

CHALLENGES PRESENTED TO MILITARY LAWYERS REPRESENTING DETAINEES IN THE WAR ON TERRORISM

MATTHEW IVEY*

INTRODUCTION

On September 11, 2001, four planes were hijacked and used in attacks on the Pentagon and World Trade Center.¹ In the days that followed, Congress authorized the use of military force against “those nations, organizations, or persons” determined to be responsible for these terrorist acts.² In early October 2001, the United States and its allies launched missile and air strikes against the Taliban and al Qaeda in Afghanistan.³ In the ensuing fighting on the ground, many prisoners were captured and approximately 700 persons were sent to the facilities at Guantanamo Bay, some arriving as early as January 11, 2002.⁴

In a Military Order dated November 13, 2001, President George W. Bush announced that military commissions would administer trials of detainees captured in Iraq or Afghanistan who were believed to have “engaged in, aided or abetted, or conspired

* Matthew Ivey is a Lieutenant in the United States Navy. The views expressed in this paper are the Author’s own. They do not necessarily represent the views of the Department of Defense, the United States Navy, or any of its components. The Author would like to thank Professor Frank R. Herrmann, S.J., for his guidance and mentorship on this project. The Author would also like to thank military prosecutors and defense lawyers for their assistance in researching this project, especially Lieutenant Colonel Colby C. Vokey, United States Marine Corps (retired). Finally, the Author would like to thank the staff of the *New York University Annual Survey of American Law* for their outstanding editorial assistance, especially Dominique Windberg and Daniel Passeser.

1. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM’N REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2003).

2. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended in 50 U.S.C. §§ 1541–48 (2006)) [hereinafter AUMF].

3. Jason Straziuso, *U.S. Plans for Longer Stay in Afghanistan*, CHI. TRIB., Oct. 7, 2007, at 16.

4. See Carol D. Leonnig & Julie Tate, *Some at Guantanamo Mark Five Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A1; Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10.

to commit, acts of international terrorism.”⁵ Pursuant to this order, Secretary of Defense Donald Rumsfeld established procedures for military commissions.⁶ Thus, the United States has since faced a need to develop rules for military commissions that allow the nation to protect its security while adhering to international standards of human rights and respect for due process.

Since their inception, these military commissions have been subject to controversy and legal challenges.⁷ President Barack Obama described the events of the past seven years at Guantanamo Bay as a “sad chapter in American history” and promised to close down the prison.⁸ On January 21, 2009, President Obama ordered the suspension of all prosecutions of Guantanamo Bay detainees for 120 days to allow his administration to review all detainee cases.⁹ Shortly thereafter, President Obama issued an executive order mandating the closure of Guantanamo Bay within a year.¹⁰ Although President Obama has called for review of all detainee files and for the closure of the facility within the year,¹¹ his plans have seen some setbacks. Many of the detainees have incomplete or nonexistent files.¹² Further, although some detainees have been cleared for release, there has been difficulty in the repatriation process in parent countries.¹³ Undoubtedly, the U.S. government will continue to have to make difficult decisions regarding the legal process afforded to detainees at Guantanamo. Of the 700 detain-

5. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

6. See Department of Defense Military Commission Order No. 1 (Mar. 21, 2002), available at <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>.

7. See, e.g., Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SEC. L. & POL'Y 375, 379 (2005); Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81 (2003–2004); David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 58 (2006).

8. Stephanie Hessler, *What to do about the Gitmo Detainees; The Ball is in Congress's Court*, WEEKLY STANDARD, Feb. 2, 2009; see also Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1.

9. Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, WASH. POST, Jan. 21, 2009, at A2; Carol J. Williams, *Guantanamo Judge Says He's Forging Ahead; He Defies Obama's Request to Suspend Tribunal Proceedings*, L.A. TIMES, Jan. 30, 2009, at A9.

10. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

11. See *id.*

12. Karen DeYoung & Peter Finn, *Guantanamo Case Files in Disarray—Situation Complicates Prison's Closure*, WASH. POST, Jan. 25, 2009, at A5.

13. *Uighurs Ask Supreme Court for Their Freedom*, MIAMI HERALD, Apr. 6, 2009.

ees who were charged under the original military commissions trial procedures, only a handful were re-charged following the United States Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*¹⁴ and even fewer were re-charged following the Military Commissions Act of 2006.¹⁵ The attorneys, whether civilian or military commissioned, appointed to defend these individuals have faced innumerable challenges.

Many civilian attorneys have traveled to Guantanamo in order to defend detainees, and many attorneys continue to work on detainee issues from outside Guantanamo, both in the United States and elsewhere in the world.¹⁶ This Article, however, will focus specifically on military defense attorneys in the Judge Advocate General's Corps (JAGs).¹⁷ Military defense attorneys have a unique place in both the legal profession and the armed services. According to noted ethicist Professor David Luban:¹⁸

The JAG Corps is a fascinating segment of the legal profession, and it cries out for a detailed ethnography. . . . In obvious ways, JAGs' identities are lawyers set apart from other military officers. Some, to be sure, began their career as warriors. . . . While many JAGs regard themselves proudly as warriors and lawyers, common-sense psychology suggests that their dual

14. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

15. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

16. See generally Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

17. JAG officers are commissioned officers who serve as lawyers in each branch of the U.S. military. Since Congress adopted the Uniform Code of Military Justice (UCMJ) after World War II, JAGs are required to be trained lawyers and members in a state bar. 10 U.S.C. § 827(b)(1) (2000). JAG officers can serve in a variety of legal roles, including criminal litigation. Lawyers assigned as defense attorneys are known as "detailed defense attorneys." See Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877 (2007).

18. David Luban is the Frederick Haas Professor of Law and Philosophy at Georgetown University's Law Center and Department of Philosophy. He has published extensively on legal ethics, international criminal law and international human rights, just war theory, jurisprudence, and moral responsibility within complex organizations. Georgetown Philosophy Department (David Luban) (Mar. 8, 2004), <http://philosophy.georgetown.edu/faculty/bios/luban.htm>.

identity may make them more, rather than less, zealous than civilian lawyers in their defense of rule-of-law values.¹⁹

Professor Luban recognized that “JAGs have shared a dual professional identity as military officers and lawyers.”²⁰ This Article will focus, in part, on the dual role of JAG officers as warriors and attorneys and the conflicts that may arise from this.

A variety of factors have posed difficulties for military defense attorneys in Guantanamo Bay. The legal process employed there has been in a constant state of flux.²¹ Detainees have not always cooperated with their military attorneys.²² The government and military officials have put pressure on the military attorneys.²³ Finally, military defense attorneys have struggled with numerous personal and professional ethical issues.²⁴

Part I will discuss the systemic challenges that military defense attorneys face in their pursuit of defending detainees, focusing on the evolving legal process employed at Guantanamo and reviewing detainee petitions in the Supreme Court. Part II will examine challenges stemming from detainee attempts to subvert the legal process and other barriers to establishing attorney-client rapport. Part III will evaluate the tools and techniques a military defense attorney utilizes to provide effective representation to Guantanamo detainees in the face of these challenges. Part IV will conclude the Article with some best practices and policy recommendations for improving representation of Guantanamo detainees in light of these challenges.

I. SYSTEMIC CHALLENGES

A. *A Constantly Evolving Legal Process*

The legal process in Guantanamo Bay has been anything but predictable, creating many challenges for military defense lawyers. The Bush Administration’s approach to the continued detention of Guantanamo detainees was conceptually based on the idea of a “war on terror.”²⁵ In 2001, Congress passed the Authorization for

19. David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2000 (2008).

20. *Id.* at 1999.

21. *See infra* Part I.A.

22. *See infra* Part II.

23. *See infra* Part III.C.

24. *See infra* Part III.E.

25. *See generally* JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007). The “war on terror” was founded

Use of Military Force (AUMF) that gave the President the power to use “all necessary and appropriate force against those nations, organizations, or persons determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”²⁶

Military defense attorneys initially faced complications concerning the classification of detainees.²⁷ The Bush Administration determined that the power to detain enemy combatants was incident to the executive’s power to wage war, as authorized by Congress in the AUMF.²⁸ Whether a detainee is treated as a criminal defendant, a prisoner of war, a lawful enemy combatant, or something else entirely is of great consequence to the legal process afforded to the detainee and the detainee’s defense strategy.²⁹ Scholars and military lawyers have asserted that it has been difficult to discern the government’s process in designating a detainee as an enemy combatant or a criminal defendant.³⁰ The cases of John Walker Lindh and Yaser Esam Hamdi, both captured in Afghanistan, are instructive. The government deemed Lindh a criminal defendant and prosecuted him in federal court for providing material support to a designated foreign terrorist organization.³¹ Hamdi was detained for more than three years as an enemy combatant.³² Some have gone so far as to allege that government prosecutors

on the concept that the United States is at war with terrorist organizations and those who supported these terrorist organizations. *Id.* at 102–15.

26. AUMF, *supra* note 2.

27. See Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255, 1259 (2006).

28. *Id.* at 1258.

29. See *id.* at 1259. For example, both prisoners of war and criminal defendants are entitled to a variety of procedural rights, including indictment by a grand jury, appointed or hired counsel, presumption of innocence, trial by a jury of peers, and, perhaps most importantly, proof of guilt must be beyond a reasonable doubt. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, U.N. Doc A/32/144. In contrast, in the first few years of the war on terrorism, an unlawful enemy combatant was denied all of these rights. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2003); Tom Jackman & Dan Eggen, “*Combatants’ Lack Rights, U.S. Argues; Brief Defends Detainees’ Treatment*,” WASH. POST, June 20, 2002, at A1.

30. See Yin, *supra* note 27, at 1259.

31. “*I Made a Mistake by Joining the Taliban*”; *Apologetic Lindh Gets 20 Years*, WASH. POST, Oct. 5, 2002, at A1; *A Plea for Forgiveness / Lawyers: Lindh Believes his Joining Taliban was a Mistake*, NEWSDAY, Sept. 1, 2002, at A7.

