Military Accountability (or the Lack Thereof) for Detainee Abuse: The Instructive Case of Mohammed Jawad

By DAVID J. R. FRAKT*

Introduction

IN THE LATTER YEARS OF the second Bush Administration, many details emerged about significant abuses experienced by some detainees while in U.S. custody and the policy decisions by senior political and military leaders that led directly to those abuses. As a result, there were numerous calls for accountability, particularly from human rights groups. The term “accountability” became a political buzzword

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and a galvanizing and polarizing issue in the 2008 presidential campaign. Much of the focus of the accountability movement has been on the necessity to hold the senior political leaders and policy makers from the Bush Administration, up to and including the President himself, accountable for the abuses. A great deal of attention has also been paid, particularly in legal academic circles, to the issue of accountability for the lawyers, such as John Yoo, who wrote the memoranda purporting to provide a legal justification for some of the worst abuses of detainees meted out by U.S. personnel. The sharpest focus has been on the undeniable torture committed by CIA personnel of high-level detainees held in secret “ghost” prisons. However, while the “enhanced interrogation techniques” utilized by the CIA were undoubtedly among the most egregious examples of cruelty experienced


by detainees, abuses by CIA personnel represent only a small fraction of the total number of documented incidents.\(^5\)

The vast majority of persons detained by the United States in our post-9/11 armed conflicts have been held in military custody, with a proportionate number of detainee abuses committed by military hands.\(^6\) There are hundreds of well-documented incidents of detainee abuse by military personnel in the wars in Iraq and Afghanistan and at the U.S. Naval Station at Guantánamo Bay, Cuba (“Guantánamo” or “GTMO”).\(^7\) While such incidents have involved only a small fraction of the overall number of persons detained and only a small percentage of the soldiers involved with detainee operations have perpetrated such incidents, these incidents of abuse of helpless prisoners are nevertheless significant. Yet, comparatively little scholarly attention has focused on military accountability, and much of what has been written has centered on the dramatic and sensational Abu Ghraib abuse scandal.\(^8\) Perhaps part of the reason for the relative lack of scrutiny of this

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7. *Human Rights Watch et al., By the Numbers: Findings of the Detainee Abuse and Accountability Project 2* (2006), available at http://www.chrgj.org/docs/By_The_Numbers.pdf (“The DAA Project has documented over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees. These cases involve more than 600 U.S. personnel and over 460 detainees. Allegations have come from U.S. facilities throughout Afghanistan, Iraq and at Guantánamo Bay.”).

topic is the perception, successfully perpetuated by the Pentagon through constant repetition, that incidents of detainee abuse by military personnel have always been taken seriously, investigated thoroughly, and appropriate corrective and disciplinary action taken.9

The Detainee Abuse and Accountability Project, a coalition of human rights nongovernmental organizations ("NGOs"), conducted a comprehensive, independent review of detainee abuse that directly challenged the Pentagon’s official version: “[A]n analysis of alleged abuse cases shows that promises of transparency, investigation, and appropriate punishment for those responsible remain unfulfilled. U.S. authorities have failed to investigate many allegations, or have investigated them inadequately. And numerous personnel implicated in abuses have not been prosecuted or punished.”10 Based on data collected through April 10, 2006, the coalition’s report found that “over 400 personnel have been implicated in cases investigated by military or civilian authorities, but only about a third of them have faced any kind of disciplinary or criminal action.”11

Just two weeks later at an appearance before the U.N. Committee Against Torture, the Deputy Assistant Secretary of Defense for Detainee Affairs, Cully Stimson, undeterred by the report’s conclusions,


10. HUMAN RIGHTS WATCH ET AL., supra note 7, at 1.

11. Id. at 2.
reiterated the official Pentagon mantra. Stimson informed the United Nations that “[t]he Department of Defense investigates all allegations of abuse or maltreatment, and if found credible, takes appropriate actions to hold accountable those who violate the law or our policies.”

The current administration has perpetuated this dubious claim. For example, addressing the U.N. Human Rights Council, in November 2010, Harold Koh, Legal Advisor to the State Department, made the following pronouncement:

[Q]uestions have recently been raised regarding whether the U.S. government has taken appropriate steps to investigate reports of detainee abuse.[13] To be clear: no one polices its own military forces more vigorously than the United States. The Department of Defense has well-established procedures for reporting detainee abuse and investigates all credible allegations of abuse by U.S. forces. Between, Iraq, Afghanistan, and Guantánamo, we have conducted hundreds of investigations regarding detainee abuse allegations which have led to hundreds of disciplinary actions. In reviewing several hundred cases where investigators found probable cause of abuse, over 70% received some form of discipline and in more than one-third of the cases—well over 100 instances—those charged have been court-martialed, often receiving a federal conviction or federal imprisonment. Notwithstanding recent public allegations, to our knowledge, all credible allegations of detainee abuse by U.S. forces have been thoroughly investigated and appropriate corrective action has been taken. If, however, the Defense Department should become aware of credible new information concerning a past instance of abuse, its standard rigorous reporting and investigatory procedures will apply.14

But, according to a report by the International Center for Transitional Justice, accountability under the Obama administration is still inadequate: “Overall, there has been a failure to effectively investigate or prosecute anyone beyond those who immediately carried out the abuses and a tendency toward lenient penalties for anyone who has

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13. Mr. Koh appears to have been referring to documents released by WikiLeaks concerning abuses by Iraqi forces. See Tom Gjelten, Documents Suggest U.S. Turned Blind Eye To Abuse, NPR News (Oct. 23, 2010), http://www.npr.org/templates/story/story.php?storyId=130775265 (“Classified intelligence documents released Friday by WikiLeaks show the treatment of prisoners held by Iraqi security forces was more severe than that of prisoners held by the U.S. in Baghdad’s Abu Ghraib prison. The new information revives questions about whether U.S. troops on occasion ignored clear evidence of torture, even when they witnessed it firsthand.”).
been tried. This has resulted in de facto impunity . . . ” 15 So, who is more accurate? The human rights NGOs or the U.S. government? Are all investigations fully investigated and vigorously prosecuted as both the Bush and Obama administrations would have us believe? Or have detainee abuses frequently been swept under the rug or half-heartedly pursued, as the human rights report asserts?

As I detail in this article, my personal experience at Guantánamo, as military defense counsel for Afghan detainee Mohammed Jawad, suggests the criticisms expressed by the human rights organizations are well-founded. This article explains how the military has not taken incidents of detainee abuse seriously, and, where the military has investigated incidents of abuse, it has not taken appropriate corrective and disciplinary action.

I. Failure to Investigate: Mohammed Jawad and the Guantánamo Frequent Flyer Program

A. Background

On April 28, 2008, I began a voluntary sixteen-month stint as a military defense counsel assigned to the Office of Military Commissions in Washington, D.C. The following day, I was appointed defense counsel to two detainees then facing referred charges before the military commissions in Guantánamo.16 One of my clients was Mohammed Jawad. The military detained Jawad on December 17, 2002. It suspected Jawad was involved in a grenade attack on U.S. military personnel in Kabul that day. 17 The following day, the military took Jawad to the detention facility at Bagram Air Base. 18 Approximately forty-nine days later, in early February 2003, the military airlifted Jawad to Guantánamo where Jawad remained until his release. 19


18. Id. at 11.

19. Id. at 12–13.
2007, charges were sworn against Jawad stemming from the grenade attack. On January 30, 2008, those charges were referred to trial by the military commission.

My initial assumption upon assignment to the case was that Jawad had probably been treated well during his captivity. This assumption was based on two facts. First, Jawad was very young when captured, probably between fourteen and sixteen years old. I did not believe U.S. personnel would harm a child. Second, Jawad was very clearly of minimal intelligence value, at most a barely-trained foot soldier. Even the military-commission prosecutors did not appear to believe Jawad was a real terrorist. Indeed, Jawad was the only detainee charged before the military commissions not alleged to be a member of al Qaeda or the Taliban and not charged with terrorism or terrorism-related crimes, such as conspiracy or material support. My understanding, based on the constantly evolving official government version of events surrounding the abuse of detainees, was that harsh treatment of detainees was almost exclusively limited to those detainees believed to possess critical intelligence, plus the rare, unsanctioned, and sadistic acts of a few rogue soldiers, such as at Abu Ghraib. It was not long before my assumptions were proven wrong.

I flew to Guantánamo on April 30, 2008 and had my first meeting with Jawad on May 1. In my early meetings with Jawad, he alluded to experiencing mistreatment, but he seemed reluctant to provide details, and I was not focused on this issue. His treatment did not seem particularly relevant to the issue of innocence or guilt or the many complex legal issues surrounding his case that I had begun to identify, such as personal and subject matter jurisdiction, unlawful command influence, and application of the law of war. However, in an effort to develop rapport with Jawad and establish a functioning attorney-client relationship, I pushed the issue of treatment to its logical conclusion, and when he relented, he told me about the thirty-five days of beatings that had preceded his whole time in captivity, not just the four days following his capture at the grenade attack.

