were initially set up, the Appointing Authority was a designee of the Secretary of Defense charged with appointing the commissions and their personnel, including both prosecution and defense attorneys. See U.S. DEP'T. OF DEFENSE MILITARY COMMISSION ORDER NO. 1, at 1-2 (March 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. The post-MCA military commissions retain this structure, but rename the post “convening authority.” See Rules for Military Commissions R. 103(a)(8), 503, & 504, available at [http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20\(FINAL\).pdf](http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20(FINAL).pdf).

114. Interview with Military Defender A, *supra* note 19.

had to be approved by an adversary attorney. She obtained an opinion from an expert on the Pennsylvania Rules of Professional Conduct—Pennsylvania is her licensing state—finding a disqualifying conflict of interest. In addition, she obtained opinions to the same effect from a number of legal ethics experts and civilian public defenders.¹¹⁵

In a civilian context, the conflict would be so obvious that no-one would even consider allowing a public defender's office with this deeply compromised structure to represent clients with such antagonistic interests.¹¹⁶ In most jurisdictions, public defenders do not engage in multiple representation of co-defendants: all but one of the defendants will be represented by a state-compensated private attorney. That the conflict was not obvious in OMC-D has a simple explanation: JAG defender offices on military bases are usually structured this way—and the JAG rules of conduct accommodate the arrangement by eliminating the doctrine of imputed representation, according to which the client of one lawyer in a firm counts as a client of every lawyer in the firm for conflicts purposes.¹¹⁷ If a group of airmen on a base are jointly charged with drug offenses, it is not uncommon for all of them to be represented by JAGs from the defenders' office on their own base—provided, that is, that no “actual conflict exists that directly prejudices the interests of a client.”¹¹⁸ In the latter case, JAGs from a different base must be brought in to represent the multiple defendants. But doing so is expensive and inconvenient, so it does not routinely happen.

JAGs must be members of a state bar, and are required both by bar membership and military rules to abide by that state's rules of professional

115. Full disclosure: I am one of nine legal ethicists who, on a pro bono basis, submitted expert affidavits to the military commission arguing that the structure of the office is improper. The military judge denied a motion to call the ethics affiants as witnesses, on the ground that the conflicts issue is a legal rather than factual issue.

116. See, e.g., 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 289, 295 §123 cmt. *d(iv)* & Reporter's Note (2000), (imputation rule for public defender's office is the same as for private law firm). This is the rule in Lt. Col. Bradley's licensing state of Pennsylvania. See *Com. v. Westbrook*, 400 A.2d 160, 161-62 (Pa. 1979) (holding that public defender's office is “one office” for purposes of conflict of interest rules). Not all states follow this rule and impute conflicts of interest between clients of different lawyers in the same public defender's office; some require case by case analysis of the level of conflict. See, e.g., *People v. Brown*, 665 N.E.2d 1290, 1309-10 (Ill. 1996) (finding no imputed conflict—a case by case examination was necessary); *State v. Bell*, 447 A.2d 525, 527-29 (N.J. 1982) (holding that there is no per se rule of conflict of interest where deputy public defenders represent multiple defendants; however, a potential conflict of interest with significant likelihood of prejudice must be treated as actual conflict without necessity of proving prejudice). However, no state permits multiple representation by lawyers from the same office if the defendants' conflicting interests adversely affect the defenders' performance, and such a representation would most likely be unconstitutional under *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

117. See AIR FORCE RULES, *supra* note 98, R. 1.10; ARMY RULES, *supra* note 98, R. 1.10; NAVY RULES, *supra* note 98, R. 1.10.

118. AIR FORCE RULES, *supra* note 98, R. 1.10 cmt.

conduct. In addition, the Army, Navy, and Air Force have their own rules of conduct, modeled on the ABA's Model Rules of Professional Conduct, but with some differences, which JAGs must also obey. JAGs are explicitly directed to obey both. In case of inconsistency, the military rules stipulate that they control.¹¹⁹

This creates an awkward, if not entirely unfamiliar, legal situation if the state bar disagrees. Normally this is not an issue; as one military lawyer wryly explained, "State bars don't pay attention to what we do; they barely think we're practicing law."¹²⁰ The conflict would matter, though, if the state bar considers the policy embodied in its own rule important enough to enforce. It is no answer to say that under the Supremacy Clause federal rules preempt inconsistent state rules, because it is radically unclear whether, absent clear congressional intent to preempt, federal rules in an area traditionally regulated by the states do indeed preempt state rules.¹²¹ I describe this legal situation as "not unfamiliar" because it has arisen at least twice in recent memory in other prominent contexts—the first, a years-long dispute between the DOJ and state bars over whether federal prosecutors are subject to state no-contact rules, and the second, an assertion by the state bars of California and Washington that the Sarbanes-Oxley Act cannot preempt state rules of lawyer-client confidentiality.¹²² The former was resolved by the McDade Amendment, which requires federal government lawyers to abide by state ethics codes,¹²³ and the latter remains unsettled.

By its terms the McDade Amendment does not apply to JAGs.¹²⁴ The

119. AIR FORCE RULES, *supra* note 98, para. a; ARMY RULES, *supra* note 98, R. 8.5(f); NAVY RULES, *supra* note 98, R. 8.6 para. 8(a).

120. Interview with Military Defender B, *supra* note 98.

121. See Dungan, *supra* note 78, at 48-49 and sources cited therein, particularly the canonical *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that courts should "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). The preemption issue is far from clear-cut, however, because sometimes the Court has not applied the *Rice* presumption. See, e.g., *Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001). For a critique of the presumption, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092-96 (2000). Here, it might be argued on behalf of preemption that the federal interest in regulating JAGs is powerful, and indeed, federal law occupies the entire field of regulation of military officers; there is also a powerful judicial doctrine of deference to the military on military matters. Several factors point to the no-preemption result, however: first, that the military rules of professional conduct regulate JAGs entirely in their capacity as lawyers, not military officers; second, that the JAG rules require lawyers to abide by state rules except in cases of inconsistency, which demonstrates that there is no overall federal intent to displace state regulation of JAGs by federal regulation; and third, that ethics rules for JAGs are not actually implementations of any statute, so congressional intent to preempt state regulation is not simply unclear, it is non-existent.

122. See Dungan, *supra* note 78, at 50 n.127.

123. 28 U.S.C. § 530B (2000).

