David Frakt – A Short Story

I am a law professor and a JAG officer in the U.S. Air Force Reserve. I served for nine and a half years on active duty from September 1994 to March 2005, then switched to teaching law and joined the reserves. In January 2008, I received an e-mail from Air Force JAG headquarters. The Department of Defense was looking for volunteers to defend detainees at Guantánamo facing trial by military commission. They were seeking people with significant criminal defense experience. International law experience was a bonus. I had both. I decided to volunteer. In late February, I was selected for the position. I finished up my spring semester classes and headed to Washington, D.C. in late April. (The headquarters and primary offices for the military commissions are in Washington even though all commission proceedings are held in Guantánamo.) I reported for duty on Monday, April 28. The following day, I was assigned to take over two clients whose cases had already been referred to trial. The clients had previously been assigned to an Army Reserve JAG, but he had been unable to convince either client to accept him, and his one-year tour expired before anything significant had happened in either case, so he had been excused. The military judge was eager to get the cases moving again and set arraignments on both cases for the following week. The next day, April 30, I headed to Guantánamo to meet my two clients, accompanied by two interpreters, one Arabic speaker and one Pashto speaker.

I have frequently been amazed by the incredible amount of money spent (and frequently wasted) on the military commissions; my first flight to Guantánamo is a prime example. The flight was on a U.S. Army plane out of Fort Belvoir, Virginia and my interpreters and I were the only passengers. We stopped to refuel at West Palm Beach, Florida, where we were ushered into a passenger lounge for private executive jets. There were plush leather chairs, a machine that dispensed free Starbucks coffee, and fresh chocolate chip cookies. I couldn't help but think of the contrast between the way that we were being treated and the treatment my clients were receiving at Guantánamo.

The following day, I was scheduled to meet with one of my clients, Mohammed Jawad. As I entered the gates of the infamous detention camps for the first time, I realized it was the first of May and I was struck by the irony. May 1 is celebrated annually as "Law Day" in the United States. Back on the mainland, local bar associations around the country were gathering to commemorate America's devotion to the rule of law, and there I was at Guantánamo, representing a client in a legal system and in a place that symbolized America's post 9/11 abandonment of the rule of law.

Mohammed Jawad was a functionally illiterate young man from the Pashtun tribal region of Afghanistan. He had been arrested on December 17, 2002 in Kabul by Afghan authorities in connection with a hand-grenade attack on a jeep containing two U.S. Special Forces soldiers and their local Afghan interpreter. The attack took place in broad daylight in the early afternoon in a crowded public bazaar in central Kabul. It was the first such attack on U.S. forces in Kabul since the United States had invaded Afghanistan in the fall of 2001. Fortunately, none of the victims had died in the attack, but they each had sustained injuries. Mohammed was about sixteen at the time of his arrest. Like many Afghanis, he did not know his exact age or birth date. Mohammed was arrested along with several others and taken first to an Afghan police station and then to the Interior Ministry. Representatives from the U.S. Embassy and from the U.S. military immediately demanded that those responsible for the attack be turned over to the U.S. for questioning. For reasons that remain unclear, the Afghan government decided to let Mohammed take the fall. When he denied responsibility for the attack, he was threatened that he or his family would be killed if he

didn't confess. Because he couldn't write, a confession was prepared for him (the confession was in Farsi, a language Mohammed could not even speak, much less read). In lieu of a signature, the police placed Mohammed's thumbprint at the bottom of the confession, explaining to him that it was "release paperwork."

Late that evening, the Interior Minister turned over Mr. Jawad to the U.S. military, telling the Americans that he had confessed and was solely responsible for the attack. Mohammed was hand-cuffed and a blindfold and hood were placed over his head before he was whisked away and taken to an American military base on the outskirts of the city. Upon arrival he was given a medical exam and then strip-searched and forced to pose for a series of deeply humiliating nude photographs. After he was allowed to put his clothes back on, he was again handcuffed, hooded, and taken to another building on the compound for further interrogation. It was nearly midnight when the interrogation started.

The interrogation began with techniques which were designed to reinforce the shock and fear of captivity. (The specific techniques utilized are classified.) Again, Mohammed denied complicity. But the U.S. interrogators refused to accept his denials and continued the interrogation for several hours, well into the early morning hours of December 18, until they were able to extract another confession. Unfortunately, the precise details of the interrogation session and the confession will likely never be known. Although the entire interrogation session was videotaped, the videotape was later determined to be "lost" when I requested from the prosecution to be provided with a copy.