24. See, e.g., Frakt, Military Commissions, supra note 22 (discussing several of the important legal issues in the Jawad case).
relationship.\textsuperscript{25} I promised to raise the issue of his alleged ill-treatment in his military commission. Thus, at my first appearance in his case, on May 7, 2008, I informed the military judge that my representation would be limited (at least for the time being) to challenging the legality and legitimacy of the military commissions and the conditions of my client’s confinement.\textsuperscript{26}

\section*{B. The Discovery}

A couple of days after the hearing, I returned to Washington, D.C. (where the Office of Military Commission’s primary offices are located) and began to pore through Jawad’s case files, which I barely had time to skim before my first court appearance. Although a significant amount of discovery materials had been provided to my office before I arrived and took over the case, my first official action on the case had been to send a detailed discovery request to my prosecutorial counterpart, Lieutenant Colonel Darrel Vandeveld. In my request, I sought all documents relating to Jawad’s detention. Lieutenant Colonel Vandeveld diligently began searching for the relevant records. About two weeks after returning from Guantánamo, he called and told me he was sending over some important documents. He provided Jawad’s Detainee Information Management System (“DIMS”) records from 2003 through 2007, essentially a computerized log maintained by the prison guards at Guantánamo of everything that occurred with an individual detainee.\textsuperscript{27} The DIMS logs listed every camp official’s visit to the detainee, any disciplinary incidents, any medical emergencies, and every instance when a detainee left his cell for any reason, such as to shower, exercise, or go to an interrogation.\textsuperscript{28}

The meticulous DIMS logs provided a detailed picture of Jawad’s life in captivity for the previous five years. Because there were several hundred pages of records, it was not immediately clear to me why

\begin{itemize}
\item \textsuperscript{25} See, e.g., David J. R. Frakt, \textit{The Difficulty of Defending Detainees}, 48 WASHBURN L.J. 381 (2009) (elaborating on the challenge of establishing a trusting relationship with a detainee).
\item \textsuperscript{26} See Transcript of Hearing at 61, United States v. Jawad (Military Comm’n Guantánamo Bay, Cuba May 7, 2008) (on file with author).
\item \textsuperscript{27} This public information is based on intelligence reports received from the government during discovery. These reports are classified and on file at the Office of Military Commissions-Defense in Washington, D.C. See generally Kathleen T. Rhem, \textit{Automated System Helps Guantánamo Guards Track Detainees}, U.S. Dep’t of Def. (Feb. 17, 2005), http://www.defense.gov/news/newsarticle.aspx?id=25866.
\item \textsuperscript{28} Id. (Army Brigadier General Jay Hood, commander of Joint Task Force Guantánamo, said the DIMS “allows us to keep track of nearly every aspect of a detainee’s daily life.”).
\end{itemize}
Lieutenant Colonel Vandeveld believed the records required my urgent attention. For some reason, the log entries were not all in chronological order. Many entries used unfamiliar abbreviations or shorthand. For example, the guards referred to visits from the camp mental health staff as visits by “Hitchcock,” apparently a reference to the famous Alfred Hitchcock film “Psycho.” As a result, it took me several hours to sift through the records, sort them into proper order, and decipher them. When I did, I found something that was both very surprising and very troubling. The DIMS logs indicated that guards had moved Jawad back and forth from one cell to another a total of 112 times over the fourteen-day period from May 7, 2004 to May 20, 2004. The moves occurred in a clear pattern. Most moves were at approximately three-hour intervals, but on several nights there was an extra move in the middle of the night at a shorter interval. The DIMS did not provide a reason for the moves, but one of the guards had slipped up and entered “frequent flyer” in the comments section for one of the cell moves. Another entry had the letters “ff” in the comment section. From these entries, I deduced that Jawad had been a victim of an intentional sleep-deprivation regime, colloquially referred to by Guantánamo personnel as the “frequent flyer” program.

C. The Response

I immediately began to research the “frequent flyer” program and, more generally, the use of sleep deprivation on detainees. Initially, I thought the information would prove useful as mitigation evidence in Jawad’s sentencing case in the event he was convicted. I thought his maltreatment by U.S. personnel might make him more sympathetic to the officers tasked with sentencing him and might even earn him extra credit from the military judge against his adjudged sentence. However, instead of saving the information for use in post-conviction damage control, I decided to use the evidence to launch a preemptive strike on the prosecution. Using the frequent-flyer pro-

31. Id. at attach. 3.
32. Id.
gram as the centerpiece of my argument, I filed a motion to dismiss all of the charges against Jawad under a theory of outrageous govern-
ment conduct. In the motion, I argued the frequent flyer program, as administered to Jawad, was tantamount to torture. Having tort-
tured a teenaged detainee, the United States should forfeit the right to prosecute him. Although the motion was ultimately unsuccessful, it allowed me to further develop information about the frequent-flyer program for the record and led to several important findings by the military judge in his ruling on the motion.

The primary official reference to the frequent-flyer program that I found was in an investigative report into alleged abuses of detainees known as the “Schmidt-Furlow report.” The report described allegations made by a Federal Bureau of Investigation agent, who asserted that military interrogators improperly used sleep deprivation tech-
niques. United States Air Force Lieutenant General Randall Schmidt, one of the report’s authors, found that improper sleep de-
privation occurred: “Allegation: That military interrogators improperly used sleep deprivation against detainees. Finding #6: During 2003 and 2004 some detainees were subjected to cell moves every few hours to disrupt sleep patterns and lower the ability to resist interrogation. Each case differed as to length and frequency of the cell moves.” The report did not analyze the legality of sleep deprivation but rather focused on whether the government authorized the practice. The report noted that Commander of U.S. Southern Command author-
ized the practice after June 2, 2003, “when CDR USSOUTHCOM estab-
lished clear guidance on the use of sleep adjustment.” However, this “guidance prohibited the practice of keeping a detainee awake for ‘more than 16 hours or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession.’”

33. Id.
34. Id. at 11–13.
35. This motion is discussed in detail in Frakt, Closing Argument, supra note 29.
36. See Frakt, Military Commissions, supra note 22, at 1399–400.
38. Id. at 10.
39. Id.
40. Id.
41. Id.
42. Id.
The fourteen-day around-the-clock program administered to Jawad clearly exceeded these guidelines. In the course of investigating allegations of improper sleep deprivation, Lieutenant General Schmidt’s investigation uncovered references to the “frequent flyer” program:

[A] review of the interrogation records . . . indicated that some interrogators recommended detainees for the “frequent flyer program.” A current GTMO interrogation analyst indicated that this was a program in effect throughout 2003 and until March 2004 to move detainees every few hours from one cell to another to disrupt their sleep. Documentation on one detainee indicated that he was subjected to this practice as recently as March 2004.43

However, according to the report, no “Organizational Response” was required because the “[c]urrent [J]oint Task Force Guantánamo ("JTF-GTMO")] Commander terminated the frequent flyer cell movement program upon his arrival in March 04.”44

If the military “terminated” the frequent-flyer program in March 2004, then why was Jawad subjected to the program in May 2004? In an effort to learn more about what Lieutenant General Schmidt knew, I tracked him down in retirement in Idaho and called him. He told me the JTF-GTMO Commander, Brigadier General Jay Hood, had assured his investigative team that he had ordered the program stopped in March 2004.45 When I described what had happened to Jawad, he said he was sorry he had not discovered this himself, but that given the limited time and resources available to his investigation, it was impossible to review all the detainee records.46 Lieutenant General Schmidt said the investigative team had not interviewed detainees directly and instead relied primarily on their interviews of personnel assigned to Guantánamo.47 Although he was reluctant to travel to Guantánamo to appear as a witness in Jawad’s case, he agreed to prepare a written statement, which was later admitted into evidence as a Stipulation of Expected Testimony.48

In the stipulation, Lieutenant General Schmidt stated:

43. SCHMIDT-FURLOW REPORT, supra note 37, at 10–11.
44. Id. at 11.
46. Id.
47. Id.
My understanding of the frequent flyer program is that it was done to mentally fatigue detainees who were thought to have important intelligence data, such as information about impending terrorist attacks. The program would be used to break down their resistance to interrogation. As a person becomes more and more fatigued their inner strength and ability to focus on resistance techniques is compromised. I am unaware of any other valid purpose for subjecting a detainee to a sleep deprivation technique.

I regret that I did not uncover the use of the frequent flyer program on Mohammed Jawad. If the information I have been given is accurate, that Mr. Jawad was moved from cell to cell 112 times in 14 days, then I would consider that to be detainee abuse. If the cell movements are recorded in the DIMS, then I would have no reason to doubt their accuracy. From my investigation, I found no reason to question any entries in DIMS. Had I learned of the treatment of Mr. Jawad, it would have been included as a finding in my report.