32. See *Hamdi*, 542 U.S. at 552; Jackman & Eggen, *supra* note 29; *Prosecutors Detail “Enemy Combatant” Case*, N.Y. TIMES, July 26, 2002, at A19.

have manipulated the status determinations in order to use them as leverage when negotiating pre-trial plea agreements.³³

The designation of “enemy combatant” has proved difficult to define and apply, as members of terrorist organizations generally try to conceal their identities and blend into civilian populations.³⁴ Furthermore, the law of war contemplates that those designated as “enemy combatants” will be released when the war concludes.³⁵ It will be difficult to tell when this war concludes, if ever.³⁶

This environment has created difficulty for military attorneys attempting to advise their clients of their procedural rights. Several military and civilian lawyers, frustrated with the uncertain legal process at Guantanamo Bay, have sought clarification of detainee rights in the Supreme Court.³⁷

B. *Detainee Petitions in the Supreme Court*

The detainee cases that have been heard by the United States Supreme Court highlight some of challenges and frustrations faced by military attorneys. In 2004, in *Hamdi v. Rumsfeld*,³⁸ the Supreme Court determined that a citizen-detainee is entitled to legal representation, even when detained as an enemy combatant.³⁹ Further, pursuant to *Mathews v. Eldridge*,⁴⁰ the Court determined that citizen-detainees seeking to challenge classification as an enemy combatant were entitled to receive notice of the factual basis for their classification and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.⁴¹

The scope of these rights, however, was somewhat unclear. In a plurality opinion by Justice O’Connor, the Court stated that the detainee was only entitled to counsel “in connection with the issues

33. See, e.g., Yin, *supra* note 27, at 1259.

34. U.S. DEP’T OF ARMY, FIELD MANUAL 3–24: COUNTERINSURGENCY D-5 (2006).

35. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (referring to release of prisoners at end of hostilities).

36. Attorney General Michael B. Mukasey, Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008), *available at* <http://www.justice.gov/archive/ag/speeches/2008/ag-speech-0807213.html> (stating that “although wars traditionally have come to an end that is easy to identify, no one can predict when this one will end or even how we’ll know it’s over”).

37. See *infra* Part I.B.

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

39. See *id.* at 510–13.

40. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

41. *Hamdi*, 542 U.S. at 534 (citing *Mathews*, 424 U.S. 319).

on remand.”⁴² Some scholars have concluded that Justice O’Connor’s opinion should be read quite narrowly, recognizing the right to legal counsel only for the status hearing to challenge a citizen’s classification as an enemy combatant.⁴³ In other words, the right to counsel would not extend to broader challenges, such as the President’s authority to detain citizen combatants.⁴⁴

In *Rasul v. Bush*,⁴⁵ the Court granted certiorari on the petition for a Writ of Habeas Corpus on behalf of two British citizens, Shafiq Rasul and Asif Iqbal, and an Australian citizen, David Hicks.⁴⁶ The three men were not notified of the charges against them and had not appeared before any type of military or civilian tribunal.⁴⁷ Further, the men had not been informed of their rights, nor had they been able to contact counsel.⁴⁸ The Supreme Court ruled that these detainees were entitled to invoke the statutory habeas jurisdiction of the federal courts to challenge their detention.⁴⁹

Perhaps most notably, in 2006, the Court decided the case of *Hamdan v. Rumsfeld*, involving a Yemeni national alleged to have served as Osama bin Laden’s personal driver.⁵⁰ Hamdan challenged his detention in federal court.⁵¹ In reply, the government filed a motion to dismiss, maintaining that the Detainee Treatment Act of 2005 (DTA)⁵² barred a detainee from seeking review in fed-

42. *Id.* at 539.

43. Yin, *supra* note 27, at 1293.

44. *Id.*

45. *Rasul v. Bush*, 542 U.S. 466 (2004).

46. David Hicks is an Australian citizen who converted to Islam and trained with al-Qaeda. Hicks was captured by the Afghan Northern alliance and sold to U.S. forces. As the first detainee charged under the MCA, Hicks pleaded guilty to “providing material support for terrorism.” After his conviction, Hicks was repatriated to Australia, where he served the remainder of his sentence. See Michael Melia, *Australian Gitmo Detainee Gets 9 Months*, WASH. POST, Mar. 31, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033100279_3.html; Carol J. Williams, *Terror Suspect Pleads Guilty; Australian David Hicks’ Admission Caps a Day of Legal Wrangling at the Guantanamo Tribunal*, L.A. TIMES, Mar. 27, 2007, at A1; Elise Labott, *U.S., Australia Reach Detainee Agreement*, CNN.COM, Nov. 26, 2003, <http://www.cnn.com/2003/LAW/11/26/guantanamo.hicks/index.html>.

47. *Rasul*, 542 U.S. at 472.

48. *Id.*

49. *Id.* at 483.

50. *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).

51. *Id.* at 567.

52. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2739, 2739–44, available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&>.

eral court.⁵³ The Supreme Court held that the military commission's procedure violated numerous aspects of U.S. and international law, including the Uniform Code of Military Justice (UCMJ)⁵⁴ and Geneva Conventions Common Article 3.⁵⁵ The Court held that the DTA applied only prospectively and that Hamdan retained the right, recognized in *Rasul v. Bush*, to challenge his detention.⁵⁶

In response to the Court's decision in *Hamdan*, Congress passed the Military Commissions Act (MCA) in 2006, authorizing "trial by military commission for violations of the law of war, and for other purposes."⁵⁷ Furthermore, the MCA attempted to definitively establish what constitutes a "lawful"⁵⁸ or "unlawful"⁵⁹ enemy combatant. Nevertheless, the MCA still faced challenges in the Supreme Court. In the consolidated cases of *Al Odah v. United States* and *Boumediene v. Bush*, the Court found the MCA to be unconstitu-

53. *Hamdan*, 548 U.S. at 572.

54. *Id.* at 620–21. The Court held that the commission's procedures failed to comply with UCMJ Article 36(b), 10 U.S.C. § 836(b), which required that the procedural rules that the President promulgated for military commissions and courts-martial be "uniform insofar as practicable."

55. *Id.* at 629–30 (holding that commission's procedures violated Geneva Conventions because commissions did not meet Common Article 3 requirement that detainee be tried by "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples").

56. *Id.* at 650–51.

57. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

58. Military Commissions Act of 2006 § 948(a) ("The term 'lawful enemy combatant' means a person who is—

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

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

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

59. *Id.* ("The term 'unlawful enemy combatant' means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.").

tional.⁶⁰ In doing so, the Court determined that constitutional habeas corpus rights applied to all Guantanamo detainees.⁶¹ Despite the seeming finality of this decision, *Boumediene*, like other Supreme Court cases involving the war on terror, left many questions open, including the scope of the executive's power to detain.⁶²

Shortly after his inauguration on January 22, 2009, President Barack Obama issued an executive order ordering the Secretary of Defense to take steps immediately sufficient to ensure that no new charges be referred to a military commission under the MCA and the Rules for Military Commissions.⁶³ Further, President Obama ordered the immediate halt of any military commission in which no judgment had been rendered, and of all proceedings pending in the United States Court of Military Commission Review.⁶⁴

The future of legal process for the Guantanamo detainees is unclear. Undoubtedly, it will undergo further modifications and changes.⁶⁵ Some have suggested eliminating the military tribunals and offering process to the detainees in Military Courts—martial or Article III courts.⁶⁶ Many have advocated for an entirely new legal system, including a National Security Court, which would consist of judges specifically trained in matters relating to terrorism and na-

60. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

61. *Id.*

62. See *id.* at 2276. See also Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. 1, 2 (2009); Benjamin Wittes, Editorial, *Congress's Guantanamo Burden*, WASH. POST, June 13, 2008, at A23.

63. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

64. See *id.* Even the President's order faced challenges. A military commission judge, Colonel James Pohl, ruled against the executive order in the case of Abd al-Rahim al-Nashiri, and continued with military proceedings. *Judge Won't Halt Hearing on USS Cole Suspect*, RICHMOND TIMES (Va.), Jan. 30, 2009, at A4. Abd al-Rahim al-Nashiri faced the death penalty for his participation in the 2000 bombing of the USS Cole. On February 2, 2009, the government withdrew charges against al-Nashiri, forgoing further action from the President. Carl Rosenberg, *Standoff Averted: Defense Official Dismisses Charges*, MIAMI HERALD, Feb. 6, 2009.

65. See, e.g., Waxman, *supra* note 62, at 8–10 (providing comprehensive description of options for legal process at Guantanamo Bay).

66. LIBERTY AND SECURITY COMM'N & COALITION TO DEFEND CHECKS AND BALANCES, THE CONSTITUTION PROJECT, A CRITIQUE OF "NATIONAL SECURITY COURTS" 4–5 (2008). But see Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 611 (2002) ("U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals and enemies. U.S. district courts are eminently unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11.").

tional security.⁶⁷ Others have called for the expansion of the jurisdiction of the Foreign Intelligence Surveillance Court.⁶⁸

Such a constantly evolving legal landscape presents great challenges to military attorneys. A defense lawyer has an ethical duty to provide his or her client with an assessment of the likelihood of different outcomes.⁶⁹ Some scholars and judges have maintained that defense counsel has a constitutional duty “to advise clients whether to plead guilty or proceed to trial, and, if necessary, to attempt to persuade clients to accept their advice.”⁷⁰ From a client-centered perspective, this allows the client to make an informed decision about how to proceed.⁷¹ Because of the unpredictable nature of the process, military defense attorneys have had difficulties presenting firm legal options to detainees. This has led to increased mistrust between Guantanamo military attorneys and their clients.⁷²

According to Major Mori, the defense attorney for David Hicks:

Stepping into it, I thought I was going to be involved in court-martials [sic]. I have plenty of experience dealing with court-martials and that’s [sic] the laws we would be using. Unfortunately what I found out [sic] that we were in something different, something completely made up and resurrected from 1942.⁷³

67. *E.g.*, Matthew Ivey, *A Framework for Closing Guantanamo Bay*, 32 B.C. INT’L & COMP. L. REV. 353, 367, 373 (2009); Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.

68. *See* PHILIP B. HEYMANN & JULIETTE N. KAYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 18, 51–52 (2005).

69. STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, §§ 4-5.1(a) to (b) (1993).

70. Steven Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 894 (1997) (discussing *Boria v. Keene*, 99 F.3d 492 (2d Cir. 1996)). *See also* *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992); Dan K. Webb, *The Responsibility of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 131, 133 (1996); Yin, *supra* note 27, at 1292.

71. *See* Zeidman, *supra* note 70, at 893–94.

72. *See infra* Part II. *But see* Charles J. Dunlap, Jr. & Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 420–25 (2008).

73. Transcript of interview with Major Mori on *Enough Rope*, With Andrew Denton (Australian Broadcasting Corporation television broadcast, Aug. 14, 2006), available at <http://www.abc.net.au/tv/enoughrope/transcripts/s1709428.htm>.

II. CHALLENGES PRESENTED BY THE DETAINEES

A. *Detainees Who Wish to Reject the Legal Process*

U.S. law recognizes a defendant's autonomy and allows a defendant to take many procedural steps that may be contrary to a defendant's interest.⁷⁴ In the case of detainees captured in the war on terrorism, defendants may wish to take actions contrary to their own interests in order to reject the legal process. Some detainee legal requests, if allowed, would compromise the ability of the already maligned military commissions system to reach just outcomes. Nevertheless, in the context of client-counseling and the efforts of a military lawyer to represent a detainee effectively, the interests of the detainees cannot be ignored. By their efforts to subvert the legal process, the detainees at Guantanamo presented further challenges to their military attorneys.