Later that morning, Mohammed was transferred to Bagram prison. At that time, Bagram prison was being run by the infamous 377th Military Police Company from Indiana, responsible for the worst prisoner abuse of the entire global war on terror. Just the week prior to Mohammed's arrival, prison guards at Bagram had beaten an Afghani taxi-driver named Dilawar to death. The horrendous abuse that occurred at Bagram is the subject of the Academy Award-winning documentary, "Taxi to the Dark Side." The cruel and abusive treatment of prisoners at Bagram continued throughout the winter of 2003. Mohammed was subjected to a variety of abusive tactics there including beatings, hooding, being pushed down the stairs, and being chained to the wall. He heard the rumors from other prisoners about beating deaths of other prisoners and heard the screams of other prisoners being tortured. He spent forty-nine days at Bagram in mortal fear.

On February 6, 2003, Mohammed was transferred to Guantánamo. He was hooded and shackled for the seventeen hour flight. Standard operating procedure at the time was to starve the detainees for three days before the flight so they would not soil themselves en route. He arrived in Guantánamo frightened, hungry, and dehydrated and was immediately placed in solitary confinement for thirty days to maximize his feelings of isolation and desolation and to "set the stage" for successful interrogations. At the time of this writing in late December 2008, Mohammed has been in U.S. custody for six years, over one quarter of his life. At Guantánamo, he was interrogated on approximately three-dozen occasions. Each time, he denied throwing the hand grenade. He was subjected to a variety of abusive techniques and practices, including an additional thirty-day period of isolation, and a two-week sleep deprivation regime known as the "frequent flyer program," but he persisted in proclaiming his innocence. In despair over his situation, he tried to commit suicide on December 25, 2003. For over five years, he never spoke to his family, until prison officials relented and began to allow phone calls in the summer of 2008. He suffered from a variety of physical ailments. He suffered from the cold and noise and bright lights of Guantánamo, burning twenty-four hours a day, seven days a week, 365 days a year. He

felt that he was losing his mind. He told me that being in Guantánamo was like living in a graveyard and that he was already dead.

So this was the young man that I was assigned to represent. Perhaps needless to say, he was deeply distrustful of me. There I was, wearing the same uniform as his tormentors, an officer in the same U.S. military that was prosecuting him as a war criminal, telling him that I was his new lawyer. "Why should I trust you?" he asked. "How do I know that you are even a real lawyer? How did I know that these interviews aren't being monitored or recorded?" All good questions. Mohammed may not be educated, but he is far from stupid.

I asked Mohammed to give me one chance to represent him in court before making any final decisions about whether he wanted to accept me as his lawyer on a long-term basis. I told him that I worked for him and that he could fire me at any time. We had several meetings over the next week where we got to know each other. Mohammed was smart enough to understand that he could not represent himself and decided to give me a try. Just prior to the arraignment, on May 7, he agreed to allow me to represent him for the limited purpose of challenging the lawfulness of the commissions and the conditions of his confinement. The judge, recognizing this as considerable progress after his complete rejection of his prior counsel and so accepted this compromise. He gave me three weeks to file briefs and set the next hearing for June.

Over time, I developed a positive working relationship with Mohammed. Although he was frustrated by the pace of the proceedings, he recognized that I was doing my best for him and that I was working in his best interests. This was in sharp contrast to my relationship with my other client Ali Hamza al Bahlul.

I met Mr. al Bahlul for the first time on the May 2. From the beginning, he made it clear to me that he had no intention of accepting the assistance of an American military lawyer. He was al Qaeda; I was the enemy. Although he was cordial when we met, more often than not he refused to even meet with me when I came to the detention camps. After his initial refusal, I would prepare a letter to him and have it translated by my interpreter. The prison officials would then bring the letter into him. Sometimes this would work and he would then allow us in. Sometimes he would refuse to even accept the letter.