According to my understanding of the approved interrogation techniques, if JTF-GTMO interrogators wished to use the technique of sleep deprivation, they were required to request permission of SECDEF through CDRUSSOUTHCOM. This technique was limited to four days. We specifically and thoroughly investigated all instances in which requests were made to CDRUSSOUTHCOM or SECDEF to utilize any interrogation technique beyond the standard Army Field Manual 34-52 approved techniques. To our knowledge, no request was made to use this or any other technique on Mohammad Jawad.49

The next step in my investigation was to locate former JTF-GTMO Commander Brigadier General Jay Hood, on whose watch guards abused Jawad.50 By this time, the military had promoted Hood to Major General.51 In May 2008, General Hood was just completing an assignment as the Commanding General of Fort Meade, an Army installation in Maryland that houses the National Security Agency.52 When I contacted him initially, he refused to talk to me.53 After prod-

49. Id. at 2–3.
50. See Frakt, Closing Argument, supra note 29, at 16–17 (discussing when the abuse began and how General Hood did not authorize program administration on Jawad).
53. General Hood’s refusal was conveyed to me by General Hood’s staff in email exchanges and telephone calls in late May and early June 2008. In response, I filed a motion to compel the production of General Hood and several other witnesses with the Military Commissions. Defense Motion for Production of Witnesses Pursuant to R.M.C. 703(c)(2)(D) in Support of D-008 Motion to Dismiss (Torture of Detainee), United States v. Jawad (Military Comm’n Guantanamo Bay June 5, 2008) (on file with author). On June 10, 2008, the military judge, Colonel Stephen Henley, ordered the prosecutor to assist me.
ding by Lieutenant Colonel Vandeveld, he agreed to meet with me to
discuss the DIMS report.\textsuperscript{54} When we met, General Hood professed
bewilderment at the DIMS entries and proclaimed doubt as to their
authenticity.\textsuperscript{55} But when I asked him if the guards were trained to only
input correct factual information into the DIMS database, he con-
ceded they were.\textsuperscript{56} He admitted that a frequent-flyer program existed
when he arrived as the JTF-GTMO Commander.\textsuperscript{57} However, accord-
ing to General Hood, when he was asked to approve the use of the
program on one of the detainees, he called a meeting to discuss the
program with his senior staff.\textsuperscript{58} At the meeting, he informed his subor-
dinates that he was ordering the program discontinued because he
considered the program to be “counterproductive.”\textsuperscript{59} JTF-GTMO was
divided into several functional areas, but the two primary subunits
were the Joint Detention Group (“JDG”\textsuperscript{60}) and the Joint Intelligence
Group (“JIG”).\textsuperscript{61} The leaders of both groups attended the meeting,
according to General Hood.\textsuperscript{62} General Hood could provide no expla-
nation for the apparent use of the frequent flyer program on Jawad.\textsuperscript{63}
He stated categorically that he would not have authorized it and did
not authorize it.\textsuperscript{64}

I then tracked down General Hood’s JDG Commander from the
spring of 2004, Army National Guard Colonel Nelson J. Cannon, since
promoted to Major General.\textsuperscript{65} At the time I located him, he was
in gaining access to General Hood. See Transcript of Hearing at 92–93, 112–13, United
States v. Jawad, (Military Comm’n, Guantanamo Bay June 19, 2008) [hereinafter June
Transcript of Hearing] (on file with author).

\textsuperscript{54} The meeting was actually arranged by the Office of Military Commission Prosecu-
ion. I was informed that General Hood would be made available for an interview on June
12, 2008.

\textsuperscript{55} Interview with Jay W. Hood, Major General and former Commander of Joint Task
Force Guantanamo, at Fort Meade, in Md. (June 12, 2008) [hereinafter Interview with Jay
W. Hood] (on file with author).

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} Later JDG was renamed the “Joint Detention Operations Group,” or “JDOG.”


\textsuperscript{62} Interview with Jay W. Hood, supra note 55.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} Gen. Officer Mgmt. Office, Biography of Major General Nelson J. Cannon, Nat’l
Guard Bureau, http://www.ng.mil/ngbgomo/library/bio/983.htm (last updated May
2010).
deployed to Iraq. He also refused to speak to me initially until Lieutenant Colonel Vandeveld conveyed to him that he had to. I sent a copy of the DIMS report to General Cannon’s aide-de-camp for him to review. Through a series of emails, General Cannon claimed to have no prior knowledge of the use of the frequent-flyer program on Jawad and asserted that he did not authorize it and had no explanation for it.

I also contacted the JIG Director, Esteban Rodriguez, a civilian official with the Defense Intelligence Agency. Mr. Rodriguez recalled the March 2004 meeting where General Hood ordered the frequent-flyer program discontinued. Mr. Rodriguez said he followed the order, and the JIG had discontinued use of sleep deprivation for interrogation purposes. However, he said that there was a second frequent-flyer program administered by the JDG for disciplinary or punishment purposes. He surmised that if guards subjected Jawad to the frequent-flyer program, then it must have been under the JDG program. After Lieutenant Colonel Vandeveld also interviewed Mr. Rodriguez, Lieutenant Colonel Vandeveld and I agreed to enter a stipulation of expected testimony for Mr. Rodriguez into evidence. I read the stipulation into evidence at a pretrial hearing on June 19, 2008. It read, in pertinent part:

I served as the Director of the Joint Intelligence Group at JTF Guantánamo from 2003 to 2006 . . . . In the first couple of years . . . of that tenure, there were two different Frequent Flyer programs being conducted on detainees. The first of these programs was an intelligence gathering interrogation technique, which involves moving detainees from cell to cell and also involved intermingling with that interrogation sessions. This technique was to be utilized on, only on detainees who are believed to possess credible intelligence and only when other . . . more traditional interrogation methods have failed.

66. See id.
67. In late May 2008, I contacted General Cannon via email and requested an interview. I never received a response.
69. Telephone Interview with Esteban Rodriguez, Former Joint Intelligence Group Director (June 16, 2008) (on file with author).
70. Id.
71. Id.
72. Id.
73. June Transcript of Hearing, supra note 53, at 381–82.
The second program was an informal program run by the Joint Detention Group in which similar cell moves were made, also referred to as the Frequent Flyer program, for disciplinary purposes . . . . I am aware of this program because there were occasions when it hampered our intelligence collection efforts when detainees who were providing intelligence complained that they were being moved on a regular basis and it annoyed them.

I recalled a meeting in . . . late March 2004, of the JTF GTMO staff, headed by newly arrived Commander, General Jay Hood, at which he discussed the Frequent Flyer program. At that meeting, he ordered the Frequent Flyer program to be ceased, to be terminated. General Cannon, or at that time Colonel Cannon, was present, and all at the meeting, I believe, understood General Hood’s order. After that point, the JIG, the Joint Intelligence Group, did not conduct, to my knowledge, any more Frequent Flyer programs.74

Armed with this information, Lieutenant Colonel Vandeveld located an army intelligence officer who had been assigned to the JDG under Colonel Cannon and actually administered the frequent-flyer program. This officer, an active duty army major,75 testified at the next pretrial hearing in Jawad’s military commission that he was a staff officer in the Detention Operations Group from 2002 to April 2005.76 I questioned him extensively about the frequent-flyer program, as reflected in the following excerpt from the hearing transcript:

Q [MAJ FRAKT]: Was there any written guidance to your knowledge published describing the Frequent Flyer Program?
A [WITNESS]: Not to my knowledge.

Q [MAJ FRAKT]: Was the camp leadership aware that the frequent flyer program was going on?
A [WITNESS]: Yes.

Q [MAJ FRAKT]: Including the Joint Detention Group Commander?
A [WITNESS]: Yes.

Q [MAJ FRAKT]: Including the Joint Task Force Guantánamo Commander?
A [WITNESS]: Yes.

Q [MAJ FRAKT]: Who would have to approve a detainee being subjected to the Frequent Flyer Program?

74. Id.
75. The officer’s name is protected by court order. Protective Order 2, United States v. Jawad (Military Comm’n Guantánamo Bay, Cuba May 8, 2008). The witness’s name has been redacted from the transcript below to comply with the Protective Order.
A [WITNESS]: Those detainees would be vetted between the S2, the S3 of the Detention Operations Group, the Interrogation Control Element, and the Joint Interrogation Group. There was a group—there are a lot of different people who had inputs into vetting who would go in there . . . .

Q [MAJ FRAKT]: Do you have any idea of the number of detainees who were subjected to this Frequent Flyer Program?
A [WITNESS]: No, I could not give you a number off the top of my head.

Q [MAJ FRAKT]: More than 20?
A [WITNESS]: Yes.
Q [MAJ FRAKT]: More than 30?
A [WITNESS]: Well you have got all the camps two and three so if you look at the maximum capacity of camps two and three it would be more than that. Because many people that were in camps two and three were moved around that was one of the disincentives for being in camps two and three.

Q [MAJ FRAKT]: Did this program continue during your entire time here at Guantánamo?
A [WITNESS]: It would—when I left the program was still ongoing and that was April of 2005 so.

Q [MAJ FRAKT]: Are you aware of any order to stop the program?
A [WITNESS]: No.
Q [MAJ FRAKT]: Did you ever discuss this program with General Hood?
A [WITNESS]: Not specifically he knew about the program, the leadership knew about the program.
Q [MAJ FRAKT]: Including General Cannon or then Colonel Cannon?
A [WITNESS]: Yes, sir.
Q [MAJ FRAKT]: And you’re saying this was basically a routine part of the operations, the detention operations?
A [WITNESS]: This was a routine that was in our daily synchronization matrix when we did all the moves within the camp and it was vetted by all the aforementioned people.

