

Closing Argument at Guantanamo II: The Torture of Mohammad Jawad, Continued

Introduction: The best thing that I ever wrote was an oral argument in support of a motion to dismiss charges against a Guantanamo detainee, Mohammed Jawad, whom I represented before the military commissions at Guantanamo Bay, Cuba in 2008 and 2009. Mohammed was an Afghani teenager, detained in Kabul on December 17, 2002, when he was approximately 15 years old. He was detained at Guantanamo from February 2003 to August 2009. He was the fourth person to be charged under the Military Commissions Act of 2006. I was appointed as his military defense counsel in late April 2008, made my first court appearance at his arraignment on May 7, 2008, and filed the motion to dismiss later that month. The basis of the motion to dismiss was “outrageous government conduct,” specifically a sleep deprivation program, known colloquially as the “frequent flyer” program to which Mohammed had been subjected by the U.S. government in May 2004, and which I asserted constituted torture. I delivered the argument at the end of a marathon fourteen-hour pretrial motion hearing on June 19, 2008. A human rights observer from the ACLU was in attendance at the hearing and he asked me for a copy of the argument. He posted it to the internet and it received wide circulation. The argument received some notoriety, and was very flatteringly praised in the *New York Review of Books* as an “example of legal and moral courage.” I was encouraged to prepare an annotated version of it, which was published in the *Harvard Human Rights Journal*.¹ Although it was not a true closing argument of the type that lawyers give at the end of a trial, I called the article, “Closing Argument at Guantanamo: The Torture of Mohammed Jawad.” (I figured that sounded better than “Oral Argument in Support of Motion to Dismiss at Guantanamo.”) At the time I gave the argument, I actually had some hope that it would be the closing argument in the case because it would persuade the judge to dismiss the charges. But, alas, it did not. In fact, “Closing Argument at Guantanamo” was not even the final word on this particular motion to dismiss. After the June hearing, with the help of my opposing counsel, prosecutor Lieutenant Colonel Darrel Vandeveld, I discovered additional evidence that the U.S. government had abused Mohammed. I submitted multiple supplements to my original motion to dismiss, detailing the new evidence, and requested another opportunity to present witness testimony on the matter. The judge scheduled another pretrial hearing for August 13 and 14, 2008. On August 13, I presented additional evidence related to the frequent flyer program, including testimony from one of the officers who ran the program, and other instances of maltreatment of Mohammed both at Guantanamo and at Bagram Air Base where Mohammed was held initially after being captured in late 2002.

¹ David J. R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammed Jawad*, 22 *Harvard Human Rts J.* 1 (2009). Available at <http://www.law.harvard.edu/news/2009/02/frakt-closing-argument.pdf>

That night after the hearing I had trouble sleeping. I couldn't stop thinking about the case. At around 3 in the morning, I gave up trying to sleep and got up and wrote out another argument the old-fashioned way on a legal pad. I wasn't sure if the judge would give me another opportunity for oral argument on the motion, but I wanted to be ready if he did. We continued to present evidence on the motion on August 14th. When we concluded, I asked the judge if I could make an additional argument on the motion and he assented. I then delivered, with some extemporaneous additions to take into account the evidence presented that day, the argument that I had prepared early that morning. Although perhaps not quite as eloquent as the first argument I had given on the motion, I still consider it some of my best work.

Today, in an effort at greater transparency, all military commission hearings are immediately transcribed and released on the official military commissions website.² But the practice in 2008 was to wait until the conclusion of a case before releasing the trial transcripts. Because the charges against Mohammed were ultimately dismissed, no official transcript of the pretrial hearings was ever publicly released, and the argument I gave on August 14th has not previously been published. So, other than the small group of spectators who were present in the courtroom that day, and a handful of people with access to the unofficial transcript, no one has ever read this second argument. When I was invited to present at the PEN World Voices Festival of International Literature on the topic "Going on the Record, Resistance and Writing" focusing on Guantanamo and human rights abuses, and asked to contribute a piece of writing, I realized this would be the perfect opportunity to share the argument with a wider audience. As I did with the first "Closing Argument", I have annotated the argument to provide additional context.