I informed Mr. al Bahlul at our first meeting that his arraignment would take place on the May 7 and that I would come back to see him prior to the arraignment. He refused to see me when I came back, and I did not see him again until just prior to the arraignment. He was in a holding cell outside the giant new courtroom which had been constructed especially for the trial of the alleged 9/11 co-conspirators. His arraignment was to be the first test of the multi-million dollar high-tech "Expeditionary Legal Center." In the holding cell, he told me that he wanted to represent himself, that he intended to boycott the proceedings, and that he did not wish me to sit with him or say anything on his behalf. The new courtroom had six rows of defense tables, so I told him that I would sit at the second table, and he could sit in the front row by himself, unless the judge ordered me to sit with him. I informed the judge prior to the hearing and he gave me permission to sit apart from my client.

The test of the new courtroom turned out to be a complete flop. The arraignment was plagued with technical difficulties with the audio and video equipment. The microphone at the Judge's bench was working only intermittently. He got so fed up with it that he got up from the bench and wandered around the courtroom looking for a functioning microphone. He found one in the first row of defense tables at the opposite end of the table from Mr. al Bahlul. While he was sitting at the table with Mr. al Bahlul conducting the hearing, there was a complete power failure and blackout in the windowless courtroom. A phalanx of guards rushed to surround Mr. al Bahlul

who was sitting unshackled just a few feet from the judge. Undeterred, the judge continued on with the hearing with the dim light provided by a couple of emergency lights. The prosecution did not have a copy of the charges in Arabic and were forced to read the multi-page charge sheet in English while the court interpreter translated. My limited role in the hearing consisted of asking the court to advise Mr. al Bahlul of his right to self-representation and urging the judge to allow Mr. al Bahlul to proceed *pro se*. Mr. al Bahlul indicated that he wanted to represent himself but intended to boycott and remain silent. After a brief adjournment, the judge decided that there was nothing inherently incompatible about representing oneself and remaining silent. He granted Mr. al Bahlul's request for self-representation and assigned me as "standby counsel," a role which would require me to be ready to step in and defend Mr. al Bahlul on a moment's notice if either the judge or Mr. al Bahlul changed his mind about self-representation.

Mr. al Bahlul had been requesting the right to represent himself since 2004, when he was first charged under President Bush's executive order of November 13, 2001 creating an earlier version of the military commissions. Under the military commission rules established under that order, later invalidated by the Supreme Court in *Hamdan v. Rumsfeld*, the accused had no right of self-representation. Mr. al Bahlul was charged and arraigned before two previous military commissions under the old system. Both times, he attempted to reject his appointed military defense lawyers and proceed *pro se*. It should not have been a surprise that Mr. al Bahlul still wanted to represent himself under the new system, but, although the Military Commissions Act authorized detainees to represent themselves, the government was ill-prepared for a detainee to do so. There were no procedures in place for detainees to have access to their case files (known as discovery), much of which was classified and therefore off-limits to the detainees. There was no law library and little, if any, legal materials available to facilitate a detainee's right to represent himself. Even basic resources like the court rules and procedures had not been translated into the native language of the accused. Detainees were not allowed access to a phone or a computer; even basic office supplies like pens and paper were strictly limited. The prosecution therefore spent the rest of the summer trying to persuade the court to revisit the *pro se* issue and revoke Mr. al Bahlul's right to represent himself. After the judge who granted Mr. al Bahlul's request was forcibly retired and a new judge was appointed to replace him, they succeeded. Mr. al Bahlul was completely disgusted with the process, which he termed "a circus." He believed that the commissions were simply for show and that the outcome of his trial was predetermined. He did not believe there was a possibility to receive a fair trial. He did not recognize the legitimacy or legality of the commissions. When his right to self-representation was revoked in August, he directed me to waive all pre-trial motions and demand a speedy trial. He also requested that I ask to be excused from representing him, which I honored. He did not want to be represented by me, or any other member of the military, or, for that matter, any U.S. citizen. The judge rejected my request and ordered me to stay on the case. Under the rules for military commission, only U.S. military counsel or other attorneys with U.S. citizenship can represent detainees. Even foreign attorneys who are licensed bar members in multiple U.S. jurisdictions, and who would be eligible to represent an American soldier facing a court-martial, or an accused terrorist in federal district court, cannot represent a detainee in a military commission.