Q [MAJ FRAKT]: Did anyone ever question to your knowledge the legality of this program?
A [WITNESS]: No.

Q [MAJ FRAKT]: So . . . the Frequent Flyer Program was standard operating procedure?
A [WITNESS]: Yes.

77. “S2” refers to an Army staff intelligence officer and “S3” refers to an Army staff operations/training officer. Military Acronyms and Abbreviations, Rubicon Planning, LLC, http://www.militaryacronyms.net/s (last visited Mar. 29, 2011).
78. August Transcript of Hearing, supra note 76, at 451.
Q [MAJ FRAKT]: So can you explain why the Frequent Flyer Program does not appear in the standard operating procedures from that time, in writing?

A [WITNESS]: No.79

The officer’s testimony not only flatly contradicted General Hood’s and General Cannon’s claims that they had no knowledge about the frequent-flyer program but indicated that the use of sleep deprivation on Jawad was far from an isolated occurrence. The fact that the program, although standard operating procedure, was operating essentially “off the books” raised the possibility of an intentional effort to hide the existence of the program.

At my request, Lieutenant Colonel Vandeveld searched for additional detainee records that could corroborate the officer’s testimony. The documents he discovered, from only a partial search of detainee records, identified several other detainees who the military subjected to the program. This development was reported in the Washington Post:

At least 17 detainees held at Guantánamo Bay were subjected to a program that moved them repeatedly from cell to cell to cause sleep deprivation and disorientation as punishment and to soften detainees for subsequent interrogation, according to U.S. military documents.

Defense Department investigations of abuse had previously revealed that the program was used in a limited manner and only on high-value detainees, but the documents indicate that the program was far more widespread and that the technique was still used months after it was banned at the facility in March 2004.80

The discovery in the Jawad case of significant new evidence of detainee abuse after multiple high-level investigations into detainee mistreatment strongly suggested either an intentional cover-up by Guantánamo officials or gross incompetence or willful blindness by the investigators. The investigation conducted by Vice Admiral Albert T. Church III, the navy inspector general who was at Guantánamo on May 7, 2004 searching for evidence of detainee abuse at the direction of Secretary of Defense Donald Rumsfeld, illustrates the failure of these high-level investigations.81 Just hours after he departed the is-

79. Id. at 451–53, 467.
81. See News Transcript, U.S. Dep’t of Def., Media Availability with Vice Admiral Church (May 12, 2004), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3002 [hereinafter Media Availability with Vice Admiral Church] (“I was directed by the Secretary of Defense last week to go down to Guantánamo Bay . . . . I was on station Thursday/Friday 6 to 7 [May].”).
land, the JDG commenced the frequent-flyer regime on Jawad.\footnote{Frakt, Closing Argument, supra note 29, at 16.} Yet, at a press conference on May 12, Jawad’s sixth day in this blatantly abusive program, Admiral Church told reporters at the Pentagon, “I’m pretty confident that there’s no abuse currently going on, or that there’s been any in [the] recent past that has gone unreported.”\footnote{Media Availability with Vice Admiral Church, supra note 81.} Of course, as Admiral Church candidly acknowledged, “We did not interview detainees, no.”\footnote{Id.} Admiral Church later conducted a large-scale investigation of allegations of detainee abuse, referred to as the “Church Report,” which largely absolved senior administration officials of any wrongdoing and generally minimized the extent and severity of detainee abuses.\footnote{A.T. CHURCH, III, OFFICE OF THE SEC’Y OF DEF., DETAINEE FILES: REVIEW OF DEPARTMENT OF DEFENSE DETENTION OPERATIONS AND DETAINEE INTERROGATION TECHNIQUES (U), 3 (2005), available at http://www.aclu.org/images/torture/asset_upload_file625_26068.pdf (“An early focus of our investigation was to determine whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees. We found that this was not the case.”).} The New York Times described the report as a “whitewash.”\footnote{Editorial, Abu Ghraib, Whitewashed Again, N.Y. TIMES, Mar. 11, 2005, http://www.nytimes.com/2005/03/11/opinion/11fri2.html (“This whitewash is typical of the reports issued by the Bush administration on the abuse, humiliation and torture of prisoners at camps run by the military and the Central Intelligence Agency.”); see also Pentagon Releases Whitewash Report on Detainee Abuse, ACLU (July 3, 2006), http://www.aclu.org/national-security/pentagon-releases-whitewash-report-detainee-abuse.}

D. Reporting the Abuse

While my investigation (with the aid of Lieutenant Colonel Vandeveeld) may have yielded more useful information than Lieutenant General Schmidt’s or Admiral Church’s efforts, my role as defense counsel limited my access to information and my ability to use it. Though I would have liked to investigate further, conducting a full-scale criminal investigation of the frequent flyer program was outside the scope of my duties as a defense counsel. Consistent with my obligations as a military officer, I decided to turn the matter over to the appropriate authorities to investigate.

All U.S. servicemembers are trained that if they observe a possible violation of the law of war by any party to a conflict, they have a duty to report the incident up the chain of command.\footnote{U.S. AIR FORCE, AIR FORCE INSTRUCTION 51-401: TRAINING AND REPORTING TO ENSURE COMPLIANCE WITH THE LAW OF ARMED CONFLICT (LOAC) ¶ 4 (1994) (setting forth the Air Force’s mandatory law of war training requirements).} Judge Advocates
("JAGs") like myself, routinely discuss this obligation in annually required law of armed conflict ("LOAC") training. Department of Defense ("DoD") directives contained in the Law of War Program, and the service implementing regulations thereto, clearly spell out the obligation to report and investigate suspected LOAC violations. According to this document, "It is DoD policy that . . . [a]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action." The document defines a "Reportable Incident" as "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information." The directive specifically states the obligation of the servicemember to report and the obligation of the military to investigate any reportable incident:

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DoD Component shall report reportable incidents through their chain of command. . . . The commander of any unit that obtains information about a reportable incident shall immediately report the incident through the applicable operational command and Military Department. . . . Higher authorities receiving an initial report shall . . . [r]equest a formal investigation by the cognizant military criminal investigative organization.

After doing extensive research on the issue of sleep deprivation, I concluded the frequent-flyer program violated the law of war. Accordingly, I prepared a report detailing what had happened to Jawad and the basis for my conclusion that servicemembers violated the law of armed conflict, attaching supporting evidence. I carefully cited relevant DoD Directives highlighting the mandatory reporting and investigation requirements. I forwarded the report to my immediate supervisor, the Chief Defense Counsel. In turn, he forwarded it to the appropriate officials, including the Office of the Staff Judge Advocate.

89. Id.
90. Id. ¶ 3.2.
91. Id. ¶¶ 6.3, 6.5; see also U.S. AIR FORCE, supra note 87, ¶ 5.1 ("Individual Responsibilities. Personnel who, in the course of their duties, uncover information that a possible LOAC violation has occurred will immediately report that information to their commander."). As an Air Force officer, I was subject to this regulation.
92. Defense Motion to Dismiss, supra note 30, at 10–13 (containing the author’s legal analysis of sleep deprivation and support for his conclusion).
94. Id. at 1–2.
at JTF-GTMO. My initial report was filed May 29, 2008.95 I expected that I would be contacted shortly thereafter by an official appointed to investigate the incident. Meanwhile, I continued to develop the evidence about the frequent-flyer program as part of my motion to dismiss, filing several supplements to the motion as new information was unearthed.96 The commission received evidence and argument on the motion in two pretrial hearings, the first on June 19, 2008 and the second on August 13–14, 2008.97 Although the prosecution conceded the truth of the DIMS report, the government disagreed with my characterization of the frequent-flyer program as torture and objected to my proposed remedy of dismissal.98 Colonel Stephen Henley, Chief Trial Judge of the U.S. Army, issued the ruling on September 24, 2008.99 Although he denied the motion,100 his ruling nevertheless vindicated the defense. Judge Henley did not mince words in his findings:

As early as November 2003, Joint Task Force-Guantánamo Bay personnel (JTF-GTMO) used a sleep deprivation measure to disorient selected detainees thought to have important intelligence data, disrupt their sleep cycles and biorhythms, make them more compliant and break down their resistance to interrogation. Pursuant to this technique, euphemistically referred to as the “frequent flyer” program, a detainee would be repeatedly moved from one detention cell to another in quick intervals, usually at night. . . . [T]he accused was subjected to the “frequent flyer” program and moved from cell to cell 112 times from 7 May 2004 to 20 May 2004, on average of about once every three hours. The accused was shackled and unshackled as he was moved from cell to cell. The accused was not interrogated and the scheme was calculated to profoundly disrupt his mental senses.


96. See Defense Reply to Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 (D-008), United States v. Jawad (Military Comm’n Guantánamo Bay, Cuba filed June 5, 2008), available at http://www.defense.gov/news/d20080528Defense%20Motion%20to%20Dismiss%20Based%20on%20Torture%20of%20Detainee.pdf. Several additional supplements to this motion that I filed were never published on the military commission website.