124. *Id.* § 530B(c); 28 C.F.R. § 77.2(a) (2008).

result is a situation of intense normative ambiguity, of a sort brilliantly analyzed by Susan Koniak fifteen years ago.¹²⁵ Lawyers have their own “nomos,” Koniak’s term for their gut-level understanding of the profession’s core commitments, embodied in norms of zealous advocacy, fiercely guarded confidentiality, and independence from conflicts of interest. Faced with conflicting directives from federal regulatory bodies, and weak commitment by courts or Congress to settle the issue authoritatively, that nomos—the core norms of state bar codes—provides the magnetic north for the lawyer’s ethical compass.

Lt. Col. Bradley’s letter of assignment to the military commissions graphically illustrates the problem. It included the following paragraph:

4. In the event that you become aware of a conflict of interest arising in the representation of Mr. Muhammad [sic] before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, you will be subject to professional supervision by the Department of Defense General Counsel.¹²⁶

The tension here approaches the maximum: not only was Lt. Col. Bradley bound to two sets of ethics rules, one containing an imputed-conflict rule and one not, she was also subject to the supervision of the civilian DOD General Counsel, an office run by political appointees that had been trying for years to undermine JAG independence, and is deeply invested in making the commissions run smoothly.

The straightforward way to honor both state and service rules is to follow the more restrictive, which in this case would be the civilian rule on imputed conflicts of interest.¹²⁷ That would eliminate the inconsistency, in which case the preemption issue does not even arise. Here, moreover, Maj. Bradley urgently argued that an actual conflict existed, encompassing all the lawyers in the office and in particular Col. Sullivan; and an actual conflict violates even

125. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993).

126. Memorandum from Col. Dwight Sullivan to Maj. Yvonne Bradley ¶ 4 (Nov. 30, 2005) (on file with author) (detailing defense counsel).

127. There is an alternative, but it doesn’t work. The Pennsylvania Rules of Professional Conduct, like many other sets of states’ rules, contains a choice-of-law provision that specifies that in practice before a tribunal, “the rules of the jurisdiction in which the tribunal sits shall be applied, unless the rules of the tribunal provide otherwise.” Pennsylvania Rules of Professional Conduct R. 8.5(b)(1), 204 PA. CODE § 81.4 (2008). That suggests an easy resolution: even the state rules require deference to the commission rules. However, in 2006 the military commissions had no ethics rules beyond what was set out in counsels’ assignment letters—and, as we have seen, that letter required that she follow both state and service rules. Although the service rules state that they prevail, the assignment letter on its face required her to follow both, and it would be hard to read that injunction as a requirement to follow only the service rules, given that following the more restrictive state rules would eliminate the inconsistency between them.

the military rules. As remedy, she sought a restructuring of the office.¹²⁸

Matters came to a head in the initial hearing for Maj. Bradley's client Binyam Mohamed. The presiding officer, Marine Col. Ralph Kohlmann, rejected her claim of conflict of interest without ruling on it, and told Bradley to proceed with *voir dire*.¹²⁹ He acknowledged, however, that "as far as what you have perceived as an ethical problem with you, I cannot advise you and it is not my function to advise you how to deal with your licensing authority."¹³⁰ He then ordered her to proceed: "That is a direct order from me to you, which you will disobey at your own peril frankly."¹³¹ Later in the hearing, he reiterated what he was doing: "I am directing her, ordering her, to perform her duties. She violates that order at her own peril and that is black book, longstanding military law. And, I would be really concerned about her doing that because her responsibility to follow my orders is crystal clear."¹³² Bradley comments:

It caught me out in left field. In my entire career as a JAG and civilian attorney I have never faced such a dilemma. I have been in hostile situations during death penalty hearings and even had a judge shut me down during questioning of witnesses and tell me the 6th Amendment did not apply in his courtroom, but this situation was beyond what I could ever imagine.

As I recall, after I realized that the judge was threatening me with disobeying an order (i.e., a violation of Article 90; if not Article 133 conduct unbecoming, which is the general catch all article the military normally uses against an officer just as a safety net to get a conviction in case they can't prove the more specific UCMJ violation) I realized the implication this would have not only to me and my career (incidentally at the time this occurred I was about to face a promotion board to be promoted to Lt. Col. so I could ill afford to be facing any charges at this time (I doubt very much the judge knew about my upcoming promotion board but I surely did and had grave concerns about the future of my career)) but also toward Binyam, my state bar and ethical duties.

I was really pushed into a corner with no way out.¹³³

Bradley took the Fifth Amendment.¹³⁴ She describes this as "more or less a heat of a moment action to the judge's unexpected action to threaten me with disobeying an order of a superior officer,"¹³⁵ although the transcript makes clear that she invoked the self-incrimination privilege in part on impromptu

128. Interview with Bradley, *supra* note 49.

129. Transcript of Record at 142-48, *U.S. v. Binyam Muhammad* [sic], (Apr. 6, 2006) (No. 05009) (copy on file with author) [hereinafter *Muhammad Transcript*]. For a riveting narrative description of this hearing, see STAFFORD SMITH, *supra* note 7, at 98-127.

130. *Muhammad Transcript*, *supra* note 129, at 148.

131. *Id.* at 158, 167.

132. *Id.* at 184.

133. E-mail from Lt. Col. Yvonne Bradley to author (Nov. 28, 2007) (on file with author).

134. *Muhammad Transcript*, *supra* note 129, at 174.

135. E-mail from Bradley, *supra* note 133.

advice of her co-counsel Stafford Smith.¹³⁶

The unusual Fifth Amendment theory was not that she would reveal self-incriminating information, but that the very act of speaking would be a crime. This is not entirely correct: if she followed Kohlmann's order, she would risk professional discipline by the state of Pennsylvania, but professional discipline is not criminal punishment, and it is not generally protected by the privilege against self-incrimination (something that she and Stafford Smith are unlikely to have known without researching the issue in advance).¹³⁷ It appears, however, that her dominant fear was not professional discipline, but criminal prosecution for violating Col. Kohlmann's order—and that suggests that Bradley did not intend to follow the order. She was being true to her professional *nomos* as a lawyer.

The episode ended strangely. Bradley was sure that she would be written up for violating orders, but at the end of the session someone handed the judge a note. Bradley and Stafford Smith believe that Pentagon observers were present in the courtroom and that Kohlmann was told not to press the issue. Apparently, headlines reading "Military Commission Defense Lawyer Court-Martialed for Following Ethics Rules" were not part of the script.¹³⁸ In any event, upon return from a recess, Kohlmann unexpectedly reversed himself, acknowledged that the conflict of interest posed a legitimate issue, and set a future date for a full hearing on it. But a few days before the scheduled hearing, three Guantánamo prisoners committed suicide and there was no hearing. By the time of the next hearing date, the Supreme Court's *Hamdan* decision shut down the military commissions, so that no ruling was ever made on the conflict of interest.