Mr. al Bahlul was the second detainee, after Salim Hamdan (Osama Bin Ladin's driver), to be tried by military commission, and I had a front row seat. At the commencement of the trial, in accordance with Mr. al Bahlul's directions, I requested once again to be excused from representing him and requested the judge grant Mr. al Bahlul's request to represent himself. The judge once again denied Mr. al Bahlul's request, claiming that the request was "untimely," despite the fact that

Mr. al Bahlul had been requesting to represent himself for over four years and was prepared to proceed immediately. I was ordered to continue representing Mr. al Bahlul and to remain in the courtroom. Upon denial of the request, I announced that I was boycotting the proceedings and sat mute throughout the rest of the trial, at the far end of the defense table from Mr. al Bahlul. He never spoke to me, much less consulted me, throughout the trial. The trial resulted, not surprisingly, in Mr. al Bahlul being confined to prison for life (the maximum punishment authorized and grossly disproportionate punishment for the conduct that Mr. al Bahlul was proven to have committed) after less than forty-five minutes of deliberation by the jury of nine Air Force, Marine, and Army Colonels and Navy Captains. The trial concluded on Monday, November 3, the day before the historic election of President Obama, meaning that it was very likely the last military commission. Mr. al Bahlul's primary offense was creating a propaganda video used to spread al Qaeda's political and religious views, a video that is available to legally purchase and view in the United States.

After viewing Mr. al Bahlul's trial from my comfortable front row seat, I was struck by the fact that there was no apparent legal reason to try Mr. al Bahlul before a military commission. Some of the rationales that have been advanced in support of military commissions are that the offenses are uniquely military in nature or that the evidence and statements available to prove the charges would not meet the stringent requirements of the federal rules of evidence because they were obtained under unique wartime constraints. In my view, as a former Special Assistant U.S. Attorney and as a law professor of evidence and criminal law, there was absolutely no reason that Mr. al Bahlul could not have been tried in federal court. Equivalent crimes covering all of Mr. al Bahlul's alleged acts are available under federal criminal statutes. Numerous other al Qaeda terrorists have been tried and convicted in federal court for similar offenses. In fact, three American citizens convicted of "material support to terrorism" in federal court, (one of the crimes of which Mr. al Bahlul was convicted) testified as witnesses for the prosecution against Mr. al Bahlul. There was no evidence that Mr. al Bahlul engaged in active combat or personally harmed any U.S. or allied military personnel. According to the testimony of the agents who interrogated Mr. al Bahlul, his statements were entirely voluntary. No evidence from battlefield interrogations or obtained by coercive methods was offered. All the evidence offered at trial was gathered by experienced federal agents in compliance with standard evidence collection protocols, so there was no problem with the chain of custody of the evidence. No classified evidence was offered and no closed sessions were held. Although the government did convincingly prove that Mr. al Bahlul created the videotape, the rest of the case against Mr. al Bahlul was very flimsy and circumstantial. I am convinced that if Mr. al Bahlul had been tried in a federal court with competent representation, he would not have received a life sentence.

Although I was ultimately unable to help Mr. al Bahlul, I had far more success in my representation of Mr. Jawad. I worked feverishly throughout May and for the first half of June preparing for the first motion hearing. I filed a series of motions to dismiss the charges based on a number of theories. From documents provided to me in discovery by the lead prosecutor Army Reserve Lieutenant Colonel Darrel Vandeveld, I learned that my client had been subjected to the "frequent flyer" program in May 2004. The program was meticulously documented in the prison activity logs. The regime consisted of moving a detainee from cell to cell repeatedly approximately every three hours for days on end. In Mohammed's case, the program lasted for fourteen days. During this two-week period, he was moved 112 times, an average of eight times per day. I later learned that other prisoners were subjected to the program for even longer periods.

There was no documentation explaining the purpose of the program or authorizing its use generally or on Mohammed. Whatever the purpose of the program, the effect was to deprive the prisoner of sleep and disorient him. Each move was time consuming and required shackling the detainee's hands and feet. I interviewed Army Major General Jay Hood, who was commander of the Guantánamo prisons in 2004, and he told me that he had ordered the frequent flyer program discontinued in late March 2004, shortly after assuming command. He had no explanation for Mohammed's treatment. The frequent flyer program was a clear violation of the Geneva Conventions, which require that all prisoners be treated humanely. The program also violated the Convention Against Torture, which prohibits torture and cruel and inhumane treatment. Prolonged sleep deprivation is widely considered to be a form of psychological torture. Based on this clear example of torture, I filed a motion to dismiss the charges against Mohammed. My theory was that the United States had forfeited the right to try Mohammed because of "outrageous government conduct."