97. June Transcript of Hearing, supra note 53; August Transcript of Hearing, supra note 76.

98. August Transcript of Hearing, supra note 76, at 633 (Lieutenant Colonel Darrel Vandeveld, lead prosecutor, said: “the commission will find that it has no authority for the relief requested in Motion D008.”).

99. United States v. Jawad, 1 M.C. 334 (Military Comm’n, Guantánamo Bay, Cuba Sept. 24, 2008) (ruling on Defense Motion to Dismiss—Torture of the Detainee (D-008)).

100. Id. at 337.
While the “frequent flyer” program was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations, by March 2004 the accused was of no intelligence value to any government agency. The infliction of the “frequent flyer” technique upon the accused thus had no legitimate interrogation purpose.\(^\text{101}\)

Judge Henley’s conclusion left little doubt about the legality of this program:

This Commission finds that, under the circumstances, subjecting this accused to the “frequent flyer” program from May 7–20, 2004 constitutes abusive conduct and cruel and inhuman treatment. Further, it came at least two months after the JTF-GTMO commander had ordered the program stopped. Its continuation was not simple negligence but flagrant misbehavior. Those responsible should face appropriate disciplinary action, if warranted under the circumstances.\(^\text{102}\)

Although the commission did not grant the motion to dismiss,\(^\text{103}\) this ruling clearly supported my LOAC violation report. Although the leadership of JTF-GTMO, SOUTHCOM, and senior leaders at the Pentagon were closely following the military commissions and were undoubtedly aware of this ruling as soon as it came out, I decided to follow up my initial LOAC violation report and attach a copy of the ruling. More than four months had passed since I filed the report, and I had not yet been contacted about it. Surely, I thought, the Pentagon will not be able to ignore a very clear and strong suggestion from the Chief Trial Judge of the U.S. Army that the matter be investigated and disciplinary action taken. Thus, on October 7, 2008, I sent an email to appropriate officers in the chain of command with a copy of the original LOAC violation memo. The e-mail read:

On 29 May, I filed this LOAC violation memo with the Chief Defense Counsel, COL David. He forwarded the memo to your office on or about 1 June. Presumably your office forwarded it to SOUTHCOM. I have never received any information about the investigation.

The military judge in the Jawad case recently found that Jawad was subjected to the frequent flyer program, and that it constituted “abusive conduct and cruel and inhuman treatment.” (see attached ruling) He found it unnecessary to decide whether the conduct rose to the level of torture but did find that the action was intended to seriously disrupt the mental senses, which is one of the elements of psychological torture. He recommended disciplinary action for this “flagrant misbehavior”. [Sworn testimony from a

\(^{101}\) Id. at 335.

\(^{102}\) Id. at 336.

\(^{103}\) Id. at 336–37 (ruling that dismissal was a last resort and was not appropriate where other adequate remedies were available).
staff officer indicated] that the program was standard operating procedure, was carried out on many detainees as part of the camp “incentives program” and was personally approved by Col Nelson Cannon (now Maj Gen) and Brig Gen Jay Hood (now Maj Gen). Please provide me with an update on the status of the mandatory LOAC violation investigation or direct me to the appropriate officials who can respond to this inquiry. If you need any further supporting documentation to assist you in the investigation, please let me know. Thank you very much.104

Although I was careful to include my contact information, I was never contacted. Despite the fact that my report implicated serious misconduct by two very senior officers (or perhaps because of this fact), there seemed to be no interest in investigating. I found the lack of response disconcerting. Although I suspected that there would be some reluctance to investigate incidents that had occurred over four years earlier, I assumed that the responsible officials, including experienced military lawyers, would not simply ignore mandatory requirements. But perhaps I should not have been surprised at the lack of response. Under the Bush Administration, there was not a single senior military officer prosecuted for any abuses of detainees that occurred under their command.105

In November 2008, voters elected a new President with an apparently strong commitment to humane treatment of detainees.106 Perhaps now the Department of Defense would get serious about investigating detainee abuse, I thought. Initially, there were encouraging signs. In December 2008, Jeh C. Johnson, who was subsequently appointed DoD General Counsel,107 invited me to the Pentagon to meet with himself and another member of President Obama’s Transition Team charged with reviewing legal issues surrounding detainees. Although our conversation focused on the military commissions, Mr. Johnson spoke of his strong commitment to restore the rule of law to

104. Email from Major David J. R. Frakt, Def. Counsel, Office of Military Comm’ns, to Captain Todd M. Cabelka et al., Dep’t of Def. (Oct. 7, 2008) (on file with author).
105. HUMAN RIGHTS WATCH ET AL., supra note 7, at 3 (“No U.S. military officer has been held accountable for criminal acts committed by their subordinates under the doctrine of command responsibility.”).
106. See, e.g., Barack Obama’s Remarks on Victory in Wisconsin Primary, WASH. POST, Feb. 19, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/19/AR2008021903257.html (“We are going to lead by example, by maintaining the highest standards of civil liberties and human rights, which is why I will close Guantanamo and restore habeas corpus and say no to torture.”); Barack Obama Responses to AJC Questionnaire, Anti-Jewish Committee (Feb. 11, 2008), http://www.jjc.org/site/?c=ijIT2PHKoG&k=3878139; Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).
DoD operations, referring to a speech he had given at the Air Force JAG Corps’ leadership conference the previous year. Under the theory that the new leadership in the Pentagon, including Mr. Johnson, would be more likely to take my report of detainee abuse seriously, in late January, shortly after President Obama’s inauguration, I decided to send another follow-up message. Once again, I provided a copy of the original LOAC violation report and the Judge’s ruling substantiating the factual allegations therein. My latest message read, in part:

> It has now been over seven months since this report was filed. I have never received any update on the status of the mandatory LOAC violation investigation. In the interim, the Military Commission has determined that the violation did, in fact, occur and that “under the circumstances, subjecting [Mr. Jawad] to the ‘frequent flyer’ program from May 7–20, 2004 constitutes abusive conduct and cruel and inhuman treatment.” In other words, Mr. Jawad was abused, in clear violation of the Geneva Conventions. The commission has specifically recommended that “those responsible should face appropriate disciplinary action.” (See attached Ruling D-008) . . .

> Upon receipt of a LOAC violation report, a formal investigation is mandatory and should be done by the most expeditious means available. However, it does not appear that the DoD Directive was followed because I have never been contacted by anyone regarding my report. Please confirm whether JTF-GTMO or SOUTHCOM investigated this incident, and provide me with an update on the status of this investigation or direct me to the appropriate authority at USSOUTHCOM who can answer this query. If I do not receive a satisfactory explanation, I intend to pursue this matter with the appropriate Inspector General offices. Thank you very much for your prompt attention.

Once again, I received no reply and was never contacted to discuss the matter. As the fifth anniversary of Jawad’s abuse approached, I began to suspect that the military had intentionally failed to investigate the issue in order to protect the senior officers involved. Under the Uniform Code of Military Justice (“UCMJ”), noncapital offenses

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have a five-year statute of limitations.\textsuperscript{110} In other words, after May 20, 2009, it would be impossible to prosecute any soldiers for their involvement in the frequent-flyer abuse of Mohammed Jawad. As the anniversary date approached, I gave serious thought to preferring charges against General Hood and General Cannon, and I even prepared draft charges for dereliction of duty\textsuperscript{111} and cruelty and maltreatment.\textsuperscript{112} Although I was not assigned to the role of prosecutor, any military member subject to the UCMJ may prefer charges against any other.\textsuperscript{113} However, by the spring of 2009, the Jawad defense team (I had recruited several other lawyers to assist me on the case) was making significant strides in both the military commission case and Jawad’s federal habeas corpus petition, and it started to appear likely that we might actually win Jawad’s release. I feared that if I preferred charges, it might be seen as a publicity stunt that could easily backfire on Jawad. I did not want to do anything to jeopardize my client’s interests. For similar reasons, I did not follow through on my threat to go to the Inspector General.

The only other thing I could think to do was to try to get some media interest in the story, in the hope that public pressure might generate a response. I contacted many leading reporters during my time as a defense counsel, and I tried to persuade several of these journalists to write about the government’s failure to investigate my report. Sadly, I could not interest any of the reporters from the major newspapers to write the story before the statute of limitations expired. However, I continued to tell any reporter I met about the issue.