Today the OMC-D structure remains exactly as it was. The ethics ambiguity has likewise not been resolved by the post-*Hamdan* military commissions rules. As in Lt. Col. Bradley's assignment letter, the newly-minted Rule 109 of the military commissions requires counsel to abide by state bar rules of conduct *and* service-specific rules of conduct—and, in addition, "any rules of professional responsibility prescribed by the Secretary of Defense."¹³⁹ In cases of conflict, "the latter shall be considered paramount, unless such consideration is expressly forbidden by the rules of a counsel's

136. Muhammad Transcript, *supra* note 129, at 171, 172.

137. See, e.g., Geoffrey C. Hazard, Jr. & Cameron Beard, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 *YALE L.J.* 1060, 1070-72 (1987).

138. STAFFORD SMITH, *supra* note 7, at 127; Interview with Bradley, *supra* note 49. The word "script" is literal: "I was astounded when I received an e-mail from Colonel Kohlmann attaching the 'script' of the upcoming hearing. It was even called a script and it really was a script: nine pages long, single-spaced, with virtually every word that either side was meant to say in the tribunal." STAFFORD SMITH, *supra* note 7, at 96.

139. Rules for Military Commissions R. 109(b)(1), available at [http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20\(FINAL\).pdf](http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20(FINAL).pdf).

licensing jurisdiction.”¹⁴⁰

The legality of this rule is deeply questionable. Nowhere does the Military Commissions Act authorize professional responsibility rules inconsistent with state and service professional responsibility rules; indeed, it does not in express terms authorize anyone to promulgate novel professional responsibility rules at all. Section 949a(b) authorizes the Secretary of Defense, in consultation with the Attorney General, to promulgate rules of procedure and evidence, but they may not be “contrary to or inconsistent with this chapter.”¹⁴¹ But other portions of the MCA clearly presuppose that counsel on both prosecution and defense sides will follow ordinary ethical standards: counsel are required to be bar members or graduates of an accredited law school, and certified for court-martial practice,¹⁴² no coercion may be used to influence the “exercise of professional judgment by trial counsel or defense counsel,”¹⁴³ and it is forbidden to use threats directed toward an officer’s promotion to curb “the zeal with which such officer, in acting as counsel, represented any accused before a military commission. . . .”¹⁴⁴ The job qualifications, and the use of standard ethics terminology like “exercise of professional judgment” and “zeal,” indicate that the MCA presumes lawyers trained in, and honoring, traditional professional values. Furthermore, Congress—in a fit of self-congratulatory wishful thinking—declares that the military commissions provide “all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples,’”¹⁴⁵ which one assumes includes lawyers whose professional ethics rules are not nullified by the Secretary of Defense. For these reasons, it is doubtful that military commissions Rule 109 successfully preempts state or service rules of professional responsibility.¹⁴⁶

140. *Id.*, R. 109(b)(3)(A).

141. 10 U.S.C.A. § 949a(a)-(b) (2008).

142. 10 U.S.C.A. § 948k(c)(1)-(2) (2008).

143. *Id.* § 949b(a)(2)(C).

144. *Id.* § 949b(b)(2).

145. *Id.* § 948b(f). The internal quotation is the language of common Article 3 of the Geneva Conventions, and in this clause of the Military Commissions Act, Congress is declaring that the commissions comply with Article 3. That, of course, is not up to Congress to determine. The Geneva Conventions are a treaty, and as such are “supreme law of the land.” Under the Constitution, legal questions such as whether the military commissions comply with common Article 3 are solely for the courts to determine. That is why I describe section 948b(f) as wishful thinking. The point is a subtle one, because Congress *does* have the power to supplant common Article 3 with a later-in-time statute inconsistent with it. Doing so would be politically damaging, because it would make the United States the only country in the world to have opted out of the Geneva Conventions; but as a matter of domestic law, Congress could unquestionably do so. However, section 948b(f) demonstrates that Congress did not mean the MCA to supplant common Article 3; and in that case, while Congress can hope that the military commissions comply with common Article 3, Congress cannot settle the question by fiat, any more than Congress could settle the question of whether a statute is constitutional by declaring it to be constitutional.

146. Perhaps the closest analogue to the preemption issue is *Gonzales v. Oregon*, 546 U.S. 243 (2006), which rejected the government’s efforts to undermine Oregon’s assisted

And speaking of wishful thinking: In one of its clauses, Rule 109 declares that for purposes of construing state choice of law rules in professional responsibility codes, the military commissions “shall be deemed a ‘court,’ ‘forum,’ or ‘tribunal’”¹⁴⁷—which, under most states’ rules, would imply that the commission’s professional responsibility rules, not the state’s, govern.¹⁴⁸ This provision is patently illegal, because the federal government has no authority to direct state supreme courts on how to construe terms in their own rules. More importantly, this particular direction is especially problematic. To recognize a body as a court or tribunal pays it a compliment: that we acknowledge it as a legitimate adjudicator, not a kangaroo court or political sham. That was precisely the compliment that the Supreme Court withheld from the military commissions in *Hamdan v. Rumsfeld*, and it is not at all obvious that Military Commissions 2.0 should fare any better—particularly in light of the recent resignation of the chief prosecutor on the ground that the commissions have been fatally politicized.¹⁴⁹

3. *The Hicks defense*

The final example I wish to discuss in some detail arose in the defense of Australian detainee David Hicks. Hicks’s is the first and, to date, only case resolved by the military commissions. He was released from Guantánamo on a plea bargain—the result, apparently, of a political deal between Australian prime minister John Howard, who was hurting politically because of Hicks’s prolonged detention, and Vice President Cheney.¹⁵⁰

Hicks had three lawyers: detailed defense counsel Major Dan Mori, a Marine JAG; Rebecca Snyder, a Naval reserve officer appointed to the OMC-D; and civilian lawyer Joshua Dratel, a well-known New York criminal defender. According to Dratel, the lawyers “knew from nearly the beginning

suicide statute by removing physicians’ power to write prescriptions for the necessary drugs. In *Gonzales*, the Court rejected the government’s argument that the Controlled Substance Act (CSA) preempts state regulation of physicians. It found that the CSA evinced no intent “to regulate the practice of medicine generally,” a silence that the Court found “understandable” given that federalism gives the states wide regulatory latitude. *Id.* at 270. The same can be said of the MCA, which evinces no intent to regulate the practice of law, other than by stipulating the minimum credentials for counsel before the military commissions. In addition, the Court observes that “[t]he structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States’ police powers,” *id.*, and we have just seen structural evidence from the MCA that it similarly relies on a legal profession regulated in the ordinary fashion.