I also filed a motion to dismiss based on the unlawful influence of the senior military lawyer overseeing the military commissions. His name was Brigadier General Thomas Hartmann. Like me, he was a Reserve Air Force JAG Officer. His official title was "Legal Advisor to the Convening Authority" but in practice he had usurped the role of the Chief Prosecutor and was essentially directing the military commissions. According to the former Chief Prosecutor, Air Force Colonel Morris Davis, who resigned in protest over political meddling with his prosecutorial independence, it was at General Hartmann's urging that the charges against Mohammed had been brought. According to Colonel Davis, Mohammed's case had been moved "from the deep freeze to the front burner" because of General Hartmann's intense interest in the case.

The third major motion to dismiss that I filed addressed a basic deficiency in the case—throwing a hand grenade at uniformed enemy soldiers in a war is not a war crime. The government's apparent theory was that because Mohammed was not a member of a national Army wearing a uniform, any warlike acts that he committed were automatically "in violation of the law of war," in other words war crimes. I found virtually no support for this novel legal theory. In fact, to the contrary, all of the major authorities on the law of war agreed that warlike acts committed by "unlawful combatants" (more properly termed "unprivileged belligerents") were not necessarily war crimes. The difference between lawful combatants and unlawful combatants was that lawful combatants enjoyed "combatant immunity" while unlawful combatants could be prosecuted domestically for ordinary crimes. Both lawful and unlawful combatants could be prosecuted in war crimes tribunals for war crimes, such as using unlawful weapons or killing protected civilians.

I filed a fourth motion to dismiss based on Mohammed's age. There was literally no precedent in the history of international law for trying a child soldier as a war criminal, and I saw no reason why my client should be the first. I challenged the government's jurisdiction over Mohammed as a juvenile at the time of his capture. The government's theory was that because the Military Commissions Act of 2006 (MCA—the law authorizing military commissions) contained no explicit age limitation, that there was no age limitation. I researched the legislative history of the MCA and found that Congress had simply not considered the issue. There was not a single mention of the term "minor", "juvenile" or "child soldier" in the entire legislative history. Apparently, it never occurred to members of Congress that children would be tried under this law, especially in light of the fact that the U.S. was party to a treaty, The Optional Protocol on the Involvement of Children in Armed Conflict, which placed strict limitations on the manner in which child soldiers could be held accountable for war crimes. The Optional Protocol recognized that

child soldiers were victims of war and specified that any efforts to hold child soldiers accountable for illegal acts had to be administered for the purposes of rehabilitation and reintegration of the child soldier into society, not for punishment. The MCA offered no provision for rehabilitation and reintegration, only incarceration.

I filed a fifth motion to dismiss based on the failure of the U.S. to treat Mohammed (and all the other detainees) as a prisoner of war (PW) and afford him the protections provided by the Geneva Conventions. Under the Geneva PW Convention, persons detained in armed conflict are presumed to be prisoners of war and must be treated as such, unless they are afforded a hearing to determine their status. Prisoners of war must be tried in the same courts as the detaining power's soldiers are tried. In the U.S., that would mean PWs would have to be tried in courts-martial. I argued that the charges in the military commission were invalid because there had never been a proper determination of Mohammed's status.

I returned to Guantánamo in mid-June to meet with Mohammed prior to the next hearing, scheduled for June 19th. In the intervening weeks, a new Judge had been appointed to oversee Mohammed's case, Colonel Stephen Henley. Colonel Henley was the Chief Trial Judge of the U.S. Army and had a reputation as a very fair judge who was protective of the rights of defendants. He was an experienced former defense counsel and I felt that he was the best judge I was likely to get. During my initial questioning of the Judge, he assured me that he intended to provide Mohammed a fair trial. One concern that I had was that Colonel Henley was close personal friends with the Chief Prosecutor. He had even been in his wedding party. But I feared if I tried to have him disqualified, I would end up with someone far worse, so I decided not to make an issue out of it. The June 19 hearing lasted fourteen hours and was focused on the torture and unlawful influence motions. Mohammed got fatigued and wasn't feeling well by late afternoon, so I informed the judge and he excused him for the evening. I was the sole defense counsel representing him at the time,[1] so it was just my paralegal and I for the rest of the evening.[2] Fortunately, Mohammed had seen enough to convince him that I cared about him and that I was working in his best interest. He gave me permission to continue representing him and even signed a letter authorizing me to file a *habeas corpus* petition on his behalf in U.S. District Court. It was a major breakthrough.