On July 30, 2009, a federal district judge granted Jawad’s habeas corpus petition and ordered him released.\textsuperscript{114} The following day, the Convening Authority dismissed the military commission charges against him.\textsuperscript{115} On August 23, 2009, the military transferred Mohammed Jawad home to Afghanistan and released him to his family.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{110} Uniform Code of Military Justice, 10 U.S.C. § 843 art. 45 (2006).
\item \textsuperscript{111} Id. § 892 art. 92.
\item \textsuperscript{112} Id. § 893 art. 93.
\item \textsuperscript{114} Bacha v. Obama, No. 05-2385, 2009 WL 2365846, at *1 (D.D.C. July 30, 2009) (order granting Jawad’s petition for writ of habeas corpus).
\end{itemize}
few weeks later, a reporter for the Washington Independent, Daphne Eviatar, called me to do a follow-up on Jawad’s release. I told her about the DoD’s failure to investigate my LOAC violation report. She wrote a compelling story about it.117 Another journalist, Kathleen Miller, then followed up on Ms. Eviatar’s story.118 Neither reporter was able to compel the Department of Defense to respond to their inquiries. I had hoped these critical articles would provide the impetus for the Department of Defense to begin an investigation or perhaps lead to a Congressional inquiry, but if the publicity had any effect at all, it was not apparent to me. Despite the articles, no government official has contacted me about my report.

For over a year, the issue of responsibility for the abuse of Jawad appeared dead, until Harold Koh spoke to human-rights groups in a town hall meeting in conjunction with his appearance at the U.N. Human Rights Council in Geneva on November 2010.119 In response to Mr. Koh’s comments, Larry Siems, lead writer for the ACLU Torture Report, posed a series of ten questions to Mr. Koh on the Torture Report’s website.120 Mr. Siems prefaced the questions with this comment:

Last month, when the United States had its human rights record reviewed by the United Nations in Geneva, U.S. State Department legal advisor Harold Koh assured the world that all alleged abuses of detainees in the custody of the U.S. military “have been thoroughly investigated and appropriate corrective action has been taken,” and that Special Prosecutor John Durham is actively investigating allegations of torture by the CIA and other civilian agencies.

Drawing largely from material we have covered so far in The Torture Report, I have come up with a list of 10 follow-up questions that the press and public at large—indeed, all of us—should be asking the Obama administration about the status of U.S. compliance with its domestic and international commitments on Torture and Cruel, Inhuman, and Degrading Treatment.121

The third of the ten questions squarely addressed Jawad’s case:

When Guantánamo detainee Mohammed Jawad came before the Military Commission, military judge Colonel Stephen Henley

117. Eviatar, supra note 109.
121. Id.
found that the “frequent flyer” sleep deprivation regime to which Jawad had been subjected from May 7 to May 20, 2004 constituted cruel, abusive and inhuman treatment. During the commission proceedings, the officer in charge of the “frequent flyer program” presented testimony and evidence that the treatment Mohammed Jawad suffered was “standard operating procedure” and was used on many detainees at least until April 2005.

Mohammed Jawad’s military defense counsel, Lieutenant Colonel David Frakt, filed a Law of Armed Conflict Violation report, the formal notice by which military personnel alert their superiors that a possible war crime has occurred, when he first discovered this abuse in May 2008. He repeatedly requested to be informed of the status of the investigation, but it appears that no investigation was ever initiated, even when the matter was reported in the Washington Post and the Washington Independent. Lt. Col. Frakt has never been contacted by anyone in the Defense Department concerning his report.

Was the violation that Lt. Col. Frakt reported ever investigated? If so, by whom? What was the result of the investigation? Has anyone been disciplined in relation to the frequent flyer program that was in place in Guantánamo up to April 2005? 122

So far, there has been no response from the current administration, and none is likely to be forthcoming, for to answer the question would be to put the lie to the claim that all credible reports of detainee abuse are investigated. Despite sworn testimony by the responsible officer describing a highly abusive practice on dozens of detainees, a court ruling finding that abuse occurred and recommending disciplinary action, testimony from a three-star General—previously tasked with investigating abuse at Guantánamo—condemning the abuse, an official report from a military officer alleging a law of war violation, and multiple news stories highlighting the failure of the Pentagon to investigate, no one has been, and due to the statute of limitations, ever will be held accountable for the frequent-flyer sleep-deprivation program at Guantánamo.

II. Inadequate Investigation: Beating at Guantánamo

Of course, even when there is an investigation, full accountability is far from guaranteed. Human rights groups complain that when investigations of detainee abuse do occur, the investigations are inadequate:

Available evidence indicates that U.S. military and civilian agencies do not appear to have adequately investigated numerous cases of alleged torture and other mistreatment. Of the hundreds of allega-

122.  Id.
tions of abuse collected by the DAA Project, only about half appear to have been properly investigated. In numerous cases, military investigators appear to have closed investigations prematurely . . .

Through my representation of Mohammed Jawad, I also saw first-hand an example of an inadequate investigation.

In mid-June 2008, a day or two prior to the June 19, 2008 hearing in Jawad’s case, I visited Jawad in an interview room at the Guantánamo detention facility. I had not seen or spoken to him in over a month since our first appearance together before the commission on May 7, 2008. Soon after we exchanged greetings, he complained that prison guards had beaten him. Although the incident had occurred nearly two weeks earlier, he still had visible bruises on his legs and arms. I asked him to explain what had happened. He told me that the guards had removed him from his cell on a pretext so they could search his cell. When the guards removed Jawad from his cell, they placed him in handcuffs and ankle shackles, with a belly chain connecting the two restraints. (This was standard procedure any time guards moved a detainee and was the same procedure used in the frequent-flyer program.) Jawad told the guards he had religious materials in his belongings and asked them to treat the items respectfully. After the guards completed the search, they escorted Jawad toward his cell. As they approached Jawad’s cell, Jawad saw through the open cell door that the guards had placed a dirty rag that Jawad used to clean the floor directly on top of Jawad’s religious items. Incensed, Jawad refused to enter the cell until the guards removed the rag. The guards refused and tried to force him into his cell. When Jawad resisted, the guards shoved him to the cement floor, sat on him, and hit him. When he struggled, a guard sprayed pepper-spray into his eyes. He told me that three different guards hit and kicked him during the incident. Because this incident occurred in the hallway, several detainees in the cellblock saw or heard what went on. Many of the detainees became extremely angry at what they perceived as both the religious insensitivity of the guards and their unnecessary use of force against Jawad. In an effort to distract the guards, several of the detainees clogged their toilets with towels, causing their cells to flood. According to Jawad, it was a near riot, with dozens of guards responding to the scene. When I expressed outrage at what he was telling me and

124. Interview with Mohammed Jawad, in Guantánamo Bay, Cuba (June 2008) (on file with author).
informed Jawad that I intended to complain about the matter to the camp administration, Jawad begged me not to. He believed the guards beat him in retaliation for speaking up at the first hearing and for complaining about being mistreated. Jawad also explained that guards transferred him to another cell block away from most of his Pashto-speaking friends after the incident. He feared that if the guards viewed him as a troublemaker, they would continue to harass him. Although he asked me not to pursue the matter, I insisted I would get to the bottom of it.

Immediately after my visit with Jawad, I reported to the JTF-GTMO Staff Judge Advocate’s Office, wrote a report about the incident, and demanded that the military investigate the incident. Jawad had provided me a list of the names of the detainees who had witnessed the event and could corroborate his account, and I included these names in my complaint. A few weeks later, I received a copy of the investigative report and was surprised to find that the incident had been investigated and closed even before I had filed my complaint. The investigation was woefully inadequate. The investigator had failed to speak to a single detainee about the incident. Only the guards had been interviewed, and they provided very self-serving accounts, claiming that they had acted in self-defense. The report did not mention anything about the guards’ religious insensitivity, which had sparked the incident. Surprisingly, the report concluded that the guards had used excessive force, particularly in the use of pepper spray on a prisoner who was lying face down on the floor with his hands and feet shackled. However, rather than recommending any disciplinary action, the report recommended that the guards be given additional training in the proper use of pepper spray. The JTF-GTMO legal office confirmed that the military did not take any disciplinary action against the guards (their names were not included in the report) and informed me that the case was closed. When I complained that the investigator had failed to interview several eyewitnesses, I was told that the detainees were not considered witnesses and, as a rule, detainees other than the complainant were not interviewed about abuse incidents.

125. Meeting with JTF-GTMO, Office of the Staff Judge Advocate, in Guantánamo Bay, Cuba (June 18, 2008) (on file with author).

126. The investigative report was classified. It is maintained in the files of the Office of Military Commissions-Defense in Washington, D.C.

127. Discussion with representative from JTF-GTMO, Office of the Staff Judge Advocate, in Guantánamo Bay, Cuba (July 2008) (on file with author).
Unfortunately, the investigative report itself was classified, and I could not release the report publicly to reveal its flaws. But I did provide it to the military judge for his consideration in conjunction with my motion detailing other abuses experienced by Jawad. The judge referenced the incident in the findings portion of his ruling: “On or about June 2, 2008, the accused was beaten, kicked, and pepper sprayed for not complying with a guard’s instructions.”

This incident perhaps best exemplifies the radically different perspectives of the Department of Defense and its critics concerning detainee abuses. The Pentagon viewed this as just another report of detainee abuse that was promptly investigated and corrected. But from my perspective, both the investigation and the corrective action were pathetically inadequate.