147. Rules for Military Commissions R. 109(3)(B).

148. See MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(1) (1983), a prototype followed by many states.

149. See *supra* notes 107-08 and accompanying text. On the other infirmities of the commissions, see Glazier, *supra* note 80.

150. Josh White, *Australian’s Plea Deal Was Negotiated Without Prosecutors*, WASH. POST, Apr. 1, 2007, at A7.

that Hicks would not be released until it became an Australian electoral issue.”¹⁵¹

They drew this conclusion in part because of the remarkably unbuttoned statements by American political leaders. As early as March 2002, President Bush explained the importance of the military commissions by saying, “Remember . . . the ones in Guantánamo Bay are killers. They don’t share the same values we share. They would like nothing more than to come after America, or our friends and allies. . . . I think they’re killers.”¹⁵² Given that the President is the last-resort appellate reviewer of military commissions, this is a remarkable confession of prejudice. A few weeks before, the Vice President said of the detainees, “These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort.”¹⁵³ The same day, Secretary of Defense Donald Rumsfeld called them “among the most dangerous, best trained, vicious killers on the face of the earth.”¹⁵⁴

The prosecution also commented about the case, and Dratel believes that “by April 2004 the whole notion of an embargo on information was a joke.”¹⁵⁵ Finally, as the Australian public became increasingly outraged at David Hicks’s prolonged detention, the Australian government adopted the strategy of blaming “human rights lawyers” for preventing a resolution of the case. “In the fall of 2006 and into ‘07 the press coverage in Australia was brutal.”¹⁵⁶

In response, Mori, who was in Australia investigating the case, delivered a number of blistering public comments against the military commissions, charging that they are rigged for conviction. (All told, Mori made eight trips to Australia, plus one each to Kosovo and Afghanistan in the course of investigating the Hicks case.) As a result, Colonel Davis suggested that Mori might be court-martialed for violating a military law prohibition on speaking disrespectfully of high U.S. government officials.¹⁵⁷

151. Interview with Dratel, *supra* note 21.

152. Press Release, White House, Remarks by the President to the Travel Pool (Mar. 20, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/03/20020320-17.html>.

153. Press Release, White House, The Vice President Appears on Fox News Sunday (Jan. 27, 2002), *available at* <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20020127-1.html>. He made similarly inflammatory remarks in 2005. Press Release, White House, Radio Interview of the Vice President by Steve Gill (June 17, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/06/20050617-9.html>.

154. Gerry G. Gilmore, *Rumsfeld Visits, Thanks Troops at Camp X-Ray in Cuba*, ARMED FORCES PRESS SERVICE, Jan. 27, 2002, *available at* <http://www.defenselink.mil/news/newsarticle.aspx?id=43817>.

155. Interview with Dratel, *supra* note 21.

156. *Id.*

157. UCMJ Article 88 reads:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth,

The basic ethics rule on trial publicity is simple: neither side should say anything about a pending case or investigation that will “be disseminated by means of public communication” and “will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.”¹⁵⁸ The key exception is a defensive statement—one that “a reasonable . . . attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney’s client.”¹⁵⁹ Under this standard, Mori’s statements would undoubtedly be permitted; and, under the leading Supreme Court decision on civilian lawyer speech, *Gentile v. Nevada*, the First Amendment would protect them.¹⁶⁰ Furthermore, once the lawyers had concluded that pressuring the Australian government to push for Hicks’s early release was the only strategy likely to get him out of Guantánamo, Mori’s speeches became an integral part of zealous advocacy. In this respect, the civilian counterpart would be a lawyer representing a U.S. national arrested in a foreign country who lobbies the State Department to intervene diplomatically in order to have the client sent home. This would be normal “best practice” for a civilian lawyer.

In addition, Dratel explains that the lawyers felt it necessary “to put David [Hicks] in a positive light in Australia. We knew it was likely that he would serve some time there, and we worried about how the Australians would view him when he returned in custody. We needed to help his re-entry to Australia.”¹⁶¹ This, too, is best practice—it is the kind of sophisticated consideration of a client’s long-term reputational interests that the best white-collar defenders offer their clients.

However, military members enjoy lesser free speech rights than civilians, and the legal issues involved in determining whether Mori could indeed have been court-martialed for his statements are intricate. No case has ever tested whether the First Amendment protects the speech of a military lawyer

or possession in which he is on duty or present shall be punished as a court-martial may direct.

10 U.S.C.A. § 888 (2008). The important documents in this incident—including news stories and e-mail messages from Col. Davis—may be found as attachments to the defense’s motion to disqualify Col. Davis, Defense Motion for Appropriate Relief: Prosecutorial Misconduct United States v. Hicks, No. 002 (Office of Military Commissions 2007), available at http://media.miamiherald.com/smedia/2007/03/25/21/Hicks_Motion_Prosecutorial_Misconduct.source.prod_affiliate.56.pdf.

158. NAVY RULES, *supra* note 98, R. 3.6(a), which is essentially similar to MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (1983). I use the Navy version because it applies to Major Mori.

159. NAVY RULES, *supra* note 98, R. 3.6(d). Here also the rule is a substantial counterpart to civilian rules.

160. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), found that the First Amendment protects a lawyer from being disciplined for stating that his client was an “innocent . . . ‘scapegoat’” who was the victim of “crooked cops.” *Id.* at 1034.