Because we weren't able to get through all of my motions in a one-day hearing, and because I informed Judge Henley that I intended to file several additional motions, he scheduled another motion hearing for August 13 and 14. Throughout the summer, as I gradually learned more about the mistreatment of Mohammed and had more time to research the law, I continued to file supplements to my earlier motions. By July, Lieutenant Colonel Vandeveld had started to believe that the case against Mohammed was not as strong as he originally had believed. The more that he learned about Mohammed's treatment, the more disenchanted he became with the case. He was a deeply religious man with a strong moral and ethical compass as a prosecutor. He was disturbed that Mohammed had not been treated as a juvenile and had been offered no rehabilitation. He made concerted efforts to convince his superiors to pursue a negotiated resolution to the case which would enable Mohammed to receive rehabilitation and return to his family, but he could not convince the Chief Prosecutor to even consider any reasonable terms and the negotiations foundered. To his great credit, Lieutenant Colonel Vandeveld sought diligently to

[1] I later added up two fine co-counsel to the defense team, Navy Lieutenant Commander Katharine Doxakis and Marine Corps Major Eric Montalvo.

[2] The story of that day and the closing argument that I gave that night is the subject of a law review article I wrote entitled "Closing Argument at Guantanamo: The Torture of Mohammed Jawad" which appears in the Fall 2008 Harvard Human Rights Journal.

discover and provide to the defense exculpatory and mitigating evidence, including evidence of abuse at Guantánamo and Bagram. Ultimately, Lieutenant Colonel Vandeveld became so disenchanted with what he perceived to be systemic problems with the military commissions that he decided he could no longer ethically serve as a prosecutor and resigned, requesting reassignment to other duties in early September, and even testifying as a defense witness in Mohammed's case in late September, even though he knew that it would be harmful to his military career. Lieutenant Colonel Vandeveld has since become an outspoken and highly credible critic of the commissions. He is a true patriot and hero.

The August 13 and 14 hearing focused on the law of war motion, the child soldier motion and the Geneva Convention motion. Additional evidence was also presented related to the torture motion. I had planned to call as a witness a military psychologist who had been part of a Behavioral Science Consultation Team (BSCT) at Guantanamo in 2003. In that capacity, the psychologist had conducted an assessment of Mohammed's mental state and provided it to the interrogators along with recommendations as to how to exploit his psychological vulnerabilities. The assessment was one of the most outrageous and chilling documents I have read, and I wanted desperately to expose its contents, but the document was classified and I could not release it. I therefore decided to call the psychologist as a witness. Just before the psychologist was scheduled to testify, the prosecution informed me and the court that the psychologist (whose name is protected by court order) had consulted a lawyer and, if called as a witness, would invoke the right against self-incrimination provided by Article 31 of the Uniform Code of Military Justice, the military equivalent of pleading the Fifth. The BSCT psychologist's apparent refusal to testify became a major national news story and helped influence the outcome of a referendum before the American Psychological Association to bar the involvement of its members in interrogations. The referendum passed by a wide margin.

At the close of the two day hearing, Colonel Henley issued his first major ruling from the bench, on the unlawful influence motion. Although he declined to dismiss the charges, he took the highly unusual step or ordering the Convening Authority, the senior official in the military commissions who decides which cases are referred to trial, to reconsider her earlier decision to refer the charges against Mohammed to trial. He ordered that the defense be given an opportunity to provide matters in extenuation and mitigation to the Convening Authority and ordered her to consider the submission without further input from General Hartmann. He also barred General Hartmann from providing further legal advice in the case, finding that he had compromised his objectivity by too closely aligning himself with the prosecution. Before closing the hearing, he also ordered additional briefing on the issue of whether the acts alleged to have been committed by Mohammed constituted war crimes. The next hearing was scheduled for September 25 and 26 to consider evidentiary matters. The Judge set a deadline for the defense to submit matters to the Convening Authority by September 15 and ordered the Convening Authority to complete her review by September 24. He declined the government's request to set an early trial date. Things seemed to be starting to go our way.