The Argument:

*U.S. Military Commission, Guantanamo Bay, Cuba
U.S. v. Mohammed Jawad, Pretrial Motion Hearing
August 14, 2008*

This is the second time I have made an oral argument on this motion, so I will focus on what we have learned since the last time we were here in this courtroom on June 19th. What have we learned since June 19th?

We've learned about the horrendous abuse that Mohammad Jawad was subjected to at Bagram prison, the abuse that he was so eager to tell the court about on June 19th.³ At Bagram prison, Mohammad Jawad, was repeatedly beaten, pushed down the stairs, hooded, chained to the wall, held in stress positions, and deprived of sleep.⁴ Bagram in

² www.mc.mil

³ Mohammed testified on June 19, 2008 in support of the motion to dismiss. Although he tried to discuss the mistreatment he had experienced at Bagram Prison, the military judge instructed me to focus his testimony on abuses that occurred at Guantanamo, which was the subject of the original written motion I had submitted.

⁴ This information came from a statement made by Mohammed to Army CID Agents who interviewed him as part of an investigation into detainee abuse (including homicide) at Bagram prison at or near the time that Jawad was detained there. One of the interviewing agents testified that Jawad's testimony was entirely

late 2002 and early 2003 was not a detention camp, it was a torture chamber, a cesspool of human cruelty where angry and sadistic young men avenged their downed American comrades by savagely beating prisoners, sometimes even to death.⁵ It is almost impossible to imagine . . . American soldiers, beating a prisoner to death, while others, like Mohammad Jawad, trapped in their cells, could hear the screams -- the begging for mercy of others -- and were powerless to do anything about it.

Perhaps he was relieved to be sent to Guantanamo after his 49 days stint at Bagram,⁶ perhaps he thought he was being taken to a better place. What was going through young Mohammad's hooded head as he endured the unbearably long flight from Afghanistan? How could he process what was happening to him? How lonely and desperate and hopeless must his life have been? The Americans waiting to receive him at Guantanamo knew all about the hopelessness and desperation and had a specific plan to exacerbate it and exploit it.⁷ Thirty days in isolation.⁸ No human contact. No Chaplain.⁹ No ICRC.¹⁰

credible and consistent not only with the statements obtained by numerous other detainees but also with admissions made by several of the prison guards.

⁵ Jawad arrived at Bagram prison on December 18, 2002 in the middle of a period of widespread and severe abuse of detainees by military prison guards and interrogators, which was the later the subject of an extensive investigation by the U.S. Army. Earlier in December, two detainees, Dilawar and Habibullah died as a result of beatings from prison guards. The death of Dilawar is the subject of the award-winning documentary *Taxi to the Dark Side*.

⁶ Guantanamo records indicate that Jawad arrived there on February 6, 2003.

⁷ This plan is outlined in Camp Delta Standard Operating Procedures, Headquarters, Joint Task Force Guantanamo, 28 Mar 2003, available at <http://www1.umn.edu/humanrts/OathBetrayed/SOP%201-238.pdf>

Here is the most relevant excerpt:

“Paragraph 4-20. Behavior Management Plan

a. Phase One Behavior Management Plan (*First thirty days* or as directed by JIG). The purpose of the Behavior Management Plan is to *enhance and exploit the disorientation and disorganization felt by a newly arrived detainee* in the interrogation process. *It concentrates on isolating the detainee* and fostering dependence of the detainee on his interrogator. During the first two weeks at Camp Delta, classify the detainees as Level 5 and house in a Maximum Security Unit (MSU) Block. During this time, the following conditions will apply:

- (1) *Restricted contact: No ICRC or Chaplain contact*
- (2) No books or mail privileges
- (3) MREs for all meals.
- (4) Basic comfort items only:
 - (a) ISO Mat
 - (b) One blanket
 - (c) One towel
 - (d) Toothpaste/finger toothbrush
 - (e) One Styrofoam cup
 - (f) Bar of soap
 - (g) Camp Rules
 - (h) *No Koran, prayer beads, prayer cap.*
- (5) Mail writing and delivery will be at the direction of the J-2.”