161. Interview with Dratel, *supra* note 21.

representing a client, nor for that matter whether the rarely used Article 88 restricts it.¹⁶² Mori, who was in Australia when news of Davis's threat surfaced, was thoroughly surprised by it. He understood himself to be criticizing the commissions, not launching personal attacks on civilian leaders.¹⁶³

I'm a pretty conservative guy. I wasn't trying to be disrespectful to the President or the Secretary. We knew the President didn't write the rules for the commissions. The President was let down. He said he wanted full and fair trials. And even though the rules went out over Rumsfeld's signature, we knew he didn't write them either. They were written by someone in the [DOD] general counsel's office.¹⁶⁴

From a tactical point of view, Mori's strategy proved to be the right one for his client. The plea agreement the lawyers negotiated with General Thomas Hemingway required Hicks to serve only nine months' imprisonment in Australia, where Davis's best offer had been fifteen years.¹⁶⁵

More important for our purposes are the ethical implications of Col. Davis's threat. Whether Davis realized it or not, if his suggestion to prosecute Mori for excess lip on his client's behalf had been taken seriously it would have required Mori to disqualify himself for a conflict of interest—and so would every military lawyer defending a client before a military commission. Lawyers are forbidden from taking cases in which their own personal interests—in this case, the interest in avoiding prosecution—prevent them from taking actions on behalf of their clients that other lawyers could lawfully take. It is a disqualifying conflict of interest if “the representation of that client may be materially limited by . . . the covered attorney's own interests.”¹⁶⁶ The quoted

162. On the free speech issue, see generally *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (rejecting a First Amendment challenge to military dress code and finding that courts “must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest”), John A. Carr, *Free Speech in the Military Community: Striking a Balance between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303 (1998), and Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957). On the constitutionality of Article 88, see *United States v. Howe*, 37 C.M.R. 429, 442 (C.M.A. 1967) (rejecting First Amendment challenge to Article 88). On the other hand, restriction of military members' free speech rights must be justified by a military purpose and narrowly tailored to that purpose. *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003). An interesting parallel might be speech restrictions on military chaplains, given that they, like lawyers, occupy a dual professional status. In *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997), the court refused to apply an anti-lobbying regulation to a military chaplain, commenting that “the compelling interests advanced by the military are outweighed by the military chaplains' right to autonomy in determining the religious content of their sermons especially because the defendants have failed to show how the speech restrictions as applied to chaplains advances these interests.” *Id.* at 162. The parallel to lawyers representing clients is straightforward.

163. Interview with Mori, *supra* note 82.

164. *Id.*

165. Interview with Dratel, *supra* note 21.

166. NAVY RULES, *supra* note 98, R. 1.7(b).

language comes from the Navy's rule, but essentially similar rules govern lawyers in every civilian jurisdiction. Of course, lawyerly zeal on behalf of clients is limited by law—lawyers can't bribe jurors or bump off witnesses. But here the point is that only military lawyers face criminal prosecution for criticizing high government officials. Given the politicized character of the military commissions, and the inflammatory anti-defendant rhetoric of the highest officials in the government, any representation by lawyers constrained by law from denouncing the commissions would be "materially limited" compared with what a civilian lawyer could do on a client's behalf. The issue at stake in this case represents in telling form the clash between the role obligations of a military officer and those of a defense lawyer.

Dratel, who describes Mori as a tough man to intimidate, had no worries about the threat's effect on him, but does worry about its possible effect on other military counsel.¹⁶⁷ Confirming this worry, Yvonne Bradley says that because of Col. Davis's threat "other attorneys have reported that they have been chilled talking to the press."¹⁶⁸ In addition, Dratel worried that the threat against Mori would interfere with the strategy of making David Hicks the story.¹⁶⁹ Mori reports carefully studying the *Gentile* opinion and analyzing whether his public comments about the case fell within ethical limitations.¹⁷⁰

For all these reasons, Hicks's defense team decided that they had no alternative to counterattack. They moved to have Davis disqualified for violating a provision of the Military Commissions Act that states: "No person may attempt to coerce or, by any unauthorized means, influence . . . the exercise of professional judgment by . . . defense counsel."¹⁷¹ But because of the plea bargain, the military judge never ruled on this motion.

Instead, bizarrely, he disqualified Hicks's other two lawyers from the hearing. Col. Kohlmann ruled that Rebecca Snyder was not qualified as military counsel because she was not on active duty status, despite being appointed to OMC-D—a decision that Dratel believes was entirely *ultra vires*.¹⁷² Then Kohlmann bounced Dratel because he refused to sign a statement the judge had drafted attesting that Dratel would abide by all the rules of the military commissions—including rules that did not yet exist. "I cannot sign a document that provides a blank check on my ethical obligations

167. Interview with Dratel, *supra* note 21.

168. Interview with Bradley, *supra* note 49.

169. Interview with Dratel, *supra* note 21.

170. Interview with Mori, *supra* note 82.

171. 10 U.S.C.A. § 949b(a)(C) (2008).

172. Interview with Dratel, *supra* note 21; see Transcript of Hearing of March 26, 2007 at 13-23, *United States v. Hicks*, No. 0002 (Office of Military Commissions 2007), available at [http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20\(Redacted\).pdf](http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf). Snyder is a Lieutenant Commander in the naval reserve, and had been detailed as Assistant Detailed Defense Counsel by the OMC-D.

as a lawyer,” Dratel explained.¹⁷³

That is clearly correct. What if the as-yet-to-be-issued rules improperly impeded Dratel’s ability to defend Hicks? To take an entirely realistic example, what if a future rule drastically weakens confidentiality for national security reasons? If Dratel violated such a rule, he would be open to prosecution for the felony of making a false statement to the government when he signed the statement saying he would abide by the rules.¹⁷⁴

This is by no means a farfetched possibility. A false statements charge was one of several in the indictment against radical lawyer Lynne Stewart, when she violated prison rules after signing a statement saying she would abide by them.¹⁷⁵ Stewart was representing the “blind sheik” who was convicted of planning terrorist attacks in New York City. Stewart signed a statement saying that she would abide by special rules designed to prevent the sheik from communicating with his followers in the outside world; she subsequently violated those rules. After Stewart’s prosecution, no defense lawyer in his or her right mind would sign the statement Dratel was asked to sign.¹⁷⁶ As he explains,

I was concerned that there would be some point in the case where this thing would rear its ugly head—and I would face the point of no return, where I would have to quit the case. It was better to do it early. The fact is, from the beginning of the case there was always the specter that we would have to walk away from the case.¹⁷⁷

Why did Col. Kohlmann remove Snyder and Dratel? Dratel believes that he “wanted to establish himself as boss, because he was mad about the first round” when Bradley, Stafford Smith, and their client Binyam Mohamed completely derailed the hearing. “He was strident—a my-way-or-the-highway guy. They had a railroad to run, and the fewer lawyers the better.”¹⁷⁸

“The fewer lawyers the better” could be taken as a motto for the entire panoply of efforts to take out the lawyers at Guantánamo.

173. *Id.* at 26. For the full context, see *id.* at 24-29. The reference at page 27 to Dratel’s schedule was based on the judge’s setting of a hearing schedule that conflicted with other cases that Dratel was involved in. Appellate Exhibit No. 5 at 4-9, *United States v. Hicks*, No. 0002 (Office of Military Commissions 2007), available at [http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20\(Redacted\).pdf](http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf); Interview with Dratel, *supra* note 21.