1. Detainees Who Wish to Dismiss Their Attorneys

Several detainees have made requests to dismiss their attorneys and represent themselves. The reasons behind these dismissals may not always be readily apparent. Omar Khadr, one of the youngest detainees in the war on terrorism, fired his military lawyers a week before he was to appear before a military tribunal to face the charge of murder.⁷⁵ His lead military attorney, Lieutenant Colonel

74. See *Johnson v. Zerbst*, 304 U.S. 458 (1937) (recognizing defendant's right to waive counsel). See generally John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Farett*, 6 SETON HALL CONST. L.J. 483, 490 (1996).

75. Omar Khadr, a Canadian citizen, was accused of murder for events involving a grenade killing a U.S. Army Special Forces medic, Sgt. First Class Christopher Speers, United States Army. See Colin Nickerson, *A Boy's Journey from Canada to Al Qaeda*, BOSTON GLOBE, Mar. 9, 2003, at A1. Separately, Khadr was also charged with planting roadside bombs in Afghanistan. *Id.* In 2002, U.S. military forces apprehended Khadr in Afghanistan when he was 15 years old. *Id.* Soon thereafter, Khadr was transferred to Guantanamo Bay. *Id.* The U.S. government first brought charges against Khadr on November 4, 2005. Charge Sheet, United States v. Omar Ahmed Khadr (Military Commission Feb. 2, 2007). On January 11, 2006, Omar appeared before a Military Commission, but the judge postponed the hearing pending decision on issues, including Khadr's right to choose his own attorney. Melissa A. Jamison, *The Sins of the Father: Punishing Children in the War on Terror*, 29 U. LA VERNE L. REV. 88, 128 n.216 (2008). Khadr boycotted an April 2006 hearing before the Military Commission. Tim Golden, *Boycott Threat Roils Guantanamo Hearing*, N.Y. TIMES, Apr. 6, 2006, at A14. Charges against Khadr have been dropped in the past. Order on Jurisdiction, United States v. Khadr, 1 Military Comm'n 152, 154 (2007). See also *Charges Dismissed Against Canadian at Guantanamo*, U.S. FED. NEWS, June 4, 2007.

Vokey,⁷⁶ stated that the firing stemmed from his distrust of American lawyers, as the United States is “responsible for his interrogation and his treatment under a process that is patently unfair.”⁷⁷ Such a sentiment demonstrates that Khadr may have been unable to separate his appointed attorney from the legal process that sought to detain him.⁷⁸

More recently, the self-described mastermind of the September 11, 2001 attacks, Khalid Sheikh Mohammed (KSM),⁷⁹ led a group of five detainees who unexpectedly told a military judge of their intentions to plead guilty, dismiss their military attorneys, and withdraw all pending motions filed on their behalf.⁸⁰ In making such a plea, KSM and his cohorts subjected themselves to a possible punishment of death.⁸¹ KSM notified the military judge during the proceeding that he was “not trusting any Americans.”⁸²

Some military lawyers suspect that the conduct of Guantanamo guards and interrogators has fueled detainee decisions to dismiss attorneys.⁸³ One civilian lawyer who represents thirty-five detainees has maintained that interrogators have told detainees that certain defense lawyers are Jewish or homosexual.⁸⁴ Further, as previously discussed, attorneys have noted that attorney-client relationships

76. Lieutenant Colonel Vokey also defended Staff Sgt. Frank Wuterich, the Marine squad leader charged with unpremeditated murder in the deaths of Iraqi civilians in Hadiatha on Nov. 19, 2005. Diane Jennings, *Retired Marine is still fighting Attorney critical of U.S. military plans to keep defending servicemen*, DALLAS MORNING NEWS, Dec. 9, 2008, at 1A.

77. Carol Rosenberg, *Captive Commits Suicide in Cell*, MIAMI HERALD, May 31, 2007.

78. See Robert Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1035–36 (1981).

79. KSM claimed responsibility for the September 11, 2001 attacks as well as the beheading of Wall Street Journal reporter Daniel Pearl. KSM was captured in Pakistan in 2003 and transferred to Guantanamo in 2006. *Khalid Sheikh Mohammed Confesses to Daniel Pearl's Execution*, FOX NEWS (Mar. 15, 2007), available at <http://www.foxnews.com/story/0,2933,258907,00.html>.

80. Alan Gomez, *Five Accused in 9/11 Ask to Plead Guilty; Defendants Seek to End Tribunal at Guantanamo*, USA TODAY, Dec. 9, 2008, at 8A.

81. William Glaberson, *U.S. Said to Seek Execution for 6 in Sept. 11 Case*, N.Y. TIMES, Feb. 11, 2008, at A1; 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.

82. Bryan Bender & Farah Stockman, *Five Try to Plead Guilty in 9/11 Attacks*, BOSTON GLOBE, Dec. 9, 2008, at A1.

83. William Glaberson, *Many Detainees at Guantanamo Rebuff Lawyers*, N.Y. TIMES, May 5, 2007.

84. JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 204 (2006) (mentioning that interrogators have told detainees that their lawyers are Jewish); Luban, *supra* note 19, at 1994–95 (mentioning that interrogators have told detainees that their lawyers are homosexual).

have deteriorated as the detainee's legal cause suffered setbacks in Congress and the courts, and policies have been enacted to limit lawyer access to detainees.⁸⁵

2. Detainees Who Wish to "Boycott" Trial

As of early 2009, five detainees have threatened to boycott, or fail to appear at, their trials for a variety of reasons.⁸⁶ The first boycott in Guantanamo Bay involved Ali al-Bahlul, an alleged bodyguard of bin Laden.⁸⁷ Al-Bahlul was denied the opportunity to represent himself after making such a request at his first pretrial proceeding in 2004.⁸⁸ In January 2006, he held up a piece of paper with the word "boycott" written in English and Arabic and then repeated the word "boycott" three times aloud in English.⁸⁹

Similarly, Omar Khadr also initially threatened to boycott his trial, announcing his intentions in April 2006.⁹⁰ According to a variety of sources, Khadr threatened to boycott in order to challenge the legitimacy of the proceedings.⁹¹ His attorney, Lieutenant Colonel Vokey, suggested that Khadr may have initiated the boycott for entirely different reasons.

According to Lieutenant Colonel Vokey, just before a pretrial hearing, Khadr was moved from the communal living at Guantanamo to the maximum security Camp Five, where his privileges were limited to spending two hours a day outside of his cell.⁹² Immediately following the move, Khadr became uncooperative with his attorney.⁹³ Captain Wade Faulkner reported a similar occur-

85. See Luban, *supra* note 19, at 1997.

86. See Matthew Bloom, "I Did Not Come Here To Defend Myself": Responding to War on Terror Detainees' Attempt To Dismiss Counsel and Boycott the Trial, 117 YALE L.J. 70, 80–84 (2007) (describing various instances of detainee boycotts).

87. See David S. Cloud, *Terror Suspect Upsets Plan to Resume Trials in Cuba*, N.Y. TIMES, Jan. 12, 2006, at A24.

88. Scott Higham, *Detainee Tells Hearing He Was Member of Al Qaeda*, WASH. POST, Aug. 27, 2004, at A3.

89. Record of Trial at 60, United States v. al-Bahlul, No. 04-0003 (Military Comm'n Jan. 11, 2006).

90. Golden, *supra* note 75, at A14; Michelle Shephard, *Khadr Vows Boycott As Shouts Rock U.S. Court; Toronto Teen Moved to Solitary Confinement; Accused Terrorist Demands "Humane and Fair" Treatment*, TORONTO STAR, Apr. 6, 2006, at A10.

91. Human Rights First, *Khadr Boycotts Hearings, Challenges Conditions of Confinement*, Apr. 5, 2006, http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040506-patel.aspx.

92. Michelle Shephard, *The View from GUANTANAMO: "They Just Struggle to Maintain Hope"*, TORONTO STAR, Feb. 4, 2007, at A08.

93. Telephone Interview with Colby C. Vokey, Lieutenant Colonel, United States Marines Corps (Apr.–May 2009) [hereinafter LtCol Vokey Interview].

rence with his client, Sufyan Barhoumi, an Algerian charged with planning attacks against U.S. military units in Afghanistan.⁹⁴ Barhoumi told Captain Faulkner that he would become uncooperative if he was not moved back to communal living.⁹⁵

3. Detainees Who Wish to Use the Court as a Political Forum

Several detainees have made clear their intentions to use the court as a political forum.⁹⁶ For example, Binyam Ahmed Muhammed noted that “what happens in America happens around the world,” indicating his awareness of the political implications of his actions.⁹⁷ Like Khadr and others before him, Muhammed also attempted to boycott his trial and dismiss his attorneys.⁹⁸ Muhammed informed the Court that he “wish[ed] [for] no representation I didn’t ask for a trial. You can kill me tomorrow. I really don’t care.”⁹⁹

Although not a detainee at Guantanamo, Zacarias Moussaoui is another example of a defendant in a terrorism case who sought to use the legal process to make a political statement.¹⁰⁰ Moussaoui claimed to be the so-called twentieth hijacker in the September 11 attacks and was tried in federal district court in Virginia.¹⁰¹ On the first day of jury selection, Moussaoui attempted to fire his attorneys, declaring “I am al Qaeda. They are American. They are my enemies.”¹⁰² Moussaoui continued outbursts and diatribes throughout his proceedings.¹⁰³ On April 3, 2006, Moussaoui was found to be eligible for the death penalty.¹⁰⁴ Before leaving the courtroom af-

94. Carol J. Williams, *A Dilemma for the Defenders*, L.A. TIMES, Apr. 30, 2006, at A11.

95. *Id.*

96. Toni Locy, “*Terrorism on Trial*”: *The Trials of al Qaeda: Federal Court vs. Military Commission*, 36 CASE W. RES. J. INT’L L. 507, 507–12 (2004). See generally Eric Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75 (2005) (discussing political trials, though not trials involving terrorists specifically).

97. Record of Trial at 84, *United States v. Muhammad*, No. 05-0009 (Military Comm’n Apr. 6, 2006).

98. *Id.* at 79.

99. *Id.* at 54, 82.

100. *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003), *aff’d in part, vacated in part*, 365 F.3d 292 (4th Cir. 2004).