(emphasis added)

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* See also, *id.* para. 9-2.b p. “The initial period of time, which a detainee may be placed in the Maximum Security unit without ICRC, access or restricted access shall be 30 days.” The ICRC is the International Committee of the Red Cross, which monitors the treatment of detainees.

No Koran. Nothing but an occasional interrogation to break up the stultifying monotony and the terrifying loneliness.

But they didn't break Mohammad Jawad, or at least not the way they wanted him to break. They could not get him to budge from his denial of throwing the hand grenade.¹¹ Time and time again they tried and he stuck to his "cover story". How was this unschooled ignorant teenage boy able to resist these skilled and practiced interrogators for months and years on end when the hardened terrorists all were broken and confessed? How could he so consistently hold to his adamant denial of responsibility? According to one observer, his only resistance technique was feigning homesickness. It simply never occurred to anyone that he might just be telling the truth. He even asked for a polygraph, but this request was denied. Instead of being given a chance to establish his innocence, he was given another 30 days in isolation, moved away from the neighbors with whom he had started to bond, told that this family had abandoned him, linguistically isolated so he had no one to talk to, and nowhere to turn except to his interrogator.

In Sept 03, when an interrogator observed Mohammad talking to posters on the wall of the interrogation room and was concerned about his mental health, they didn't call for a mental health professional to care for him, they summoned the Behavioral Science Consultation Team, who prepared an assessment and recommendation. I have provided the commission with this classified document, one of the most chilling documents that has been produced so far. What has this country come to when a licensed psychologist, a senior officer in the US Armed Forces, someone trained in the art of healing broken hearts and mending broken minds, someone with a duty to do no harm, turns her years of training and education to the art of breaking people, to the intentional devastation of a lonely, homesick teenage boy?

We also learned, courtesy of Major O,¹² quite a bit about the frequent flyer program¹³ – we learned that it was an official standard operating procedure, carried out with ruthless efficiency every day for years according to the "matrix."¹⁴ Yet, although it was standard operating procedure, it was an off-the books standard operating procedure, not included in the published SOPs. Indeed, although this program was approved by the senior leadership of JTF-GTMO, the government has failed to produce a single document purporting to authorize the program or even describe the program. No legal review was

¹¹ Mohammed was accused of throwing a hand grenade into an American military vehicle, which injured two U.S. servicemen and their Afghani interpreter. The primary evidence against him was a confession provided by the Afghan police, which was later ruled by both the military commission and the U.S. District Court to be the product of torture.

¹² The identity of this witness is protected by order of the military commission.

¹³ The frequent flyer program was a euphemism for a sleep deprivation program widely used on detainees. In the program, the detainees were roused and moved from one cell to another (a process involving multiple guards to shackle and unshackle the detainee) at preplanned intervals in order to ensure that they never obtained an extended period of restful sleep. In Jawad's case, government records indicated he had been moved 112 times from cell to cell in the 14 day period from May 7 to May 20, an average of one cell move every two hours and 50 minutes for two weeks.

¹⁴ The witness referred to a "synchronization matrix" that governed all planned detainee movements.

apparently done, for if it had been done, this program could not have survived legal scrutiny.

Major O called it an “incentive program”— be a good prisoner and you’ll get to stay in your cell 23 hours a day, instead of being moved from cell to cell like a human ping pong ball. Major O’s testimony made it clear that the frequent flyer program was simply punishment for prisoners the guards didn’t like for one reason or another. Major O suggested that the program was reserved for the worst of the worst of the worst of the worst, the most violent troublemakers, those who assaulted the guards, the spitters and feces throwers. The defense is not suggesting that there can be no legitimate disciplinary measures for those detainees who engage in such activities, but misconduct by a detainee does not authorize torture. Major O suggested that the frequent flyer program promoted safety and security for the guards, but this simply makes no sense. Moving a detainee 8 times a day for weeks on end simply exposed the guards to these most violent prisoners unnecessarily. Major O’s testimony unfairly and inaccurately implied that if Mohammad Jawad was subjected to the frequent flyer program that he must have been one of the worst, one of the violent ones. But no evidence has been offered by the government to substantiate such an inference, and for good reason, because there is no such evidence. The DIMS¹⁵ records do not indicate a single violent incident, no feces or blood or urine throwing. Mohammad Jawad’s worst offense was cross-block talking, when he was intentionally linguistically isolated from his fellow countrymen who could speak his language. This was not a violent hardened hateful jihadist, this was a teenage boy who virtually every time he was interrogated broke into tears begging to go home to his mother and his little brother and sisters. And dozens of other detainees were subjected to the frequent flyer program.¹⁶ We’ve indentified many in our filings, but it is clear that we were provided only a fraction of the records covering a limited period of the program.