174. 18 U.S.C.A. § 1001 (2008).

175. Indictment, *United States v. Sattar*, No. 02 Cr. 395 (JGK) (S.D.N.Y. Nov. 19, 2003), available at <http://www.lynnestewart.org/IndictmentSuperceding.pdf>.

176. This problem was pointed out several years ago in an ethics opinion by the National Association of Criminal Defense Lawyers (NACDL), concluding that defenders cannot ethically participate in the military commissions. NACDL Ethics Advisory Committee, Ethics Op. 03-04, at 15 (2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/Ethics_Op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf).

177. Interview with Dratel, *supra* note 21.

178. *Id.*

IV. WHY?

In this concluding section, I wish to examine two hypotheses to explain why the United States government, which in so many ways identifies itself as a bulwark of the rule of law, has worked so hard to take out the adversary lawyers at Guantánamo. I shall call them the “lawfare hypothesis” and the “torture cover-up” hypothesis.

A. The Lawfare Hypothesis

Clausewitz famously described war as “the continuation of politics by other means.”¹⁷⁹ Recently, Professor Yoo, one of the chief legal architects of the Bush Administration’s legal policies on detainees, published a memoir entitled *War by Other Means*.¹⁸⁰ By this ingenious twist on Clausewitz, Yoo meant to indicate that the controversial tactics whose legality he defended should not be seen as problematic incursions on civil liberty but as exercises of traditional war powers in a new kind of war. Although he doesn’t say so directly, he may also have meant to signify that he regards his own efforts to legitimize tactics such as indefinite detention and harsh interrogation as a way of waging war through law.

This would be in keeping with the concept of “lawfare,” by which is meant the use of international law and litigation as a method of gaining military advantage.¹⁸¹ Some commentators regard lawfare as an insidious tool of America’s enemies, including internationalist NGOs with an agenda to promote. Lawfare, on this view, is an effort by the Lilliputians to bind Gulliver in a network of rules. Perhaps the most striking statement of this lawfare theory appears in the 2005 National Defense Strategy of the United States, produced by the Pentagon and signed by the Secretary of Defense: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”¹⁸² This easy equation of judicial processes with terrorism is startling, but it makes sense to those who regard lawyers invoking international law, human rights, or

179. CARL VON CLAUSEWITZ, ON WAR 119 (Anatol Rapoport ed. 1968) (1832). This phrase is not an exact quotation, but it captures the gist of what Clausewitz meant and is the most common version of Clausewitz’s dictum. The edition cited translates Clausewitz’s word *Politik* as “policy,” but it can with equal accuracy be translated “politics.”

180. YOO, *supra* note 89. I reviewed Yoo’s book in David Luban, *The Defense of Torture*, N.Y. REV. BOOKS, Mar. 15, 2007, at 37-40.

181. The phrase seems to have become popular through a paper by Air Force Col. (now Major General) Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (2001), *supra* note 79—although Dunlap himself attributes the word to a 1975 paper by John Carlson and Neville Yeomans, *id.* at 38 n.5.

182. 2005 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES 5, available at http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm. The quoted sentence appeared in the 2002 National Defense Strategy as well.

civil liberties as witting or unwitting agents of America's enemies. Jack Goldsmith's recent memoir of his service in the Bush administration confirms that the administration accepts the lawfare theory.¹⁸³

If lawyers opposing the U.S. government are really waging lawfare against the United States, that makes them the equivalent of enemy combatants, witting or not. And the way of the warrior is to defeat enemies by eliminating their soldiers. On this view, "taking out the adversary" becomes a perfectly understandable tactic.¹⁸⁴

Understandable doesn't mean justifiable, however. *Audi alteram partem*: The courtroom practice of law means—or should mean—the practice of legal argument. Silencing the adversary's lawyer is a means of winning cases by avoiding legal argument rather than engaging in it. That makes it "law by other means"—but the means debase the very idea of law and turn it into little more than a set of dirty tricks.

The lawfare idea is, fundamentally, a paranoid overreaction to perfectly legitimate legal challenges to Guantánamo detentions. Recently, Air Force Maj. Gen. Charles Dunlap, who introduced the concept of lawfare, took pains to distance his ideas from the paranoid thinking that Goldsmith describes. He writes that "concern from the public, NGOs, academics, legislatures, and the courts about the behavior of militaries is more than simply a public relations problem; it is a legitimate and serious activity. . . . To be clear, I condemn any interpretation of lawfare which would cast as terrorists those legitimately using the courts to challenge any governmental action."¹⁸⁵ But then, Dunlap is a JAG, and the civilian devotees of the lawfare theory may simply shake their heads and write his speech off as one more example of why the JAGs must be brought to heel.

B. *The Torture Cover-up Hypothesis*

The lawfare theory provides an explanation for government efforts to take out the adversary, and I have no doubt it is a large part of the story. But there is a more disturbing possibility as well.

It is important to recognize the basic purpose of the Guantánamo detentions. In his memoir, Professor Yoo notes that "[m]ilitary detention is also one of our most important sources of intelligence, which in turn is our most important tool in this war."¹⁸⁶ He goes on to ask whether enemy combatants should have lawyers, and answers that this would be inconsistent with the

183. GOLDSMITH, *supra* note 84, at 53-64.

184. The theory is developed in Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S MAG., July 2007, at 74-81.

185. Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFAIRS 146, 148-49 (2008).