Colonel Henley seemed to be trying to send the Convening Authority a message that the case against Mohammed was weak and that she should voluntarily dismiss it. The prosecutors and General Hartmann had acknowledged that they were unaware of the abuse of Mohammed or his suicide attempt at the time that they recommended the charges against him, and they agreed that these were relevant factors that should have been considered. It was also clear that little, if any consideration, had been given for Mohammed's age. In fact, his juvenile status was not even mentioned in the original pretrial legal advice to the Convening Authority. I was hopeful that if the

Convening Authority considered this new information about Mohammed that she would order the case dismissed. In addition to preparing my own memorandum outlining the issues for the Convening Authority, I also started a petition drive and letter-writing campaign on his behalf with the assistance with the assistance of some computer-savvy supporters. The on-line petition was signed by 268 people from all over the world, and I received several dozen letters from concerned citizens. I was amazed and heartened by the outpouring of support for Mohammed, an accused "terrorist." Sadly, the Convening Authority was not swayed. On September 23, she reaffirmed her decision to refer the charges to trial and ordered the prosecution to press forward. The following day, Colonel Henley issued two significant rulings on the torture motion and the law of war motion. Although he declined to dismiss the charges, Colonel Henley made a number of noteworthy findings of fact and conclusions of law and concluded that Mohammed was entitled to significant relief for the abuse that he had experienced. He was sharply critical of the "frequent flyer" program, finding that "under the circumstances, subjecting this Accused to the 'frequent flyer' program from May 7–20, 2004 constitutes abusive conduct and cruel and inhuman treatment" and stating that "[t]hose responsible should face appropriate disciplinary action, if warranted under the circumstances" for their "flagrant misbehavior." Judge Henley came very close to holding that the U.S. had tortured Mohammed Jawad, finding specifically that "the scheme was calculated to profoundly disrupt his mental senses." This language echoes one of the definitions of psychological torture under federal law. Perhaps the most important legal conclusion in Colonel Henley's opinion was this statement: "It is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused." This ruling vindicated my theory that he did have the power to dismiss the charges on the basis of torture, a position which the government had vigorously disputed. This holding opened the door for other detainees who had been abused even more severely than Mr. Jawad to seek dismissal of the charges against them and should serve as a deterrent to abuse in the future.

Colonel Henley's other major ruling concerned the issue of whether Mohammed's alleged act of throwing a hand grenade at U.S. soldiers violated the law of war. In his ruling, he found that there was no "persuasive authority" to support the prosecution's theory of the case that merely being an unlawful combatant was sufficient to prove a violation of the law of war. During the September 25–26 session, Judge Henley advised the government that if they did not have additional evidence to support this element, they had an ethical obligation to dismiss the charges voluntarily. In October, the prosecution filed a motion requesting reconsideration of this ruling, but failed to offer any persuasive basis to do so. The motion was denied on October 29, 2008, leaving the continued viability of the charges in grave doubt.

The primary focus of the September hearing was to hear evidence on two motions to suppress statements that we had filed. In these motions, we asserted that the confessions Mohammed had made to the Afghan police and the U.S. interrogators on the day and night of his capture had been produced by torture, or at least coercion, and were therefore inadmissible in court. The government was required to prove that the statements were not the product of torture. Colonel Henley apparently found the defense presentation more compelling. On October 28, he ruled that the self-incriminating statements attributed to Mr. Jawad by the Afghan police had been obtained by torture, and he suppressed the statements. On November 19, Colonel Henley also suppressed the statements made to the U.S. interrogators in Kabul on the day that Jawad was arrested, finding that they were "tainted" by the death threats made by the Afghan authorities just hours earlier. Realizing that they could not possibly hope to prove the charges against Mohammed without these tainted confessions, the government filed an emergency appeal to the Court of

Military Commission Review, arguing that Colonel Henley had applied the incorrect legal standard in ruling the second confession inadmissible. The government filed their brief on the appeal on December 4. Our response was filed December 15. An oral argument on the appeal has been scheduled for January (13/16), the week before President Obama's Inauguration. It is likely to be the last argument heard by the Court of Military Commission Review, as the commission will almost certainly be suspended by President Obama.

I visited Mohammed on December 7-10 at Guantánamo to bring him up to date on the case and to see how he was doing. We brought him a video that my co-counsel Major Montalvo had taken of his family in Afghanistan. We talked of life after Guantánamo and of his plans upon returning home. He smiled and even laughed a time or two. He said that he wants to go back to school and study, to make something of himself. He is finally starting to believe that he is going to be released from Guantánamo. For the first time in a long time, Mohammed has hope.