The documents released by Senator Levin¹⁷ and new revelations in books by Jane Mayer¹⁸ and others meticulously document that torture had become the official policy of the United States, wholeheartedly endorsed and carried out with unquestioning and ruthless efficiency by mindless zombies like Major O. Is it possible that he really believes that moving a detainee back and forth from cell to cell like a human pendulum every three hours is humane?¹⁹ Or was he just lying to cover his derriere, following the lead of his senior officers? In one sense it was not a fair question, obviously, he could not admit that he ordered and carried out something that was inhumane, for that would be

¹⁵ Detainee Information Management System. The DIMS was a database for all information relating to the detainees, and included entries for all disciplinary incidents. As Jawad’s defense counsel, I requested and was provided a complete printout of the available DIMS records in discovery.

¹⁶ See, Josh White, “Tactic Used After It Was Banned,” Washington Post, August 8, 2008.

¹⁷ Shortly before the hearing, the Senate Armed Services Committee, chaired by Senator Carl Levin, had released a lengthy report on detainee abuse. See, *Inquiry into the Treatment of Detainees in U.S. Custody*, Report of the Committee on Armed Services, United States Senate, November 20, 2008, available at: http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdfReport

¹⁸ Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror turned into a War on American Ideals* (Doubleday 2008).

¹⁹ Major O testified during the hearing. I asked him, “Do you believe that moving detainees from cell to cell on a regular basis is humane?” He replied, “Yes, I do.”

prisoner abuse, a grave breach of the Geneva Conventions, and a clear violation of stated U.S. policy.²⁰ Actually, in credit to Major O, he was refreshingly candid about the frequent flyer program. He was the first witness with knowledge of the program that didn't lie about it. It is obvious now that Major General Hood²¹ and Major General Cannon²² did lie about it. The reasons for their reluctance to testify should now be crystal clear. Maj Gen Hood's claim, to this commission and to Lieutenant General Schmidt²³ in the Schmidt Furlow investigation, that he had ordered the frequent flyer program stopped, was only half the truth, at best. He may have ordered the frequent flyer program run by the Joint Interrogation Group discontinued as an interrogation technique, because he considered it counterproductive, but he clearly allowed the frequent flyer punishment program, carried out by the Joint Detention Operations Group, to continue and flourish under Major O and his henchmen. The program wasn't stopped in March 2004, we know that Mohammad Jawad was subjected to it in May 2004, and we know, according to Major O, who was in a position to know, that it continued until at least April 2005. We still don't know when it stopped. The government is still withholding records, hiding the truth about this program.²⁴

Major O said he was not aware of any complaints by the guards about the frequent flyer program, that no one raised any concerns about it at all. Unfortunately, he was very likely being truthful about this and this is one of the most troubling aspects of his testimony.

²⁰ On May 7, 2002, President Bush, stated "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." *Presidential Memorandum regarding Humane Treatment of Taliban and al Qaeda Detainees*, February 7, 2002, available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf The official position of the Bush Administration from February 2002 to June 2006 was that the Geneva Conventions did not apply to detainees at Guantanamo, not even Common Article 3. The U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* in 2006 that Common Article 3, which sets a minimum standard of humane treatment of detained persons, did apply.

²¹ Jay W. Hood, Maj Gen, USA, ret. was Commander of Joint Task Force (JTF)-Guantanamo from March 2004 to March 2006. I interviewed Gen Hood in June 2008. He denied any knowledge of the frequent flyer program taking place at Guantanamo while he was in command. A stipulation of expected testimony reflecting this denial was entered into evidence on June 19, 2008.