186. YOO, *supra* note 89, at 151.

imperatives of interrogation. Lawyers would shut down interrogation by instructing their clients to say nothing. In some cases, for example that of Jose Padilla, the government went further, and argued that having access to a lawyer would interfere with interrogators' efforts to break Padilla's will by fostering utter dependence on interrogators and isolating him.¹⁸⁷ Guantánamo is not merely a prison designed to remove supposed enemy combatants from the battlefield, it is also, and preeminently, a place of interrogation. As has now been well documented, Guantánamo has been a site of "enhanced" interrogation tactics that virtually everyone but the Bush administration regards as torture or cruel and degrading treatment.¹⁸⁸ One lawyer who has represented many Guantánamo prisoners commented, "I don't think I've ever met a detainee who hadn't been beaten up."¹⁸⁹

As many have noted, that creates an awkward problem in trying them, because under ordinary rules coerced evidence is inadmissible. The Military Commissions Act flatly forbids the admission of evidence obtained under torture. However, it finesses this difficulty in three ways. First, coerced evidence can be admitted if it is reliable and probative, provided there is dispute about the level of coercion.¹⁹⁰ This peculiar rule means, in plain language, that if the defendant claims the evidence was obtained through torture, but the government disputes that the techniques were torture, the evidence can be admitted. As we now know, the government has Office of Legal Counsel opinions dating from 2005 that state that none of the enhanced interrogation techniques are torture, so from their standpoint all the evidence falls into the category of statements "in which the degree of coercion is disputed."¹⁹¹ Second, the Military Commissions Act permits prosecutors to prevent the revelation of sources and methods by which evidence was obtained¹⁹²—and so prosecutors have the ability to shut down defense inquiries into exactly what was done to witnesses to get them to talk. Third, the rules permit hearsay, which allows interrogators—or others to whom the interrogators report—to testify about what a witness said without describing the

187. See Declaration of Vice Admiral Lowell E. Jacoby at 5, 8-9, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. Jan. 9, 2003), available at http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

188. To cite only the most uncontroversial document—the Army's own report—Guantánamo interrogations have included a wide variety of sexual humiliations, together with tactics including leading detainees around on leashes and forcing them to do dog tricks, threatening them with military working dogs, prolonged isolation, bombarding them with ear-splitting pop and rap music, and prolonged sleep deprivation. ARMY REGULATION 15-6: FINAL REPORT, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTÁNAMO BAY, CUBA DETENTION FACILITY (Apr. 1, 2005) [hereinafter SCHMIDT REPORT], available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

189. Interview with Dixon, *supra* note 6.

190. 10 U.S.C.A. § 948r(c)-(d) (2008).

191. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 3, 2007, at A1.

192. 10 U.S.C.A. § 949d(f)(2)(B) (2008).

conditions under which the witness said it or the threats that elicited it.

There would, nevertheless, be obvious embarrassment in conducting hearings clouded by suspicion that the defendant was convicted using tortured evidence. More important, the government runs the risk that military judges will find the evidence unreliable and hence inadmissible, in which case the prosecutions could actually collapse. And in fact, the commissions' convening authority Susan J. Crawford abruptly dropped charges against Mohamed al-Qahtani, one of the supposed "twentieth hijackers," in May of 2008. Qahtani had been subjected to an extensive and highly publicized regimen of abusive interrogation.¹⁹³ For that matter, prosecutors might rebel at the professionally shameful prospect of building their cases around evidence obtained through torture. In that case, the best strategy might be to seek plea bargains in all but the most airtight or highest profile cases.

Remarkably, two of the first lawyers in the OMC-D, Swift and Mori, received appointment letters stipulating that they were assigned only for the purpose of negotiating a plea agreement.¹⁹⁴ Although this practice stopped almost immediately, it hardly follows that the government's desire for plea agreements abated. Notably, when chief prosecutor Morris Davis quit, he complained not only about politicization, but also that his superior officer "expressed an intent to personally conduct pretrial negotiations with defendants' attorneys," and wanted to use classified evidence in what would then be closed hearings.¹⁹⁵ In short, the issue at Guantánamo may not be lawfare alone; it may also be covering up torture. Creating difficulties for defense lawyers helps to make plea bargains the only viable option for detainees.

In an abundance of caution, however, FBI agents (the so-called "clean team") are reportedly re-interviewing abused prisoners in order to try to get them to utter the same statements in a non-abusive setting, so doubts about admissibility will no longer be an issue.¹⁹⁶ According to Charles Swift, this is almost certainly being done under the direction of prosecutors, because only the prosecutors know what questions need to be asked.¹⁹⁷

If so, the practice is a clear-cut violation of the no-contact rule. How could prosecutors so flagrantly violate ethics rules? During hearings in Hamdan's case in early December 2007, a fascinating possible explanation surfaced.

193. Josh White & Julie Tate, *Charges Against 9/11 Suspect Dropped; His Statements Were the Result of Abusive Interrogation, Officials Say*, WASH. POST, May 14, 2008, at A04. Qahtani is now known to be the subject of the first Special Interrogation Plan described in the SCHMIDT REPORT, *supra* note 187, at 13-21.

194. Interview with Swift, *supra* note 62.

195. White, *supra* note 108.

196. Interview with Gutierrez, *supra* note 30. This has now been confirmed by the government. See Josh White, Dan Eggen & Joby Warrick, *U.S. to Try 6 on Capital Charges over 9/11 Attacks*, WASH. POST, Feb. 12, 2008, at A1.

197. Interview with Swift, *supra* note 62.

Months before, a prisoner named Said Boujaadia had been cleared for release to Morocco—but the government kept him in detention for five additional months, in order to work out an immunity agreement for his testimony in the Hamdan case. As it happens, Boujaadia had a habeas lawyer, who was never told about the immunity negotiations, but was instead told that the delays in Boujaadia’s release were because of prolonged negotiations with the Moroccan government. As a result, Boujaadia received no assistance from his counsel in the immunity negotiations—one of the most delicate situations, where in ordinary criminal practice counsel’s advice can be crucial. When Swift inquired about this impropriety, the government offered a stunning response: that in their view, the habeas counsel did not really represent Boujaadia, because the Appointing Authority had not designated him.¹⁹⁸ As Swift put it incredulously, “When is an attorney not an attorney?”¹⁹⁹ He elaborated: “In the Bizarro World of access to counsel and interference of counsel at Guantánamo, the legal standing of counsel, and who counsel are, remains in a never-never land of no defined rules.”²⁰⁰ Crucially, in this never-never land, the unilateral decision of prosecutors to define habeas counsel out of existence eliminates the problem of the no-contact rule, because the prisoner is not a represented party.²⁰¹ And the ability of the government to restrict the habeas lawyers’