III. Insufficient Punishment: Death and Cruelty at Bagram Prison

Although the government’s official position is that it takes “appropriate actions to hold accountable” soldiers who abuse detainees, many critics believe that most punishment for cases of proven abuse is weak and inadequate. The pepper-spray incident certainly tended to confirm this view. As part of my defense of Jawad, I learned of a far more serious example. Jawad was held at Bagram prison from December 18, 2002 until early February 2003. During this time, the Bagram prison guards were from the 377th Military Police Company and the interrogators were from the 519th Military Intelligence Battalion. Arguably, these units were responsible for the worst detainee abuse in the entire War on Terror in the fall of 2002 and winter of 2002–03. In December 2002, U.S. soldiers serving as prison guards beat two prisoners, Habibullah and Dilawar, so badly that they died from the beatings. The initial investigation by the Army Criminal

128. No reason was provided for classifying the report, and none was apparent to me.
129. United States v. Jawad, 1 M.C. 334, 335 (Military Comm’n, Guantanamo Bay, Cuba Sept. 24, 2008) (ruling on Defense Motion to Dismiss—Torture of the Detainee (D-008)).
132. Amended Petition for Writ of Habeas Corpus, supra note 17, at 11–12.
Investigation Command ("CID") into the death of Habibullah ruled it a homicide but "initially recommended closing the case" because "it was impossible to determine who was responsible for Habibullah's injuries because so many were involved." However, press interest in the two cases "sparked renewed progress in the criminal investigation." As part of the investigation, Army CID agents travelled to Guantánamo to interview military personnel who had been assigned at Bagram and detainees who had been held at Bagram at or near the time of the two deaths. Based on a tip from another detainee, the CID agents interviewed Jawad, who had arrived at Bagram one week after Dilawar's death. I learned of this interview rather fortuitously. There was no record of this interview in the original discovery materials which purported to include all the interview and interrogations records of Jawad. Rather, months after the arraignment, Lieutenant Colonel Vandeveld happened to stumble across the statement while reading the trial transcript of an Army soldier, Private First Class Damien Corsetti. In June 2006, a court-martial acquitted Private First Class Corsetti of all charges stemming from abuse of detainees at Bagram. During the court-martial, however, the prosecutor offered into evidence a summary of Jawad's interview with the CID interrogators. The fact that an Army prosecutor considered Jawad’s statement to be sufficiently reliable to offer it into evidence against this soldier was telling.

The Jawad defense team located the CID agent who had interviewed Jawad and was one of the lead investigators into the detainee abuses at Bagram, and we called her to testify in a pretrial hearing in Jawad's commission. Assistant defense counsel Lieutenant Com-

136. Id.
137. August Transcript of Hearing, supra note 76, at 593–95.
141. August Transcript of Hearing, supra note 76, at 593 ("I was assigned as a Task Force Commander to investigate two homicides at the Bagram Control Point in Afghanistan.").
mander Katharine Doxakis, a U.S. Naval Reserve JAG, conducted the direct examination.\textsuperscript{142} Excerpts of the testimony\textsuperscript{143} are illuminating:

\begin{quote}
Q [LCDR DOXAKIS]: What did Mr. Jawad tell you about his experiences at Bagram?

A [WITNESS]:\textsuperscript{144} He didn’t have any information relevant to the deaths we were investigating, but he did talk about suffering similar types of abuse that we had noted from other detainees and on the two men that were deceased.

Q [LCDR DOXAKIS]: And specifically what types of abuse did he note to you?

A [WITNESS]: Being forced to stand, being sleep deprived, being hit, kicked, beaten.

Q [LCDR DOXAKIS]: Did he describe to you being shackled and hooded?

A [WITNESS]: Yes, he did.

Q [LCDR DOXAKIS]: During your investigation was that something that you encountered frequently, reports of being shackled and hooded?

A [WITNESS]: Yes ma’am, shackling was quite common in that facility as was hooding.

Q [LCDR DOXAKIS]: Can you describe for us what that means?

A [WITNESS]: There were a variety of configurations for shackling individuals primarily hand irons, which are traditional handcuffs we used, also leg irons. Often times there was a waist chain used and the chain was run from the legs irons, to the hand irons, through the belly chain as a form of restraint during movement. And on several occasions we had discovered evidence that the detainees were cuffed to objects: doors, ceilings, air locks, things of that nature.

Q [LCDR DOXAKIS]: And did Mr. Jawad actually report to you being chained to the door of his isolation cell?

A [WITNESS]: Yes, ma’am.

\ldots

Q [LCDR DOXAKIS]: And when you described the shackling of arms and legs was that done at the same time or at separate times?

A [WITNESS]: It varied depending on the circumstance and what the guards were trying to achieve with the shackling.

Q [LCDR DOXAKIS]: You described kicking and hitting can you tell us a little bit more about that?
\end{quote}

\textsuperscript{142} LCDR Doxakis was later promoted to Commander. See Worthington, supra note 116.
\textsuperscript{143} These excerpts are from an uncorrected transcript prepared by the court reporter for the military commission and provided to the parties to the case. Because the charges were dismissed, the transcript was never published or officially released.
\textsuperscript{144} The witness’s name is withheld for privacy reasons.
A [WITNESS]: It has been my experience with talking with folks from that theater that anytime they are touched with a foot or leg they describe it as a kick. We were much more precise in the homicide investigation because we were looking at a particular type of blow that was delivered by the MPs, which was a knee to the thigh area. So when he says kicked it could have been a number of things.

Q [LCDR DOXAKIS]: Was there—didn’t Mr. Jawad report to you that he was not allowed to speak during his time at Bagram?

A [WITNESS]: Yes, ma’am that is one of the rules at Bagram.

Q [LCDR DOXAKIS]: And what happened if someone did speak?

A [WITNESS]: They were generally segregated from the rest of the population.

Q [LCDR DOXAKIS]: Was there any discussion of doctors between you and Mr. Jawad and his medical care at Bagram?

A [WITNESS]: Yes, ma’am quite a bit.

Q [LCDR DOXAKIS]: Can you please describe that for us?

A [WITNESS]: He told us that during his capture or shortly thereafter he had a broken nose that he suffered abuses at Bagram and as a result . . . he asked to see the doctor and was taken to see him for chest pain I believe and painful urination and that he had made frequent, similar complaints while he was at Guantánamo Bay in the facility there. But he told us that he didn’t have a lot of confidence in the doctors.

Q [LCDR DOXAKIS]: Did Mr. Jawad report to you hearing the cries and screaming from other detainees?

A [WITNESS]: Yes he did, yes ma’am.

Q [LCDR DOXAKIS]: Can you explain that to us what that would mean?

A [WITNESS]: That was a fairly common finding with most of the detainees. The facility at Bagram had two floors one of them housed the general population and the second floor housed the interrogation booths and isolation cells. And there were . . . several detainees to include Mr. Jawad told us that they had heard other detainees crying for their parents, begging for the beatings to stop things of that nature.

Q [LCDR DOXAKIS]: Can you explain the procedure that was used for detainees going up and down the stairs?

A [WITNESS]: When the detainee needed to be moved for security reasons the guards did not want them to know the layout of the facility, so they were hooded, shackled, and handcuffed for movement up the stairwell.

Q [LCDR DOXAKIS]: And where were the bathrooms located?

A [WITNESS]: Downstairs.

Q [LCDR DOXAKIS]: So is it fair to say that a detainee who was in isolation would have to go up and down the stairs to get to the bathroom?
A [WITNESS]: Yes, ma’am they would.

Q [LCDR DOXAKIS]: And what did Mr. Jawad report to you about his experience on those stairs?

A [WITNESS]: He reported being pushed down the stairs by the MP guards.145

. . .

Q [LCDR DOXAKIS]: Now Mr. Jawad indicated to you that he was interrogated while he was at Bagram, correct?

A [WITNESS]: Yes, ma’am, a number of times.

Q [LCDR DOXAKIS]: And did he also indicate to you that he was beat and kicked by the MPs?

. . .

A [WITNESS]: Yes, ma’am.

. . .

Q [LCDR DOXAKIS]: In your experience as an MP and an investigator is there anything that you found troubling about the actions of the MPs in that particular situation?

A [WITNESS]: The military police were acting as an agent of the military interrogators. They were charged with keeping up the course of sleep deprivation and to that extent when the individual would lie down or sit down, the MPs would go into the cell and physically force them to stand.146

. . .

Q [LCDR DOXAKIS]: Was anything that Mr. Jawad told you inconsistent with what you have heard from other detainees?

A [WITNESS]: No ma’am.147

In response to a question on cross-examination by Lieutenant Colonel Vandeveeld, the witness stated:

A [WITNESS]: I interviewed approximately 99 members of the Military Police Company over a three week period and we obtained 18 confessions or admissions from the military police to various degrees of mistreatment, maltreatment or abuse.148

On re-direct, Lt. Cdr. Doxakis followed up on this answer.

Q [LCDR DOXAKIS]: And you indicated on cross examination that you interviewed a number of guards, yes?

A [WITNESS]: Yes, ma’am.

Q [LCDR DOXAKIS]: Did those guards admit to the same types of abuse that Mr. Jawad had reported to you?

