

I, Darrel Vandeveld, hereby declare as follows

1. I am a Lieutenant Colonel in the US Army Reserve Judge Advocate General's Corps. Since the September 2001 attacks, I have served in Bosnia, Africa, Iraq and Afghanistan. My awards include, among others, the Bronze Star Medal, the Iraqi Campaign Medal, the Joint Service Commendation Medal, and two Joint Meritorious Unit Awards. In civilian life, I am a Senior Deputy Attorney General for the Commonwealth of Pennsylvania, and since graduating from law school, I have tried well over one hundred criminal jury trials.

2. I offer this declaration in support of Mohammed Jawad's petition for *habeas corpus*.¹ I was the lead prosecutor assigned to the Military Commissions case against Mr. Jawad until my resignation in September 2008. It is my opinion, based on my extensive knowledge of the case, that there is no credible evidence or legal basis to justify Mr. Jawad's detention in U.S. custody or his prosecution by military commission. There is, however, reliable evidence that he was badly mistreated by U.S. authorities both in Afghanistan and at Guantanamo, and he has suffered, and continues to suffer, great psychological harm. Holding Mr. Jawad's for over six years, with no resolution of his case and with no terminus in sight, is something beyond a travesty.

3. In May 2007, I was assigned as a prosecutor at the Office of Military Commissions – Prosecution (“OMC-P”). At the time I reported for duty, attorneys in the office were in the process of developing charges against a number of detainees at Guantanamo. The Chief Prosecutor at the time, US Air Force Colonel Morris Davis, assigned me to review the evidence and other information collected against literally dozens of detainees, including Mr. Jawad. Within a short period of time, I assumed the role of lead prosecutor in the Commissions case against Mr. Jawad. Initially, based on my long experience and thorough review of the materials then available to me, the case appeared to be as simple as the street crimes I had prosecuted by the dozens in civilian life. Mr. Jawad's case was also qualitatively distinguishable from certain other potential Commissions cases, in that he possessed no significant intelligence value, and seemed to be of little interest to any US intelligence agency – save a few underemployed and largely untrained military and certain civilian “interrogators” looking for ways to further their rudimentary training and minimal skills during their six-month tours at Guantanamo.

4. On the surface, it appeared that in the fall of 2002, Mr. Jawad had voluntarily joined a newly-formed domestic insurgent group, Hezb-e-Islami Gulbuddin (HIG), which had

¹ To the best of my information and belief, this declaration does not contain any classified information. Indeed, virtually all of the information contained in this declaration has been publicly released in various forms including court filings cleared for release by the government and media accounts.

provided him with training and hand-grenades, to be used to carry out an attack on U.S. forces. There is no doubt that someone conducted a brazen hand-grenade attack on two U.S. Special Forces Soldiers and their Afghan interpreter, who were stuck in traffic in a crowded Kabul bazaar or marketplace on December 17, 2002. The Soldiers and the interpreter sustained significant injuries when the grenade exploded inside the victims' vehicle. Fortunately, because of the body armor worn by the Soldiers, they managed to survive the attack. Although Mr. Jawad was undoubtedly present in the bazaar at the time of the attack, there is considerable doubt in my mind about whether Mr. Jawad actually threw the hand grenade. Furthermore, the most credible evidence in the possession of the U.S. government is that Mr. Jawad was lured to Afghanistan under false pretenses – the promise of well-paid work clearing landmines promised to him by unscrupulous recruiters for HIG. There is also evidence to suggest that HIG drugged Mr. Jawad and forced him to participate in the attack against his will.

5. The skeletal witness statements I received suggested that Mr. Jawad had been arrested almost immediately after the attack by Afghan police officials and by two members of what was then the Afghan National Army, who happened to present at the scene. According to these witness accounts, the Afghan police transported Mr. Jawad to an Afghan police station located nearby, where the Afghans interrogated him. The Afghan police officials maintained that once at the station, Mr. Jawad freely confessed to tossing the hand grenade in the victims' vehicle, and further that Mr. Jawad claimed sole responsibility for the attack. The Afghans produced a statement handwritten in the Dari language (Dari is the Afghan term for Farsi), which they claimed was Mr. Jawad's personal confession, with his thumbprint at the bottom, to his recruitment by the terrorist organization and his conduct of the attack. In this handwritten statement, and in translated summaries of other interviews of other purported percipient witnesses conducted several months after the attack, Mr. Jawad proclaimed his pride in conducting the attack, and, perhaps most inflammatory of all, claimed that he would repeat the attack if given the opportunity.