198. *Id.*

199. E-mail from Lt. Cmdr. (ret.) Charles Swift to author (Dec. 10, 2007) (on file with author).

200. Interview with Swift, *supra* note 62.

201. The prosecution’s legal theory may be that the habeas representations and the military commissions prosecutions are different matters, and the no-contact rule stipulates only that a lawyer cannot speak “about the subject of the representation” with a client who is represented “in the matter.” This is the phrasing of ABA Model Rule 4.2, as well as the uniformed services’ rules of professional conduct. This reasoning is clearly wrong, however, because the matters overlap both legally and factually. The habeas lawyers are representing prisoners seeking to challenge their detention as unlawful enemy combatants; and a detainee’s status as an unlawful enemy combatant is a central issue in military commissions proceedings as well, because it is a jurisdictional requirement of the commissions under 10 U.S.C. § 948d(a) (2000). Alternatively, the prosecution may believe that reinterviews of detainees are authorized by law unless the detainee has actually been indicted and had counsel detailed. In the civilian context, a 1980 Office of Legal Counsel opinion argued that the no-contact rule should not apply to prosecutors until the moment charges are filed, because prosecutorial investigation of crime using informants and undercover agents is authorized by law, and, indeed, is prosecutors’ job. 4 Op. O.L.C. (Vol. B) 576 (1980). One Circuit Court has agreed that the no-contact rule does not kick in until indictment: *U.S. v. Balter*, 91 F.3d 427, 436 (3rd Cir. 1996). And at least two disagree—*U.S. v. Talao*, 222 F.3d 1133, 1139 (9th Cir. 2000); *U.S. v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988)—as does the American Bar Association, in ABA Formal Opinion 95-396 (1995). *Hammad* points out that the timing of an indictment is in the hands of the prosecutor, who could delay indictment to evade the no-contact rule. *Id.* But even courts taking the pro-prosecution side on the issue have never held that contact with a represented person is proper after the person has been taken into custody; the kind of contact they have approved is pre-arrest undercover investigation. The point of the no-contact rule—to prevent “overreaching and deception,” in the words of 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 99, cmt. *b* at 71—is central to the Guantánamo reinterviews. While (verbal) overreaching and deception

access to prisoners enables the re-interrogation of prisoners who underwent abuse or torture to proceed undisturbed.

CONCLUSION

Whether the persistent harassment of Guantánamo lawyers is best explained by the lawfare theory or the torture cover-up theory—or, possibly, by the more innocent theory that the episodes I have described are just that, unrelated discrete episodes—is unanswerable by those not privy to the government’s strategy. Sadly, the first two possibilities are not mutually exclusive. I choose to focus on the more speculative torture cover-up theory for one reason only: it fits in with the administration’s legal grand strategy of subordinating the model of criminal justice to the model of war. Concretely, that means that the imperatives of interrogation trump those of criminal justice. Though I disagree with it profoundly, I recognize that many consider this to be a reasonable policy choice.²⁰² The arguments that the war on terrorism is a genuine war of a novel kind are by no means frivolous. But this outlook is bound to distort efforts to deal with detainees in a law-based manner, and there is little question that the distortions have been severe. Zealous and capable defense lawyers are, to those who share this outlook, at best a nuisance and at worst a threat. As Wells Dixon puts it, “What we do is completely antithetical to what they are trying to accomplish in Guantánamo. They have three principles: isolation, dependency, and secrecy, and lawyers represent just the opposite principles: transparency and openness. So they always try to drive a wedge between lawyers and their clients.”²⁰³

Yet the lawyers keep coming back. Dixon reflects: “For all the lawyers, military and civilian, it’s become a matter of principle. But also, when you get to know your client, it becomes much more than principle. You develop a really personal bond with your client.”²⁰⁴ That is surely very important. Their tenacity visibly marks the soul of the profession.²⁰⁵

may be essential tools of intelligence-gathering, these reinterviews are solely for the purpose of criminal trials, not national security, and ordinary legal ethics rules for dealing with represented prisoners should apply.

202. I discuss the differences between the war model and criminal justice models of the war on terrorism in Luban, *The War on Terror and the End of Human Rights*, 22 PHIL. & PUB. POL’Y Q., 9, 9-14 (Summer 2002).

203. Interview with Dixon, *supra* note 20.

204. *Id.*

205. This Article is going to press in early June 2008, before the Supreme Court issues its decision in *Boumediene v. Bush*, 127 S. Ct. 3078 (2007), on the habeas rights of Guantánamo prisoners. To our frustration, the author and editors are well aware that by the time this Article is in the hands of readers the decision will have issued. Without knowing exactly the contours of the forthcoming decision, it is pointless to speculate in any detail about its effects. But a few broad-brush comments may be helpful to post-*Boumediene* readers who wish to understand the implications of the decision for the questions raised in this Article. The case will have few implications for military commissions defense lawyers.

The implications for the habeas lawyers and their clients vary widely depending on the contours of the Court's decision. If it concludes that the prisoners have no constitutional right to habeas corpus, the habeas lawyers will, quite simply, be out of business unless the next Congress rolls back provisions of the Military Commissions Act of 2006, 10 U.S.C.A. §§ 948-950 (2008), that abolished statutory habeas for Guantánamo inmates. That outcome in *Boumediene* would remove the prisoners' last recourse within the U.S. legal system. In addition, for reasons explained in this Article, it would cut off the most effective source of information about the prisoners and their conditions of confinement; it would turn Guantánamo back to what it was before *Rasul v. Bush*, 542 U.S. 466 (2004): a legal and informational black hole whose inmates will have, for all practical purposes, joined the melancholy ranks of the disappeared. The same could be true if the Court finds habeas rights, but only those spelled out in the Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd (2008): a limited right of judicial review over whether the government has followed its own procedures, based on a paper record. In that case, the government would very likely argue that there is no longer any reason for the habeas lawyers to meet with their clients, although that assertion would undoubtedly itself be subject to challenge. Finally, if the Court finds a right to substantive habeas review—that is, review of the merits of the prisoners' classification and detention as enemy combatants—lawyer visits to the island would continue, and a protracted litigation process would commence. Both the inmates and their lawyers are well aware that even a process in which the inmates win every legal battle could still result in them spending ten or fifteen years of their lives in custody (for many it has already been almost seven years) as the cases move up the appellate ladder on issue after issue, and back to the bottom on repeated remands. The model would be the opening pages of *Bleak House*. Of course, habeas review need not be so bad if the government chooses not to follow a scorched-earth strategy of litigation delay.

Alternatively, the next administration may well close down Guantánamo: both presidential candidates have promised to do so. Whether closing Guantánamo is better would depend on where the prisoners are moved. *Rasul* found habeas rights in Guantánamo only because the United States has effective sovereignty over the naval base; if the prisoners were moved to a more remote location elsewhere, habeas jurisdiction might have to be relitigated. And access difficulties to a prison in a country much farther from the United States than Cuba would be catastrophic for legal representation. If, on the other hand, the prisoners were confined within U.S. territory, the access issues could become simpler and a saner litigation process would result. As of early June, Senator John McCain has proposed moving the prisoners to Fort Leavenworth in Kansas, while Senator Barack Obama has not yet stated what he would do with them.