101. *Id.*

102. *Moussaoui*: “*I am al Qaeda*,” CNN.COM, Feb. 6, 2006, <http://www.cnn.com/2006/LAW/02/06/moussaoui.trial/index.html>.

103. See, e.g., Neil A. Lewis, *Moussaoui Tells Court He’s Guilty of a Terror Plot*, N.Y. TIMES, Apr. 23, 2005, at A1.

104. James Gordon Meek, *Jurors find Moussaoui Eligible for the Death Penalty*, DAILY NEWS (N.Y.), April 3, 2006.

ter being found eligible for the death penalty, he shouted, “You will never get my blood” and “God curse you all!”¹⁰⁵ On May 4, 2006, he was sentenced to life in prison without parole.¹⁰⁶ At the conclusion of the proceedings, Moussaoui clapped his hands and said, “America, you lost I won.”¹⁰⁷

KSM likewise attempted to use the court as political forum.¹⁰⁸ KSM led a group of five detainees in drafting a letter to a military judge seeking to confess to the terrorist events of September 11, 2001.¹⁰⁹ Indicating their desire to use the court as a political forum, KSM and his cohorts submitted the letter on November 4, 2008, the day Barack Obama was elected President of the United States.¹¹⁰ According to one observer, “What Khalid Sheikh Mohamed wants is martyrdom. And why should we hand him martyrdom on a platter in way that can be seen in the wider Muslim world as an unfair process?”¹¹¹

A detainee’s desire to use the court as a political forum presents many challenges to military defense attorney. On the one hand, allowing a detainee to make a mockery of the system may prevent the administration of justice. On the other hand, ignoring detainee desires may be contrary to ethical rules, as will be discussed in subsequent sections.

B. Barriers to Establishing Attorney-Client Rapport

In addition to detainee efforts to reject the legal process at Guantanamo, many other barriers exist to establishing attorney-client rapport. Numerous detainees suffer from mental health problems. Further, detainees have expressed inherent mistrust for “enemy officers” who serve as their attorneys. The al Qaeda training manual orders officers to lie to attorneys about the conditions

105. Mark Coultan, *Moussaoui Near to Death Row as Bereaved Prepare to Testify*, SYDNEY MORNING HERALD, Apr. 5, 2006, at 13 (quotations omitted).

106. Adam Liptak, *Moussaoui Verdict Highlights Where Juries Fear To Tread*, N.Y. TIMES, May 5, 2006, at A21.

107. Kevin Johnson, *Terrorist Moussaoui Gloats, “I won,”* USA TODAY, May 4, 2006. See Editorial, *Nobles and Knaves*, WASH. TIMES, May 6, 2006, at A12. Judge Brinkema responded by telling him that he would “die with a whimper” and “never again get a chance to speak.” *Id.*

108. See Edward A. Adams, *Moussaoui v. United States: How Due Process Thwarted A Courtroom Jihad*, 93 A.B.A. J. 18 (2007).

109. Bryan Bender & Farah Stockman, *Five Try to Plead Guilty in 9/11 Attacks*, BOSTON GLOBE, Dec. 9, 2008, at A1.

110. *September 11 Defendants at Guantanamo Say They Want to Confess*, VOICE OF AMERICA NEWS, Dec. 8, 2008.

111. *Id.* (quoting Joanne Mariner of Human Rights Watch).

of confinement.¹¹² These issues present a variety of challenges to attorneys attempting to represent a detainee effectively.

1. Mental Health Problems

There have been increasing reports of mental illness in Guantanamo Bay. Long periods of detention, periods of solitary confinement, certain interrogation tactics, and long separations from family may have led to serious mental health consequences.¹¹³ Further, many of the detainees may have had mental health problems prior to imprisonment at Guantanamo.¹¹⁴ Mental health issues have presented further complications to attorney-client relationships.¹¹⁵

Model Rule 1.14 may apply when “a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or some other reason.”¹¹⁶ When a lawyer determines that a client may suffer from some sort of diminished capacity, an attorney may take protective action on behalf of the client, provided no guardian exists.¹¹⁷ The Model Rules of Professional Conduct (Model Rules) advise a lawyer to maintain an attorney-client relationship as normally as possible: “[I]f the client lacks a guardian or legal representative, the lawyer may be called upon to determine if her client is sufficiently incompetent or incapacitated to justify her

112. See Donna Miles, *Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay*, AMER. FORCES PRESS SERVICE, June 29, 2005 (noting that manual “directs detainees to insist on proving that torture was inflicted and to complain of mistreatment while in prison” as well as “how to lie”) (internal punctuation omitted).

113. In 2003, there were 350 acts of self-harm, mass suicide attempts, and widespread hunger strikes resulting in force-feeding. PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE* 52–53 (2005); see also Michelle Shephard, *MD Says Terror Suspect May Die; Stopped Eating 75 Days Ago in Detention Center; Wants Medical Treatment, Visits with Children*, TORONTO STAR, Sept. 20, 2005, at A08 (noting that Khadr, who had been hospitalized, was participating in a hunger strike “to protest the fact he’s being held without charges, and the ‘military’s disrespect of Islam’”); Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE, Aug. 24, 2006, at 60 (stating that Khadr had contemplated suicide and that guards confiscated his possessions as a precautionary measure).

114. Susan Okie, *Glimpses of Guantanamo—Medical Ethics and the War on Terror*, 353 NEW ENG. J. MED. 2529, 2534 (noting that fifteen percent to eighteen percent of detainees arrived at Guantanamo with mental illness).

115. See Neil A. Lewis, *A Nation Challenged: The Terror Suspect; Defense Seeks Extensive Tests on Mental Health of Suspect*, N.Y. TIMES, Apr. 25, 2002, at A16.

116. MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (1983).

117. *Id.* R. 1.14(b).

taking over as de facto guardian.”¹¹⁸ Indeed, many military defense attorneys have questioned the capacity of their clients to make informed decisions.¹¹⁹

Further, Sixth Amendment issues are presented if a defendant is found incompetent to stand trial.¹²⁰ Many military lawyers have sought to have mental health evaluations for precisely this purpose.¹²¹ The doctors, however, who examine detainees for competency to stand trial also participate in detainee interrogation operations.¹²² There are no reports of a Guantanamo doctor finding a detainee unfit to stand before the military commissions.¹²³

2. Distrust of Military Attorneys

Detainees have expressed great distrust for detailed military attorneys. One detainee stated that he would proceed with trial rather than challenge the legitimacy of the system if only he were granted the right to be represented by a Yemeni attorney.¹²⁴ Additionally, the constant changes in legal process and regulations at Guantanamo have further exacerbated detainee distrust of military attorneys. Several military and civilian lawyers in Guantanamo have noted that changes in policy have caused attorneys to look powerless in their clients’ eyes.¹²⁵

Many attorneys have alleged that prison officials engaged in a misinformation campaign with detainees.¹²⁶ Reports have surfaced that interrogators have pretended to be lawyers in the hopes of obtaining information from detainees.¹²⁷ Obviously, breakdowns in attorney-client openness can occur in such an environment.

Finally, a detainee’s distrust of his lawyer may stem simply from the lawyer’s participation in the U.S. military. For example, during his boycott, al-Bahlul remarked that he could not trust an “enemy” officer or a volunteer civilian seeking personal fame as his defense

118. *Id.* R. 1.14; Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 244 (1998).

119. See Lewis, *supra* note 115.

120. See generally Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993).

121. Rein, *supra* note 118, at 244.

122. LtCol Vokey Interview, *supra* note 93.

123. Shephard, *supra* note 92, at A08.

124. Scott Higham, *Detainee Tells Hearing He Was Member of Al Qaeda*, WASH. POST, Aug. 27, 2004, at A3.

125. Luban, *supra* note 19, at 1997–99.

126. *Id.* at 1994–95.

127. *Id.* at 1994.

counsel.¹²⁸ Al-Bahlul concluded that he would only be satisfied with self-representation or the ability to select his own foreign attorney.¹²⁹ Such an embedded mindset in the detainees presents great difficulty in establishing attorney-client rapport.

3. The Manchester Document

In 2000, while searching computer files found in the home of a known al Qaeda operative, police in Manchester, England discovered a document that has come to be known as the “al Qaeda training manual” or “Manchester document.”¹³⁰ The contents of the manual were translated into English and used as evidence in the 2001 trial of the terrorists who bombed the U.S. embassies in Tanzania and Kenya in 1998.¹³¹

Most significantly, the Manchester Document contains instructions regarding counter-interrogation techniques, including how to lie and how to minimize one’s role in a terrorist plot.¹³² Further, the handbook preaches that operatives should level charges of mental abuse, torture, and religious desecration at interrogators and custodians.¹³³ If a person is captured, the manual requires that “[a]t the beginning of the trial . . . the brothers must insist on proving that torture was inflicted on them by state security before the judge. Complain of mistreatment while in prison.”¹³⁴

The U.S. government believed that the practices suggested in the Manchester document have pervaded the prison population at Guantanamo and beyond.¹³⁵ For example, Ahmed Omar Abul Ali, accused of planning to assassinate President George W. Bush,¹³⁶ told a district court judge in Virginia that he had been brutally whipped by U.S. interrogators.¹³⁷ A subsequent physical examination of Ali revealed no physical mistreatment on the defendant’s

128. Transcript of Record at 23–24, *United States v. al Bahlul*, No. 04-0003 (Military Commission Aug. 26, 2005 & Jan. 11, 2006).

129. *Id.*

130. Miles, *supra* note 112.

131. Sue Reid, *Manual for Murder*, DAILY MAIL (London), July 16, 2005, at 7.

132. Rowan Scarborough, *Captives Told to Claim Torture*, WASH. TIMES, May 31, 2005, at A1.

133. *Id.*

134. *Id.*

135. *Id.*

136. See Indictment, *United States v. Abu Ali*, Crim. No. 1:05CR53 (E.D. Va. filed Feb. 3, 2005) (alleging that Abu Ali and co-conspirator plotted to assassinate President Bush by getting close to him on the street or by detonating a car bomb). See also Jerry Markon, *N.Va. Man Indicted in Plot Against Bush*, WASH. POST, Sept. 9, 2005, at A04.

137. Scarborough, *supra* note 132.

back or any other part of his body.¹³⁸ Government officials also believed that stories of guards at Guantanamo flushing the Koran down the toilet to be part of an al Qaeda campaign to spread misinformation, however the Pentagon later admitted to desecration of the Koran.¹³⁹ The Manchester document presents problems to military attorneys assigned to defend Guantanamo detainees. How can a military attorney be certain that a detainee is telling the truth when such a document may govern his actions?