A [WITNESS]: Some of them did, yes, ma’am.149

Unlike some other investigations into detainee abuse, the investigation into the deaths and other abuses at Bagram was very thorough,

146. Id. at 605.
147. Id. at 600.
148. Id. at 609.
149. Id. at 616.
running to approximately two thousand pages. Army criminal investigators “recommended that at least twenty-seven different personnel, including military police, be criminally charged, both for crimes relating to the deaths and for other abuses of detainees at Bagram that were documented during the investigation.” But despite the overwhelming evidence collected by the CID agents, the military never punished most of the soldiers implicated. The military court-martialed and convicted only six soldiers, all of whom received exceptionally light sentences. Two soldiers received no prison sentence at all; the others received sentences ranging from two to five months. The military has not charged anyone with criminal homicide (manslaughter or murder) for the deaths of Dilawar and Habibullah. This failure to prosecute such heinous crimes is by no means an aberration. According to a 2006 report by Human Rights First:

Since August 2002, nearly 100 detainees have died while in the hands of U.S. officials in the global “war on terror.” According to the U.S. military’s own classifications, 34 of these cases are suspected or confirmed homicides; Human Rights First has identified another 11 in which the facts suggest death as a result of physical abuse or harsh conditions of detention. In close to half the deaths Human Rights First surveyed, the cause of death remains officially undetermined or unannounced. Overall, eight people in U.S. custody were tortured to death.

Despite these numbers, four years since the first known death in U.S. custody, only 12 detainee deaths have resulted in punishment of any kind for any U.S. official. Of the 34 homicide cases so far identified by the military, investigators recommended criminal charges in fewer than two thirds, and charges were actually brought (based on decisions made by command) in less than half. . . Crucially, among the worst cases in this list—those of detainees tortured to death—only half have resulted in punishment; the steepest sentence for anyone involved in a torture-related death: five months in jail.

I contacted the author of the report, Hina Shamsi, now Director of the ACLU National Security Project and asked her if accountability had improved significantly in the years since she authored the report. Her succinct reply confirms my own sense of the matter: "the general

151. HUMAN RIGHTS WATCH ET AL., supra note 7, at 27.
152. Id.
153. Id.
154. SHAMS, supra note 134, at 1.
155. Ms. Shamsi served, for a brief time, as co-counsel for Mr. Jawad’s petition for a writ of habeas corpus.
state of accountability continues to be abysmal. For senior-level officials who authorized torture, it is non-existent.”

Conclusion

The assertion that the U.S. government has appropriately accounted for all incidents of detainee abuse is the government’s latest misleading claim about the treatment of detainees over the past several years. First, our leaders claimed that the United States did not torture or abuse detainees at all. Then, confronted with undeniable evidence of abuse, they claimed that abuses of detainees were isolated incidents perpetrated by a few rogue soldiers (such as at Abu Ghraib) or that what looked like gross human-rights abuses were really “enhanced interrogation methods” necessary to elicit critical intelligence to forestall impending terrorist attacks. But the abuse of Mohammed Jawad and his fellow prisoners at Bagram and Guantánamo fell into neither of these categories. These abuses were widespread, systemic, and either officially sanctioned or deliberately ignored by senior military prison officials. Despite the persistent denials of Secretary Rumsfeld and others, it is now beyond doubt that although some abuses resulted from the isolated acts of rogue guards, many abuses resulted from command policies. And in many instances, such as the frequent-flyer program carried out by the Joint

156. Email from Hina Shamsi, Dir., ACLU Nat’l Sec. Project, to David J. R. Frakt, Assoc. Professor of Law, Barry Univ. Sch. of Law (Jan. 6, 2011, 4:29 PM) (on file with author).
160. DoD Comment on ACLU and Human Rights First Lawsuit, supra note 9 (stating that “[w]e vigorously dispute any assertion or implication that the Department of Defense approved of, sanctioned, or condoned as a matter of policy detainee abuse;” and “no policies or procedures approved by the Secretary of Defense were intended as, or could conceivably have been interpreted as, a policy of abuse, or as condoning abuse.”).
161. See, e.g., S. COMM. ON ARMED SERVS., supra note <CITE _Ref164067953>, at xii (“The abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”).
Detention Group at Guantánamo, the abuses only tangentially related to intelligence gathering, if at all, and were not limited to suspected high-level al Qaeda operatives believed to possess critical information. Whatever the causes of detainee abuse, the military has fallen short in holding the perpetrators accountable.

Why has military accountability been so poor? While I could devote several articles to this question, a few observations come to mind. Regarding the failure to investigate, or investigate carefully, the offending soldier’s direct chain of command is responsible for directing investigations and initiating disciplinary actions. But when this chain of command has failed to adequately train or supervise soldiers responsible for detention operations, or worse, tacitly encouraged or even ordered detainee abuses, they have little incentive to thoroughly investigate. As a result, the normal disciplinary procedures utilized by the military, both administrative and judicial, do not take place and the corresponding historical record remains blank.

Even when the military conducts a thorough investigation and attempts to hold abusers accountable, successful prosecution of offenders has proven difficult. Many offenders have received minimal punishment. I believe there may be several factors at work in these cases that are leading to weak results.

First, I believe that military juries are very reluctant to participate in what they see as the scapegoating of junior enlisted soldiers for problems that stem from ineffective leadership. Military officers who serve on courts-martial are often acutely aware that the lower-level personnel being tried before them are unlikely to have acted without the tacit or even direct authority of their superior officers.

Second, military defendants have also argued that they were confused about what was permitted because of poor or conflicting guidance about proper treatment of detainees and appropriate interrogation techniques. Defense counsel in the Bagram cases have blamed the confusion on the senior leadership of the Bush administration, starting with the President’s determination that the Geneva Conventions did not apply to persons captured in the Afghanistan conflict and extending to the rule that “military necessity” can overcome the general policy for humane treatment.

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163. See Memorandum from President George W. Bush to the Vice President et al., Regarding Humane Treatment of Taliban and al Qaeda Detainees 1 (Feb. 7, 2002), availa-
Third, the lack of accountability perpetuates more abuse. Regardless of whether the chain of command ordered or officially sanctioned abuses, when our military leaders look the other way or the perpetrators receive only a slap on the wrist, it sends a clear signal to the troops that the military will tolerate, and perhaps even implicitly encourage, detainee abuse. Military discipline tends to reflect the command climate, starting at the very top of the chain of command. When the Commander in Chief and Secretary of Defense have personally authorized torturing detainees and have unapologetically defended their actions, and when one high-level military investigation after another failed to recommend discipline for any senior military leaders for their role in allowing abuse to take place, it is easy to understand why a military jury would hesitate to impose severe punishment on a fellow soldier. Military juries are also aware that their civilian counterparts in the CIA and government contractors involved in detention and interrogation operations have largely avoided accountability for their abuse of detainees. Why should the military be the only ones punished for what is a government-wide problem?

Unfortunately, the permissive command climate has not changed as dramatically as one might have hoped in the two years since the current administration took office. Although the government has strengthened emphasis on humane treatment in current detainee operations and, perhaps, investigated complaints of detainee abuse more vigorously than before, the administration clearly has no appetite to revisit abuses that occurred during the Bush years. Under the

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164. See Human Rights First, Private Security Contractors at War: Ending the Culture of Impunity (2008), available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/081115-uls-psc-final.pdf; Amnesty Int’l, Fact Sheet: Outsourcing Abuses in the ‘Global War on Terror’ (2008), available at http://www.amnestyusa.org/business/pdf/pmscsfactsheet3-08.pdf (“24 known cases of abuse allegedly committed by civilians have been forwarded to the Department of Justice (DOJ) by the Department of Defense (DOD) and CIA Inspector General for investigation and prosecution. The alleged human rights violations include torture and sexual abuse, and at least four detained persons have died, two each in Iraq and Afghanistan, in the custody of civilian contractors. . . . [T]he DOJ in February 2008 . . . stated that of a total of 24 cases referred to it, 22 had been declined and two were pending.”).
guise of looking forward rather than looking backward, the Obama administration seems quite content to allow older incidents of abuse, such as that suffered by Mohammed Jawad, Dilawar, and Habibullah, to simply fade into history. This attitude, while perhaps politically expedient, makes real progress in military accountability for detainee abuse difficult to achieve. Why should we expect commanders and military juries to mete out harsh punishment for new incidents of abuse when prior offenders have literally gotten away with murder?

Failure to seek real accountability through prosecution at all levels of the chain of command not only hampers military discipline but also undermines the United States’ position as a champion of justice and the rule of law. While President Obama’s desire to avoid the messy and politically charged environment that an aggressive inquiry into prisoner abuse would likely engender is understandable, if we are to achieve real progress in restoring the rule of law to our detention and interrogation operations and effectively deter future abuses, we must first honestly confront the abuses of the recent past. While it may be too late to apply legal sanctions for the specific abuses experienced by Mohammad Jawad, there are many other serious abuse incidents for which accountability is not only feasible but arguably mandated by international law. Even if prosecution is impracticable, to restore its international credibility as a leader in the human-rights arena, the United States must undertake a thorough investigation and analysis of these abuses. That is the true way forward.


166. See Human Rights Watch et al., supra note 7, at 17–21.