²² Nelson J. Cannon, Maj Gen, USANG, ret. Gen Cannon, then a Colonel, was Commander of the Joint Detention Group in 2003-4. He was deployed to Iraq in June of 2008, but answered a series of questions I posed to him in an e-mail message. He denied any knowledge of the frequent flyer program taking place under his command. A stipulation of expected testimony based on the e-mail exchange was entered into evidence on June 19, 2008.

²³ Randall M. Schmidt, Lt Gen, USAF, ret. Lt Gen Schmidt was tasked in February 2005 by General Bantz J. Craddock, then Commander of U.S. Southern Command, to lead an investigation into allegations of detainee abuse at Guantanamo, replacing Brig Gen John T. Furlow as the leader of the investigation when it became apparent that officers of higher rank than Brig Gen Furlow would have to be interviewed as part of the investigation. Lt Gen Schmidt interviewed Maj Gen Hood in the spring of 2005 as part of the investigation. The resulting Army Regulation 15-6 Report came to be known as the Schmidt-Furlow report. (unclassified version available at; <http://www.defense.gov/news/Jul2005/d20050714report.pdf>) I interviewed Lt Gen Schmidt in May and June 2008 and a stipulation of expected testimony was entered into evidence at the June 19, 2008 hearing.

²⁴ I reported the abuse of Mohammed Jawad as a suspected law of armed conflict violation through official Department of Defense channels in May 2008. Although such a report was supposed to trigger a mandatory investigation, at that point, I had received no response to my report. I never did.

What are we teaching our young soldiers and young officers? How is it that hundreds of soldiers could be involved in such an obviously abusive program for years without a single voice of protest being raised? What has happened to basic human decency? Where was the moral courage that differentiates a true soldier from a mere automaton? Something happened in the detention camps in the early years of Guantanamo that was very ugly. Prisoners of war, captured enemy combatants, became mere numbers, not Mohammad Jawad, teenage kid, but ISN 900,²⁵ terrorist. In a misguided effort at “force protection” the guards also became mere numbers, their nametags that identified them as fellow human beings replaced with a Velcro strip bearing a number or an acronym.²⁶ Behind the comfortable cloak of anonymity, stripped of their individuality, the guards were no longer proud soldiers fighting for the American way of life, but merely cogs in a machine. A groupthink mentality took hold, if indeed it can be called thinking at all.

Outrageous government conduct, conduct which shocks the conscience, is a lawful basis for dismissal of criminal charges, even serious ones. The sheer weight of the government’s misconduct against Mohammad Jawad is staggering. Everything about this case is outrageous government conduct, from the physical torture of Bagram to the psychological torture at Guantanamo, the beatings, the sleep deprivation, the isolation of a teenage boy, the parade of lying Generals -- Hartmann,²⁷ Hood and Cannon -- concerned only about protecting their own selfish interests, the slimy situational ethics of the Chief Prosecutor,²⁸ the cold-blooded Major O²⁹ and his incentive program, the cruel and heartless assessment and recommendations of the BSCT³⁰ psychologist, the

²⁵ Each detainee was assigned an “internment serial number” or ISN. This number was the primary means of identifying the detainees while at Guantanamo. Names were rarely used by JTF-Guantanamo personnel in their interactions with detainees.

²⁶ U.S. military personnel always wear nametags on their uniforms. When performing any duty involving contact with detainees, these nametags were removed and replaced with a number, or an acronym identifying their duty position.

²⁷ Thomas Hartmann, Brig Gen USAFR, ret. Brig Gen Hartmann was the Legal Advisor to the Convening Authority and was a highly controversial figure. He was the subject of multiple defense motions in several military commission cases to disqualify him and/or dismiss the charges because of his improper conduct. He testified as a government witness in support of their opposition to these motions. He testified in the Jawad case at the June 19, hearing, and made several misleading statements under oath, which I described in a series of court filings in July and August 2008. Brig Gen Hartmann later voluntarily submitted a document to the court offering corrections to his earlier testimony. After Brig Gen Hartmann was disqualified from further participation as Legal Advisor in three separate cases by three different military commission judges, he was reassigned to other duties in the fall of 2008.