III. CHALLENGES ARISING FROM TENSION IN THE MODEL RULES

The central duty of a defense lawyer is to “further the interests of . . . clients by all lawful means.”¹⁴⁰ Beyond this, however, there are several sets of rules and models to govern a defense attorney’s pursuit of carrying out this duty. By the “zealous representation” of a client, a lawyer serves the court and ensures the proper administration of justice.¹⁴¹ Many advocate the client-centered model as the best way to achieve client goals.¹⁴² Yet when considering the attorney-client relationship between military attorneys and detainees captured in the course of the war on terrorism, these rules no longer seem so straightforward. In fact, as discussed in subsequent sections, many factors may complicate a military lawyer’s desire

138. *Id.*

139. Richard A. Serrano & John Daniszewski, *Dozens Have Alleged Koran’s Mishandling*, L.A. TIMES, May 22, 2005, at A1. Detainees staged hunger strikes when reports of the desecration spread. *Id.* Detainees complained that soldiers tore the book into pieces, urinated on the book, scrawled obscenities inside it, had a guard dog carry it around, flushed it in the toilet, and threw it on the floor and used it as a carpet. *Id.* See also James Rainey & Mark Mazzetti, *Newsweek Retracts Its Article on Koran*, L.A. TIMES, May 17, 2005, at A1. The Pentagon called the Newsweek article “irresponsible” and “demonstrably false.” The White House indicated that the article had “serious consequences” and that the “image of the United States abroad has been damaged.” *Id.* Less than two weeks later the Pentagon confirmed the alleged desecration of the Koran. Eric Schmitt, *Military Details Koran Incidents at Base in Cuba*, N.Y. TIMES, June 4, 2005, at A1; Richard A. Serrano, *Pentagon: Koran Defiled*, L.A. TIMES, June 4, 2005, at A1.

140. *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973).

141. The Preamble to the Model Rules states that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.” MODEL RULES OF PROF’L CONDUCT preamble (1983).

142. See generally DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE, & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed., West 2004).

(and duty) to represent a detainee effectively. Should the norms and rules that apply to attorney conduct elsewhere not apply in Guantanamo?

Military defense attorneys have identified conflicts between the Model Rules and military rules of conduct and other regulations.¹⁴³ The client-centered model may not apply to the particular circumstances of Guantanamo detainees and military defense lawyers. The military and government have placed career and institutional pressure on military defense attorneys. Finally, military attorneys have faced internal and personal conflicts.

A. *Applying the Model Rules*

Despite the seemingly straightforward principles of lawyering envisioned by the Model Rules, many military attorneys have experienced great difficulty in following these rules when representing a detainee.¹⁴⁴ Examining the spirit and purpose of the Model Rules from a high level of generality only begins to reveal some of conflicts experienced by military defense attorneys defending Guantanamo detainees. Further examination of specific rules of conduct exposes additional issues. The efforts of military defense attorney to resolve these conflicts have been met with varying degrees of success.

1. Broad Application of the Model Rules

Undoubtedly, many of the detainees in Guantanamo espouse different values and social concerns than their military attorneys. This may complicate a military lawyer's ability to zealously pursue a detainee's interest. Nevertheless, the Model Rules assume that both the client and the lawyer are autonomous individuals.¹⁴⁵ Thus, a lawyer's values and social concerns deserve respect. Indeed, the Model Rules provide that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."¹⁴⁶

143. See generally C. Peter Dungan, *Avoiding "Catch-22s": Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31 (2006) (describing various conflicts between state ethical rules and military rules).

144. *Id.* at 35.

145. DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE, & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282 (West 1991) ("you do not completely surrender your autonomy by becoming a lawyer"); BINDER ET AL., *supra* note 142, at 391 ("[Y]ou too are an autonomous individual whose values and broader social concerns deserve respect.").

146. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

The Model Rules emphasize that a lawyer “should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”¹⁴⁷ The Model Rules encourage a lawyer to “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful ethical measures are required to vindicate a client’s cause or endeavor.”¹⁴⁸ This is a difficult proposition given the many challenges at Guantanamo.

2. Specific Application of the Model Rules

Establishing attorney-client communication has been one of the primary challenges for military attorneys attempting to comply with the Model Rules. In 2004, the military issued a protective order greatly limiting attorney-client communications.¹⁴⁹ The Protective Order prohibited the sharing of any classified information with the client.¹⁵⁰ Further, detainees were not allowed to speak with their attorneys over the telephone and instead needed to communicate in person or via mail.¹⁵¹ Given the logistically difficult and expensive nature of travel to Guantanamo Bay, face-to-face communication was not always a viable option.¹⁵² Communication by mail, at first glance, seemed to be the most effective way of discussing matters regarding a case with a client.

Communication by mail also presented obstacles. On September 15, 2006, a federal district court judge in the District of Columbia issued a memorandum order to allow the review of attorney-detainee mail communications.¹⁵³ New regulations established what has been called a “privilege team.”¹⁵⁴ The “privilege team” was authorized to read all mail from an attorney to a detainee.¹⁵⁵ If the “privilege team” determined that a letter contained “unneces-

147. *Id.* R. 2.1 cmt. 1.

148. *Id.*

149. *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 180 (D.D.C. 2004); Mark Denbeaux & Christa Boyd-Nafstad, *Attorney-Client Relationship in Guantanamo Bay*, 30 *FORDHAM INT’L L.J.* 491, 500–01 (2006); Brendan M. Driscoll, Note, *The Guantanamo Protective Order*, 30 *FORDHAM INT’L L.J.* 873, 874 (2006).

150. *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 180.

151. *See id.* at 190.

152. *See* Luban, *supra* note 19, at 1989–90.

153. *See Hicks (Rasul) v. Bush*, 452 F. Supp. 2d 88, 94 (D.D.C. 2006).

154. *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 186–87 (requiring that written correspondence from attorney to client be first sent to privilege review team, which in turn should pass authorized materials to clients).

155. *Id.*

sary outside information,” the letter would not be forwarded to a detainee.¹⁵⁶

Oftentimes during trials of military detainees, military attorneys will become privy to incriminating classified information that cannot be shared with a client.¹⁵⁷ A rule that prohibits one accused of a crime to see evidence that will be used against him has shocked many lawyers and commentators.¹⁵⁸ These restrictions aspire to provide a “reasonable balance” of government requirements and “the right of the accused to effective representation.”¹⁵⁹

Regardless of the needs of national security, many feel that such a system contradicts the Model Rules.¹⁶⁰ Model Rule 1.4 requires that an attorney keep a client updated on all matters.¹⁶¹ Oftentimes, “outside information” greatly implicated a detainee’s case.¹⁶² Lieutenant Colonel Vokey noted that his client would often ask him direct questions about outside current events.¹⁶³ According to another military defense attorney:

Oftentimes [my client] would ask me questions he knew the answers to. He was testing me, so I discussed the events in violation of the military order. I never discussed classified information. But I viewed the prohibition on discussing outside information as an illegal order that conflicted with a greater duty.¹⁶⁴

While it is beyond the scope of this Article to discuss whether the military order was illegal, this statement underscores the senti-

156. *Id.*

157. Detailed Defense Counsel were prohibited from sharing incriminating classified information with the client or with any other counsel who do not have clearance and who were not present during the introduction of such evidence in closed session. See Military Comm’n Order No. 1, at 8–9 (Dep’t of Defense Mar. 21, 2002), www.defense.gov/news/Mar2002/d20020321ord.pdf.

158. Emanuel Gross, *Trying Terrorists—Justifications for Differing Trial Rules: The Balance Between Security Considerations and Human Rights*, 13 *IND. INT’L. & COMP. L. REV.* 1, 96 (2002).

159. See Col. Frederick L. Borch III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials: A Rebuttal to Military Commissions: Trying American Justice*, *ARMY LAW.*, Nov. 2003, at 10, 14.

160. See Dungan, *supra* note 143, at 40.

161. MODEL RULES OF PROF’L CONDUCT R 1.4 (1983).

162. *Cf. id.* (requiring that client be kept informed of all matters, including outside information, because such information may impact detainee’s case).

163. LtCol Vokey Interview, *supra* note 93.

164. Interview with Anonymous, Military Defense Attorney (on file with Author). Some of the military defense attorneys whom I interviewed for this Article prefer to remain anonymous. The reader is free to assign whatever weight he or she deems appropriate to this anonymous quotation.

ments of many defense attorneys who have represented Guantanamo detainees: the current system employed in the military commissions, in some ways, may contradict the Model Rules.

3. Resolving Conflicts with Model Rules

Prior to the establishment of Guantanamo as a detention facility, ethics opinions from state bar associations seem to provide harbor for the conflicting nature of military practice and the Model Rules.¹⁶⁵ Further, each individual service has its own rules of professional conduct and the military takes the position that these rules supersede those of state bars.¹⁶⁶ In 2003, however, the National Association of Criminal Defense Lawyers (NACDL) concluded that defense attorneys could not ethically participate in the military commissions.¹⁶⁷ Some state bars have insisted that state ethical rules take precedence over military rules, often calling for withdrawal in cases of conflict.¹⁶⁸

In an effort to resolve ethical conflicts, some military lawyers have sought advisory ethics opinions from state bar associations and ethics experts.¹⁶⁹ The ethical opinions have offered conflicting results regarding the representation of detainees.¹⁷⁰ While some states have allowed military defense attorneys to continue to represent detainees, other state bar associations have called for attorney withdrawal.¹⁷¹ Even in the face of these opinions, military

165. See Dungan, *supra* note 143, at 32–33.

166. U.S. DEP'T OF ARMY, ARMY REGULATION 27-26, RULES OF PROF'L CONDUCT FOR LAWYERS R. 8.5(f)(1) (1992) (stating that whenever a conflict between the Army Rules and a state rule cannot be resolved, "these Rules will govern the conduct of the lawyer in the performance of the lawyer's official responsibilities"); DEP'T OF NAVY, JAG INSTRUCTION 5803.1C, PROF'L CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOC. GEN., R. 8.5 cmt. 2 (2004) (stating that "these Rules supersede any conflicting rules applicable in jurisdictions in which the covered attorney may be licensed"). DEP'T OF AIR FORCE, TJS-2, AIR FORCE RULES OF PROF'L CONDUCT R. 3 (2002) Air Force Rules are silent on the precedence of the rules over state rules. *Id.*

167. NACDL Ethics Advisory Committee, Op. 03-04, at 15 (2003).

168. See, e.g., Mich. Op. RI-172, at 1 (1993) (arguing that Michigan rule of imputed disqualification, based on ABA Model Rule 1.10, applies to military legal assistance offices, even though military rules specifically disavow imputed disqualification; and failing to mention Model Rule 8.5).