6. Following several hours in Afghan police custody, US Special Forces in Kabul from the same unit as the Soldiers wounded in the attack, retrieved Mr. Jawad from the Afghans and transported him to the unit's nearby forward operating base. The Afghan authorities were initially reluctant to hand Mr. Jawad over to US Forces, but ultimately agreed to do so. Once in U.S. custody, U.S. military personnel re-interrogated Mr. Jawad, who, after initial denials, eventually confessed to his role in the attack, this time on videotape recorded by U.S. personnel. Although the materials I had accumulated before charging Mr. Jawad did not include a copy of the videotape, I expected -- naively, as it turned out -- that I would be able to retrieve a copy of the taped confession through either the Special Forces unit itself, or from the Criminal Investigative Task Force ("CITF"), a joint activity charged with

investigating and collecting evidence of crimes allegedly committed by detainees held at Guantanamo.

7. It is important to understand that the “case files” compiled at OMC-P or developed by CITF are nothing like the investigation and case files assembled by civilian police agencies and prosecution offices, which typically follow a standardized format, include initial reports of investigation, subsequent reports compiled by investigators, and the like. Similarly, neither OMC-P nor CITF maintained any central repository for case files, any method for cataloguing and storing physical evidence, or any other system for assembling a potential case into a readily intelligible format that is the sine qua non of a successful prosecution. While no experienced prosecutor, much less one who had performed his or her duties in the fog of war, would expect that potential war crimes would be presented, at least initially, in “tidy little packages,” at the time I inherited the Jawad case, Mr. Jawad had been in U.S. custody for approximately five years. It seemed reasonable to expect at the very least that after such a lengthy period of time, all available evidence would have been collected, catalogued, systemized, and evaluated thoroughly – particularly since the suspect had been imprisoned throughout the entire time the case should have been undergoing preparation.

8. Instead, to the shock of my professional sensibilities, I discovered that the evidence, such as it was, remained scattered throughout an incomprehensible labyrinth of databases primarily under the control of CITF, or strewn throughout the prosecution offices in desk drawers, bookcases packed with vaguely-labeled plastic containers, or even simply piled on the tops of desks vacated by prosecutors who had departed the Commissions for other assignments. I further discovered that most physical evidence that had been collected had either disappeared or had been stored in locations that no one with any tenure at, or institutional knowledge of, the Commissions could identify with any degree of specificity or certainty. The state of disarray was so extensive that I later learned, as described below, that crucial physical evidence and other documents relevant to both the prosecution and the defense had been tossed into a locker located at Guantanamo and promptly forgotten. Although it took me a number of months -- so extensive was the lack of any discernable organization, and so difficult was it for me to accept that the US military could have failed so miserably in six years of effort -- I began to entertain my first, developing doubts about the propriety of attempting to prosecute Mr. Jawad without any assurance that through the exercise of due diligence I could collect and organize the evidence in a manner that would meet our common professional obligations.²

² Other prosecutors who preceded me at OMC had been assigned to the Jawad case, but the case was not a high priority case and had only been partially developed.

9. However, in July 2007, still clinging to the belief that the case could be prosecuted ethically and successfully as I worked to remedy the file's deficiencies, I briefed Brigadier General Thomas Hartmann, the newly-appointed Legal Advisor to the Commission's Convening Authority, on the essential facts of the case. Brigadier General Hartmann was apparently impressed with my presentation, and later testified that it was one of the clearest and most succinct briefings that he received among the dozens presented when he first arrived at the Commissions. He was immediately and obviously enthusiastic about the case, evidently believing, as did I at the time, that the case's factual simplicity and the uncontroversial elements of the potential charges rendered the case the primary candidate for immediate prosecution. Although it was clear that the Chief Prosecutor at the time, Colonel Morris Davis, did not share this enthusiasm, and harbored misgivings virtually identical to my own about the accessibility and organization of the evidence, I was directed to focus my efforts on preparing the Jawad case for charging because of the Legal Advisor's intense interest in the case. I do not fault Brigadier General Hartmann for his initial impressions of the case, since they were based on my own honest presentation.