²⁸ This reference is to Colonel Lawrence (Larry) Morris, USA, ret. who served as Chief Prosecutor of the Military Commissions from late 2007 until June 2009, replacing Colonel Morris Davis, USAF, ret. who resigned as a matter of principle in October 2007. Colonel Morris assigned himself to the Jawad case as an assistant prosecutor, primarily to defend the conduct of Brig Gen Hartmann and the Convening Authority, Susan Crawford. In my opinion, Colonel Morris repeatedly violated Army Rules of Professional Responsibility, and I made several motions to the court seeking sanctions against him for what I perceived to be unethical conduct.

²⁹ I characterized this officer as cold-blooded because he was quite unapologetic in his testimony about the frequent flyer program, a program the military judge later ruled was “flagrantly abusive.”

³⁰ Behavioral Science Consultation Team. These were military psychologists assigned to assist interrogators in the interrogation process. Their participation in interrogations was highly controversial, and viewed by many psychologists to be in conflict with their duty not to harm patients.

intentional withholding, even destruction,³¹ of specifically requested and relevant evidence³², the repeated denial of access to relevant witnesses, to today's unfounded accusations of witness coaching by my co-counsel.³³ If ever there were a textbook case of outrageous government conduct, this is it. Almost any one of these things would be sufficient to warrant dismissal. Cumulatively, it is not even a close call. Mohammad Jawad has been denied justice, due process and fair treatment for nearly six years. It's time for that to end. Right here and right now. Thank you.

Afterword: A few weeks later, the trial judge, Army Colonel Stephen Henley, ruled on the motion to dismiss.³⁴ He declined to grant my requested remedy of dismissal of all charges, but did make factual findings that “subjecting this Accused to the ‘frequent flyer’ program from May 7-20, 2004 constitutes abusive conduct and cruel and inhuman treatment.” Further, he found that the program had “no legitimate interrogation purpose” and that it was “calculated to profoundly disrupt his mental senses.” The judge indicated that he would fashion an appropriate remedy for the abuses at a later date “as dictated by developments in the case.” He described the frequent flyer program as “flagrant misbehavior” and recommended that “[t]hose responsible should face appropriate disciplinary action.”

I never got a chance to make a true closing argument in Mohammed's case, for it never went to trial. There was one additional pretrial motions hearing in September, 2008, and then the case was suspended, first while the government filed an interlocutory appeal of an adverse ruling by Judge Henley suppressing the government's key evidence, and then, by order of President Obama the day after his inauguration. While the case was suspended, I, with the help of the ACLU, pursued Mohammed's release through a petition for a writ of habeas corpus. On July 30, 2009, the U.S. District Court for the District of Columbia granted the writ, and ordered that Mohammed be released. The following day, the military commission charges were dismissed.³⁵ On August 24, 2009, Mohammed was returned to Afghanistan and released. Despite the trial judge's

³¹ This refers to an incident where Colonel Larry Morris, Chief Prosecutor, was informed by e-mail from another senior officer in advance of calling Brig Gen Hartmann as a witness concerning the possibility that Brig Gen Hartmann might give untruthful testimony. When I learned of the existence of this e-mail, I requested a copy. Col Morris informed me that he had deleted it, even though he was aware that there was an ongoing investigation into the truthfulness of Hartmann's testimony.

³² The defense was forced to file numerous motions to compel discovery and motions to compel the production of witnesses. The military judge repeatedly threatened sanctions and ultimately imposed sanctions for the government's failure to comply with discovery rules and orders.

³³ The prosecution, in an attempt to impeach the Army CID agent who testified about the abuses at Bagram prison, suggested in a series of questions that the witness had been coached by my co-counsel or had some bias or motive to provide favorable testimony to the defense. There was no basis to these assertions.

³⁴ D-008 Ruling on Defense Motion to Dismiss – Torture of the Detainee, September 24, 2008.

³⁵ For a full account of the litigation resulting in Mohammed's release, see, David J. R. Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 Duke L. J. 1367 (2011).

recommendation, no one has ever been held accountable for what happened to Mohammed.³⁶

³⁶ My failed efforts to get DoD to launch an official investigation into the frequent flyer program are chronicled in my article, *Military Accountability (Or The Lack Thereof) For Detainee Abuse: The Instructive Case of Mohammed Jawad*, 45 U.S.F. L. Rev. 873 (2011).