169. See Luban, *supra* note 19, at 2008.

170. For example, Lieutenant Colonel Bradley obtained ethics opinions indicating that continued representation of her detainee-client would present a disqualifying conflict of interest because funding requests would have to be approved by an adversary attorney. *Id.* at 2007–08.

171. See *id.* at 2007–08. An opinion from the State Bar of California held that Lieutenant Commander William Keubler could no longer represent his detainee-

commission policy has limited opportunity for military lawyers to withdraw.¹⁷²

Lieutenant Colonel Vokey described in-depth his ongoing personal battle concerning the conflict with the Model Rules and his zealous defense of Kahdr:

All emails and phone calls were being monitored. The Navy-Marine Corps Computer Intranet (NMCI) requires that you sign a statement that computer can be monitored at any time for any purpose. This was a huge problem in Guantanamo. I guarantee that my phone was being listened to when I called overseas to Pakistan. I'm sure the Patriot Act kicked in. What are the ethical considerations when you suspect your phone calls are being monitored? I could have been disbarred.¹⁷³

Rule 1.6 of the Model Rules implicates a duty of confidentiality between an attorney and a client.¹⁷⁴ What is a military defense attorney to do when he knows that confidentiality is constantly in jeopardy?

B. *Attempting to Apply the Client-Centered Model*

As a baseline for advising clients, many lawyers rely on the client-centered model.¹⁷⁵ The client-centered counseling model offers the lawyer techniques for developing open communication with clients. The underlying assumption is that the lawyer who follows the client-centered model should be able to counsel a client in

client, given his client's desire to dismiss him. See Bloom, *supra* note 86, at 84. In contrast, the Kentucky State Bar found no ethical dilemma in Lieutenant Colonel Bryan Broyle's representation of his detainee-client. *Id.*

172. 32 C.F.R. § 9.4(c)(4) (2006) (requiring that "the Accused must be represented at all relevant times by Detailed Defense Counsel"); 32 C.F.R. § 13.3(c)(2) (2006) (requiring that "Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself").

173. LtCol Vokey Interview, *supra* note 93.

174. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

175. The creation of the client-centered model to counseling was initiated by concerns that traditional lawyering placed clients in an unequal or subordinate position with the lawyer. As a result, the client was thought to be overwhelmed by the power represented in the lawyer's position and, therefore, subject to manipulation by the lawyer. According to many, the American Bar Association's Model Rules have embraced the client-centered approach as, perhaps, a reaction to the cause lawyering of the 1960s and 1970s. Some scholars have recently compared the client-centered approach to the cause-lawyering approach in the context of representing Guantanamo detainees. See generally Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008); Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347 (2009); Luban, *supra* note 19.

a way which empowers the client to make informed decisions.¹⁷⁶ But, given the complexities and challenges facing military attorneys defending Guantanamo detainees, perhaps the client-centered model is not the most appropriate. The following paragraphs will attempt to apply elements of the client-centered model to the experience of military defense attorneys in Guantanamo Bay. The client-centered model provides a rough framework to address the so-called difficult client, differences in cultural norms between an attorney and a client, and differences in religious beliefs.

1. The Difficult Client

Proponents of the client-centered model recognize that the model may not work for a difficult client.¹⁷⁷ However, this may be the most applicable category to discuss in the context of detainees captured in the course of warfare with extremists, proponents of the client-centered model recognize that there is a class of clients known as the “atypical or difficult client.”¹⁷⁸

Advocates of the client-centered model define a difficult client as one who refuses to participate effectively in the discussion of the case, who will not make eye contact with the lawyer, and who displays an inappropriate lack of concern for the seriousness of the issues which he or she faces.¹⁷⁹ Furthermore, a difficult client may refuse or be reluctant to commence an interview or to discuss a particular topic.¹⁸⁰ Certainly, the detainees in Guantanamo have all displayed attributes of the so-called difficult clients. Some difficult clients, according to advocates of the client-centered model, may display signs of psychological impairment and need professional psychiatric assistance that a lawyer is unqualified to give.¹⁸¹

These appraisals of the client-centered model have endured scholarly criticism.¹⁸² One scholar has noted that the client-centered model does not provide enough emphasis on the race of the client or the race of the lawyer.¹⁸³ Many of the traits of the so-called

176. BINDER ET AL., *supra* note 142, at 4–5.

177. *Id.* at 237–56.

178. *Id.* at 99–100, 247.

179. *Id.* at 237.

180. *Id.*

181. See Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 537 (“Much has been written on the topic of defining and recognizing competence, yet the concept remains elusive.”).

182. See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 376–80 (1997).

183. *Id.*

difficult clients are in fact manifestations of cultural differences or misunderstandings. For these reasons, examination of the cultural issues inherent in the representation of Guantanamo detainees may be relevant.

2. Cultural Issues

For several cultural reasons, Guantanamo detainees and a military lawyer may have difficulty communicating effectively. Often, detainees do not speak very much English, if any at all.¹⁸⁴ Further, most of the U.S. military lawyers detailed to represent detainees do not speak the languages of the detainees.¹⁸⁵ Accordingly, often times, client counseling must occur through an interpreter, creating difficulties in establishing rapport and trust between an attorney and client.

Perhaps most notably, many of the detainees at Guantanamo Bay fundamentally disagree with U.S. policies. A leading authority on the client-centered model suggests that discussing personal moral concerns with a client may alleviate or resolve differences in world view.¹⁸⁶ Nevertheless, this scenario seems impractical in the case of detainees captured in the course of the war on terrorism.

One proponent of the client-centered model has opined that the model requires that a balance be struck between moral blindness and moral domination.¹⁸⁷ In the case of Guantanamo detainees, it is conceivable that moral disagreement with a detainee's attitude toward the United States could be so strong that most military officers would seek to withdraw. Nevertheless, perhaps a military lawyer's concern for providing the accused with an adequate defense will override philosophical differences.

3. Religious Differences

Many challenges may arise between detainees and military defense attorneys due to differences in religious beliefs. Virtually all

184. Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 8–9 (2003).

185. See Gail Gibson & Scott Shane, *Contractors Act as Interrogators; Control: The Pentagon's Hiring of Civilians to Question Prisoners Raises Accountability Issues*, BALTIMORE SUN, May 4, 2004, at 1A (“At an October Senate hearing, a Pentagon official said that staffing shortages, particularly of Arabic linguists, had forced the Department of Defense to hire contractors not only as interpreters but for interrogation work as well. ‘We do use contractors as a means to hire linguists and interrogators,’ said Charles Abell, principal deputy undersecretary of defense for personnel and readiness.”).

186. BINDER ET AL., *supra* note 142, at 293–95.

187. *Id.* at 295.

of the detainees in Guantanamo Bay practice Islam. Fewer than one percent of U.S. uniformed military personnel identify with the Muslim faith.¹⁸⁸ Differences between a Western and the Muslim lifestyle may further inhibit an attorney-client relationship.¹⁸⁹

For periods of time, religion had been used as a pressure point in Guantanamo Bay, assisting interrogators in discovering intelligence information from detainees.¹⁹⁰ In an October 11, 2002 memorandum drafted by the Guantanamo interrogation unit's lawyer, Lieutenant Colonel Diane Beaver opined: "Forced grooming and removal of clothing are not illegal, so long as it is not done to punish or cause harm, as there is a legitimate governmental objective to obtain information"¹⁹¹ The memorandum further stated that removal of religious items or published material did not implicate the First Amendment because detainees are not U.S. citizens.¹⁹² In January 2003, new interrogation guidelines were approved that seemed to extend some further religious protections to detainees:

Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g. the Koran) are protected under international law Although the provisions of the Geneva convention are not applicable to interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.¹⁹³

Various allegations of religious abuse at the hands of Guantanamo interrogators and guards exacerbated religious tensions between detainees and military attorneys. According to one detainee,

188. Lorraine Ali, *Muslim Warriors—For America*, NEWSWEEK, Oct. 15, 2001, at 40 (estimating 15,000 Muslims in the U.S. military and reserves); Faye Fiore & Eric Slater, *War with Iraq/ The Armed Forces; Muslim GIs Also Battle Prejudice*, L.A. TIMES, Mar. 30, 2003, at 15 (describing feelings of alienation by Muslim members of U.S. military).

189. See Susan Page, *Survey: Suspicion Separates Westerners, Muslims; Poll of Several Countries Finds "Complete Misperceptions"*, USA TODAY, June 23, 2006, at A7.

190. Carol Rosenberg, *Captives Allege Religious Abuse*, MIAMI HERALD, Mar. 6, 2005, at 1A.

191. Memorandum from Diane E. Beaver, Staff Judge Advocate, to Commander, Joint Task Force 170, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002) at 6, available at <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf>.

192. *Id.*

193. Memorandum from Secretary of Defense Donald H. Rumsfeld to Commander of U.S. Southern Command on Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>.

an interrogator stepped on his Koran and mocked him during prayers.¹⁹⁴ One detainee was transferred to a no-trousers cell section known as Romeo block.¹⁹⁵ After unsuccessfully trying to explain that he could not give up his pants for religious reasons, he was tackled, punched, and pepper-sprayed; and had a testicle squeezed and a finger broken by military guards.¹⁹⁶ Some detainees have complained that military police threw their Korans into the toilet.¹⁹⁷

Lieutenant Commander Swift, Hamdan's lawyer, attempted to provide his client with some Muslim reading material.¹⁹⁸ The guards at Guantanamo informed him, however, that only military-approved Korans were allowed, greatly limiting the detainee's practice of their faith.¹⁹⁹ With conditions in place that continue to abrasively highlight differences in religious practice between attorneys and clients, building rapport and trust is all the more difficult for military defense attorneys.

C. Career Pressures

A military defense lawyer faces many conflicts. Military officers are largely trained not to question directives or authority.²⁰⁰ Oftentimes, second-guessing an order can have tragic consequences in combat situations or training. Upon receiving an officer's commission in the military service, officers are required to take an oath "to support and defend the Constitution of the United States."²⁰¹ In many ways, defending a suspected terrorist who desires to destroy

194. Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. TIMES, Apr. 30, 2005, at 35.

195. *City on the Hill or Prison on the Bay? The Mistakes of Guantanamo and the Decline of America's Image: Hearing Before the Subcomm. on Int'l Orgs., Human Rights, & Oversight of the H. Subcomm. on Foreign Affairs*, 110th Cong. 74 (2008) (testimony of Stephen H. Oleskey, Partner, Wilmer, Cutler, Pickering, Hale & Dorr LLP).

196. *Id.*

197. *See Rasul v. Myers*, 512 F.3d 644, 650 (D.C. Cir. 2008).

198. Rosenberg, *supra* note 190.

199. *Id.*

200. *See, e.g.*, Joint Service Committee on Military Justice, Manual for Courts-Martial, United States pt. IV, para. 16.a-c (2008), available at <http://www.jag.navy.mil/documents/mcm2008.pdf>. Article 92 prohibits service members from disobeying lawful orders.

201. The Commissioning Oath for U.S. Military Officers states:

I, _____, having been appointed an officer in the (Service) of the United States, as indicated above in the grade of _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or pur-

the Constitution and the American way of life seems contrary to this oath. Nevertheless, according to Lieutenant Colonel Vokey, defending a suspected terrorist is directly in line with the officer oath:

I don't have any conflict in my head where I have to switch gears and go from one side to the other, I don't think so at all When everyone gets commissioned in the [military service], you take your oath, and every time you're promoted you take the oath again. And the oath is to support and defend the constitution of the United States. So you're not swearing to the president or to a general; that's what your oath is, to support and defend the constitution.²⁰²

Many have vociferously questioned the independence of military defense lawyers due to perceptions that Hamdan's attorney, Lieutenant Commander Charles Swift, was passed over for promotion and forced to retire because of his success.²⁰³ Numerous commentators have alleged that Lieutenant Commander Swift was forced into retirement because the Supreme Court ruled in his client's favor in *Hamdan v. Rumsfeld* and the advancement results were released shortly after the decision.²⁰⁴ Despite these strong sentiments and allegations, Lieutenant Commander Swift's failure to be promoted is entirely unrelated to the *Hamdan* decision. Although the public release of the promotion board results did closely follow the Court's decision in *Hamdan*, the decision concerning Lieutenant Commander Swift's advancement was made months earlier.²⁰⁵

pose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; So help me God.

See DEPARTMENT OF THE ARMY, Oath of Office - Military Personnel DA Form 71, (1999), available at <http://www.army.mil/USAPA/eforms/pdf/A71.pdf>.

202. LtCol Vokey Interview, *supra* note 93; *Murder Charges Against Canadian Omar Khadr, Now Imprisoned at Guantanamo Bay, Have Left the U.S. Military Deeply Divided*, TORONTO STAR, Apr. 29, 2007, at A1.

203. Erwin Chemerinsky, *Navy Is Wrong to Force Out Guantanamo Lawyer*, DAILY J. (Cal.), Oct. 23, 2006; Editorial, *The Cost of Doing Your Duty*, N.Y. TIMES, Oct. 11, 2006, at A26.

204. Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 760, 795 (2006) (alleging that provision of the Military Commissions Act designed to ensure independence of defense counsel "would be more reassuring if Lt. Cmdr. Charles Swift, the military lawyer who represented Hamdan, had not been passed over for promotion, thus ending his military career, shortly after the Supreme Court's decision in favor of his client.").

205. See David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315, 353 n.221 (2007). See also *id.* at 352-54 (contending that foreign attorneys should be allowed to represent suspected terrorists, thus alleviating some client-counseling challenges arising from cultural differences); David Frakt, *Winning De-*

Nevertheless, possibly in response to these perception issues, the MCA adopted further provisions designed to protect defense counsel.²⁰⁶ Regardless of this provision and Lieutenant Commander Swift's personal experience, many high-profile military defense attorneys have failed to be promoted following tours in Guantanamo and have otherwise suffered in their careers.²⁰⁷

Military attorneys (or their paralegals) have been punished for "doing too good of a job." For instance, Lieutenant Colonel Vokey filed a complaint with the Inspector General's Office after his paralegal, a Marine sergeant, stated that prison guards bragged to her about beating detainees.²⁰⁸ On February 7, 2007, officials announced that there was insufficient evidence to substantiate this charge.²⁰⁹ An investigation was launched against the paralegal for allegedly making a false claim.²¹⁰ In late 2008, a copy of the investigation obtained by the Associated Press revealed that one of the guards had previously told military officials that he abused detainees.²¹¹

Major Mori was, at one point, threatened with prosecution under Article 88 of the UCMJ, which forbids military officers from speaking "contemptuous words" about the President, Vice President, or Secretary of Defense.²¹² Although it is unlikely that such a

tainee Hamdan's Case Didn't Prevent Navy Lawyer's Promotion, DAILY J. (Cal.), Nov. 8, 2006.

206. See 10 U.S.C. § 949b(b) (2006) (stating that "[i]n the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may: (1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or (2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter").

207. In addition to Lieutenant Commander Swift, Lieutenant Colonel Vokey also failed to achieve the next rank after service in Guantanamo. See Rick Rogers, *Marine Lawyer has Sought Judicial Reform*, UNION TRIBUNE (San Diego), Aug. 18, 2008, at B1.

208. *Lawyers: Marines Want Silence on Gitmo Charges*, ORLANDO SENTINEL, Oct. 16, 2006, at A8; Miranda Leitsinger, *Two Ordered to Stop Speaking About Alleged Guantanamo Abuse*, INTELLIGENCER, Oct. 15, 2006, at A3.

209. Andrew O. Selsky, *Military Probe: Gitmo Guard Admitted to Abuse*, ORLANDO SENTINEL, Dec. 19, 2008, at A12.

210. LtCol Vokey Interview, *supra* note 93.

211. Selsky, *supra* note 209.

212. See Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW., July 1999, at 1.

charge would be litigated at a court martial, the threat was serious enough for Major Mori to question if he could effectively represent his client.²¹³ Although Major Mori was never ultimately prosecuted, many have contended that his lack of a promotion served as punishment in lieu of prosecution.²¹⁴

Lieutenant Commander Swift has described the environment at Guantanamo Bay as “poisonous.”²¹⁵ According to Lieutenant Commander Swift, “I’ve watched colleagues and people who are close friends, people I have the utmost respect for, just ground down by this.”²¹⁶ While defending Hamdan, Lieutenant Commander Swift reported that he faced great hostility from his superiors and innuendos from his superiors that he would be prosecuted.²¹⁷ Lieutenant Commander Swift believes that he avoided prosecution only because the *Hamdan* decision was decided in his favor by the Supreme Court.²¹⁸

D. Pressures to Seek Resolution Outside of the Courtroom

Some military attorneys representing detainees have received front-page attention in national newspapers.²¹⁹ At first, despite overwhelming press interest, most military lawyers avoided making public statements, especially in light of restrictions placed on defense attorney’s ability to speak with the media.²²⁰ Nevertheless, many military lawyers soon realized that acceptable resolution for their clients may not be found in the military commissions.²²¹

Under the Model Rules, a lawyer is not permitted to speak about a pending case with the media if the statement “will have a substantial likelihood of materially prejudicing an adjudicative pro-

213. See Ellen Yaroshefsky, *Military Lawyering At the Edge of the Rule of Law in Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563, 573–74 (2008).

214. See *id.* at 574.

215. Brooks Egerton, “Moral Decision” Jeopardizes Navy Lawyer’s Career, DALLAS MORNING NEWS, May 18, 2007, at 1A.

216. *Id.*

217. Joe Shaulis, *Hamdan Navy Lawyer Denied Promotion, Will Leave U.S. Military*, JURIST, Oct. 9, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/10/hamdan-navy-lawyer-denied-promotion.php>.

218. *Detainees: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 49 (2005) (statement of Lieutenant Commander Charles D. Swift).

219. See, e.g., Neil A. Lewis, *Military’s Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

220. Ellen Yaroshefsky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Defense Team for David Hicks*, 13 ROGER WILLIAMS U. L. REV. 469, 478 (2008).

221. *Id.*

ceeding.”²²² Nevertheless, the Rules allow a lawyer to communicate with the media if the “attorney would believe [it] 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.”²²³ Given the high level of attention the Guantanamo detainees received in the press, this exception seems to apply.²²⁴

Major Mori determined that his client’s situation would be improved through successful utilization of the media.²²⁵ Major Mori delivered a number of public comments, criticizing the military commissions.²²⁶ He also made statements to the media of several other countries, including Australia, the home of his client.²²⁷ Over time, the Australian public became outraged by their fellow countryman’s treatment and began to demand his release.²²⁸

Major Mori was careful to confine his comments to the lack of fairness in the commission process and did not discuss conditions of confinement or the specific facts of the case.²²⁹ Nevertheless, as previously discussed, a presiding military judge of the commission suggested that Major Mori might be court-martialed for violating Article 88 of the UCMJ, which prohibits speaking disrespectfully of high ranking government officials.²³⁰ Ultimately, no charges were filed.²³¹

E. Effects on the Military Lawyer as an Individual

The implications of engaging in such high profile defense work may extend well beyond the individual career of a judge advocate. According to Lieutenant Colonel Vokey, “there were great personal costs and tolls on my family. The defense of my client required extensive travel and time away from home.”²³² The facili-

222. MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (1983).

223. *Id.* R. 3.6(c).

224. Luban, *supra* note 19, at 2015.

225. See, e.g., Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10; Lewis, *supra* note 219, at A1.

226. See Yaroshefsky, *supra* note 220, at 482–83.

227. See Raymond Bonner, *Australian Parents Have New Hope for U.S.-Detained Son*, N.Y. TIMES, Jan. 19, 2004, at A8.

228. Bonner, *supra* note 227, at A10.

229. See Yaroshefsky, *supra* note 220, at 483.

230. *Id.*; see also Davidson, *supra* note 212, at 2–3; Moris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at A15.

231. See Yaroshefsky, *supra* note 213, at 574.

232. LtCol Vokey Interview, *supra* note 93.

ties at Guantanamo Bay are unlike any other place in the world, and travel to and from the facility is often quite complicated.²³³

Further, many JAGs who defended detainees described a diminished faith in the U.S. government and the military. Many JAGs believed that the military would always do the right thing. While most seem to still believe this to be true, many JAGs found it demoralizing to see the military so zealously carry out possibly illegal orders. According to Lieutenant Colonel Yvonne Bradley, “I never thought that it would be political, but it’s all political, not legal. The military is better than this and our government is better than this.”²³⁴

The official (and unofficial) security requirements for Guantanamo Bay also presented situations that challenged a military attorney’s faith in military justice. Lieutenant Colonel Vokey recounted that he would be fully searched prior to speaking with his client.²³⁵ This search extended to the guard reading his confidential notes.²³⁶ Lieutenant Colonel Vokey confronted the guard and asked to speak to the guard’s supervisor; the supervisor patently denied that anything happened.²³⁷ “Things like this happened too many times than I care to count,” stated Lieutenant Colonel Vokey.²³⁸

IV. A PROPOSED FRAMEWORK FOR REPRESENTING DETAINEES IN THE WAR ON TERRORISM

Effective representation of a client detained in the course of the war on terrorism presents challenges unlike any other. Strict application of the client-centered model undoubtedly fails. Of course, principles from the client-centered model can be, and should be, applied. Nevertheless, military officers detailed to the representing detainees captured in the course of the war on terrorism must apply a framework that considers the myriad pressures,

233. For example, Lieutenant Colonel Vokey reported that to visit his client, he would often have to take a flight on Wednesday, he wouldn’t be able to see his client until Friday, and he wouldn’t be able to get a return flight home until the following Thursday. In essence, for only a few brief meetings with his client, Lieutenant Colonel Vokey would have to embark on eight days of travel. *See id.*; Luban, *supra* note 19, at 1989–90 (discussing difficulty of traveling to Guantanamo).

234. Luban, *supra* note 19, at 2005.

235. LtCol Vokey Interview, *supra* note 93.

236. *Id.*

237. *Id.*

238. *Id.*

challenges, and obstacles inherent in such work. These assignments do not appear to be for the faint of heart. Such defense work requires a nimbleness, tact, and skill that may not have been required in any prior experience.

Competence and zealotry, however, are not the only ingredients required to represent Guantanamo detainees effectively. Several policy changes may need to be implemented, many of which are beyond the scope of this Article. At a minimum, to facilitate the efforts of defense lawyers in their pursuits to provide detainees with an adequate defense, greater opportunities for withdrawal by military lawyers and greater opportunities for service as a defense lawyer should exist for qualified attorneys.

A. *Staying Motivated*

In light of all of the challenges faced by military attorneys defending detainees, it is undoubtedly a challenge to stay motivated. With an influx of pressures from the chain of command, an uncooperative client, and other internal ethical conflicts to face, many obstacles exist in providing effective client counseling. Further, military lawyers face many complex ethical dilemmas when continuing to represent Guantanamo detainees. Despite the challenges of representing a Guantanamo detainee and the seeming helplessness of the situation, there are many ways a military can “do good” or improve the military commissions before seeing ultimate success in the court room.

On July 11, 2003, the National Institute of Military Justice issued a statement stating that each attorney should decide on his or her own whether to participate in military commission trials. Nevertheless, the statement concluded that the non-participation by an otherwise qualified and interested lawyer would be “unfortunate.” While these remarks were targeted to the civilian bar, the same also holds true for military lawyers:

Public esteem for the bar would also suffer. . . . We recommend that attorneys . . . give serious consideration to submitting their names. The highest service a lawyer can render in a free society is to provide quality independent representation for those most disfavored by government.²³⁹

Likewise, military attorneys should consider representing a detainee one of the highest services a military lawyer can render. Even if one does not agree with the processes employed in Guanta-

239. NAT’L INST. OF MIL. JUST., STATEMENT ON CIVILIAN ATTORNEY PARTICIPATION AS DEFENSE COUNSEL IN MILITARY COMMISSIONS 1, 3 (2003).

namo, by participating, a military lawyer can challenge commission procedures and suggest changes. Increased and continued participation by highly qualified military attorneys increases the chances that there will be justice or improvements in the system.

B. Establishing and Maintaining Trust

It appears that it is a constant challenge to establish and maintain trust with the detainees in Guantanamo Bay. From the literature on the subject and interviews with military lawyers who defended Guantanamo detainees, there are a few key practices that may be useful to gain the confidence of a detainee. This list is by no means inclusive, but it discusses some of the key practices employed by Guantanamo Bay defense attorneys:

- Never promise anything you can't deliver

This advice, of course, is good practice for maintaining a relationship with a client in any area of the law. Avoiding making promises you can't keep, however, has a heightened importance when advising Guantanamo detainees. As it stands, Guantanamo military defense lawyers routinely look powerless in the eyes of their clients for many things beyond their control, including the evolving legal process and strict prison regulations. Therefore, it is even more important to ensure that a military lawyer can deliver on any promises, however great or small. Otherwise, a failure to deliver will add to the perception of powerlessness and further degrade attorney-client relations.

- Provide material from the outside world, whenever possible

Although protective orders and prison regulations may limit detainee exposure to outside material, whenever possible, military attorneys have reported great gains in establishing rapport when providing detainees with various items from the outside world. Lieutenant Colonel Vokey's client grew to enjoy Pepsi soft drinks.²⁴⁰ Lieutenant Commander Swift provided his client with a variety of religious materials.²⁴¹ Other attorneys provided their clients with magazines, comic books, or newspapers.²⁴² These gestures may seem small, but they go a long way in establishing attorney-client rapport.

- Be forthright with your client

Obviously, there are many restrictions on communications between Guantanamo detainees and attorneys. Military defense attor-

240. LtCol Vokey Interview, *supra* note 93.

241. Rosenberg, *supra* note 190.

242. Interview with Anonymous, *supra* note 164.

neys need to find creative ways to adhere to regulations, orders, and the law, and also convey necessary information to clients.

- Engage your client's family

Many military attorneys make great headway in establishing and maintaining trust with their clients by engaging the client's family. Lieutenant Colonel Vokey made numerous trips to Canada to meet with Khadr's family.²⁴³ Major Mori traveled to Australia, often meeting with David Hicks' family.²⁴⁴ These encounters provided valuable insight into the minds of the detainees and allowed the attorneys to better serve their clients. Further, a military attorney could relay messages from family members who may have been unable to reach a detainee by mail or telephone due to prison regulations.

- Keep your client continually updated

Oftentimes, the breakdown in trust between a military attorney and a detainee seems to stem from a breakdown in the flow of information between the client and the attorney. As discussed, communication by phone, email, or regular mail is often impossible or impracticable. Accordingly, a military attorney must endure the challenges of traveling to Guantanamo to keep the detainee apprised of his situation. Undoubtedly, national security requirements and prison regulations prevent a military attorney from sharing all of the information that may apply to a detainee's case. Nevertheless, a military attorney should inform his client about the measures the attorney has taken in pursuit of the case.

D. Reconciling Conflicting Ethical Rules

If a military attorney senses that following a military regulation or rule conflicts with the Model Rules, a variety of options exist. First, the military attorney can discuss the issue with his or her chain of command. Many military defense attorneys, however, find this option to be impractical or unlikely to result in a positive manner. Further, military attorneys can seek ethical opinions from state bar associations or, more informally, from ethics experts.

The Model Rules require an attorney to withdraw when "the representation will result in a violation of the Rules of professional conduct or other law."²⁴⁵ Despite these provisions, as previously discussed, many attorneys in Guantanamo have encountered great difficulties in attempting to withdraw from representation. Further-

243. LtCol Vokey Interview, *supra* note 93.

244. Major Mori, *supra* note 73.

245. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (1983).

more, even if the opportunities to withdraw were present, many military defense attorneys have expressed a desire to continue representation, regardless of the many difficulties, because of their belief that all accused deserve good representation.²⁴⁶ Nevertheless, more opportunities should exist to allow an attorney to withdraw without repercussion.

E. Civilian Counsel May Be More Suitable Than Military Counsel

Perhaps detainees should be able to retain civilian counsel independent of the military. Civilian counsel, from a detainee's standpoint, may be more trustworthy, enabling more open attorney-client communication. This may be accomplished if the civilian attorney is willing to abide by the commission's rules and is not a security threat to the United States.

While the right to counsel is sufficient to meet international minimums, the right, perhaps, is not as broad as it could be. Of course, many believe that further rights should not be extended to the detainees. Expanding allowable attorneys to foreign counsel would undoubtedly enhance the legitimacy of the military commissions in the eyes of the international community. Further, this may be particularly appropriate considering the war on terrorism is ideally waged as a joint endeavor among several nations. Thus, perhaps allowing detainees to be represented by United States legal aliens and attorneys from coalition partners in the war on terrorism is appropriate.

Further, civilian counsel may be more appropriate than military counsel for several other reasons. First, civilian counsel would not be subject to the same rules and regulations as a military officer. Simply put, military officers are required to follow orders and are subject to the UCMJ. Second, military officers' First Amendment rights are restricted, limiting what a military attorney can say to the press.²⁴⁷ Finally, a civilian lawyer may be more appropriate because there would be no actual or perceived professional repercussions for doing "too good of a job."

CONCLUSION

Military attorneys are unique in their dual calling as officers of the U.S. military and as lawyers. Because of the potentially conflict-

²⁴⁶. See generally Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495 (2006).

²⁴⁷. See generally 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).

ing duties pertaining to each of these professions, military counsel detailed to represent Guantanamo detainees often find themselves in very difficult positions. Some critics may go so far as to assert that providing counsel to Guantanamo detainees is unpatriotic; however, such assertions ignore the foundations of our government and country.

The United States has a strong tradition of providing a defense attorney to even the most hated defendants. A defendant's right to a fair trial is embodied in the Constitution. Furthermore, in all of our nation's conflicts since the Revolutionary War, we have provided counsel to all of our adversaries. For example, John Adams demonstrated this country's commitment to a right to counsel by defending British soldiers involved in the Boston Massacre. Of course, the patriotism of John Adams is beyond question; he took the case because he believed in the right to counsel and not because he sympathized with the British cause.²⁴⁸ Like the military attorneys involved in the defense of Guantanamo detainees, Adams defended the British, risking his personal and professional reputation. Adams reported that although he lost half of his practice after defending British officers charged in the Boston Massacre, he still considered that case "one of the best pieces of service that I ever rendered for my country."²⁴⁹

The plight of military defense attorneys detailed to defend Guantanamo detainees, in many ways, mirrors the experience of John Adams, over 200 years later. The zealous representation of a detainee does not indicate sympathy for terrorists. Indeed, one Guantanamo military lawyer noted that "there are guys down in Guantanamo who would, if you sat down next to them, try to kill you."²⁵⁰ Nevertheless, military defense attorneys have been described as fiercely committed to the rule of law and preserving the values embodied in the Constitution. Lieutenant Colonel Vokey described his experiences as very rewarding, despite the challenges. His continued motivation stemmed from a "sense of duty" and a desire to do what is right, regardless of the personal costs.²⁵¹

While the United States continues to wage the war on terrorism, our country is fortunate to be able to rely on the continued service of military defense lawyers tasked with defending detainees suspected of terrorism. Hopefully, our country's policymakers and

248. See DAVID McCULLOUGH, JOHN ADAMS 66 (2001).

249. HILLER B. ZOBEL, THE BOSTON MASSACRE 3-4 (W.W. Norton & Company, 1970).

250. Interview with Anonymous, *supra* note 164.

251. LtCol Vokey Interview, *supra* note 93.

2010] CHALLENGES IN REPRESENTING DETAINEES 249

leaders will strive to put better laws, guidelines, and procedures in place to assist these attorneys and military officers in their pursuit of preserving the ideals upon which our country was founded.