10. We swore charges against Mr. Jawad on 9 October 2007. Col Davis had resigned the previous week and this was the first regular duty day that the Deputy Chief Prosecutor, LTC W.B.³ was serving as the Acting Chief Prosecutor. We alleged two sets of charges with three specifications each (one for each victim), but all were of course predicated on Mr. Jawad's alleged hand grenade attack. The charges alleged attempted murder in violation of the law of war and the intentional infliction of serious bodily harm. This latter charge also included the allegation consistent with the elements in the Manual for Military Commission that the act causing the injury was "in violation of the law of war." The Manual for Military Commissions does not have model specifications, so I modeled the charges and specifications on roughly equivalent offenses set forth in the Manual for Courts-Martial (which does not contain these offenses). We theorized that because Mr. Jawad was an alien unlawful enemy combatant – not part of a regular armed force, not under responsible command, not wearing a uniform or other distinctive symbol, and had not been carrying arms openly – any criminal act that he committed would perforce be a violation of the law of war as defined by the operative statutory scheme, the Military Commissions Act of 2006 ("MCA"). Essentially, OMC-P had taken the position that "attempted murder in violation of the law of war" should be considered the functional equivalent of "attempted murder by an unprivileged belligerent" (the widely-accepted term for an unlawful combatant). Of course, the legal sufficiency of the charge was the subject of some debate within the office and by

³ Again, for reasons of personal privacy, I refrain from identifying LTC W.B. by name.

other lawyers from the Department of Justice who from time to time advised OMC-P, but in the end, the consensus emerged that the facts stated charges under the MCA.⁴

11. At the time of the swearing of charges we had absolutely no idea that Mr. Jawad had ever been subjected to any abusive treatment of any kind by anyone involved in his capture and subsequent imprisonment. The documentation we did possess – photographs of Mr. Jawad unclothed, and written reports of physical examinations conducted by U.S. medical personnel after Mr. Jawad had been transferred to U.S. custody by the Afghans – seemed to demonstrate that he had not been severely physically abused (there was a fresh wound to the bridge of Mr. Jawad’s nose, but no other visible marks.). In the absence of any evidence to the contrary, I proceeded on the assumption that he had not been subjected to mental cruelty either. Neither OMC-P, CITF, nor Joint Task Force-Guantanamo (JTF-GTMO) appeared to possess any documentation concerning Mr. Jawad’s treatment at Bagram or at Guantanamo. Although I was generally aware that there had been some excesses in the treatment of detainees at Bagram, we at OMC-P were predisposed, perhaps by virtue of our core beliefs about American probity, to discount any allegation of detainee abuse at either location. Of course, we also knew and believed that members of al Qaeda had been trained to make false claims of abuse if captured as part of their propaganda war against the U.S. and as a means to halt their interrogations or to serve as the basis for attempting to discredit any admissions they may have made in the course of questioning. We accepted as an article of faith that the detainees either fabricated outright or grossly exaggerated their seemingly continual complaints of abuse. I personally assumed, based on media reports, that a small number of detainees had been subjected to less than congenial interrogation tactics, but only because the interrogators had some basis to believe that such detainees possessed intelligence critical to our efforts to disrupt and destroy al Qaeda. It did not occur to me that such methods might exceed the bounds of acceptable or otherwise properly authorized conduct.

12. Furthermore, there was nothing about Mr. Jawad’s personal history to suggest that he would be targeted for abuse in the course of his interrogation sessions or his subsequent imprisonment. It became obvious that, to the extent that Mr. Jawad was involved in HIG at all, he was certainly not involved with the organization long enough to have any actionable

⁴ I do recall that one of the more astute prosecutors in the office questioned whether attacking a lawful target (uniformed enemy soldiers) with a lawful weapon (a hand grenade) in the midst of an armed conflict could plausibly be considered a violation of the law of war. Those involved in the charging decision, including I, were unpersuaded by this argument, and the theory that any attack on U.S. Soldiers by a person meeting the MCA’s definition of unlawful combatant was a war crime ultimately prevailed.

intelligence, or even unique or otherwise unknown information about the group. Mr. Jawad's youth, his lack of any but the most rudimentary education, and his manifest gullibility marked him, at best, as a low level foot soldier. Our conclusion in this respect had been underscored by the relatively quick clearance we received from the Office of the Director of National Intelligence (ODNI) permitting us charge Mr. Jawad. Under Commission rules, ODNI has effective veto power over charging decisions because the rules require ODNI to certify that charging a detainee will not harm national security.

13. I later learned that Mr. Jawad had in fact been abused, both physically and mentally, at different times during his captivity, as I will detail below. Had I known of this abuse, I may very well have refrained from recommending the referral of charges.⁵ Both Colonel Davis and LTC W.B. testified in the course of the Commission proceedings against Mr. Jawad that they likewise knew nothing of the abuse and that the abuse would have been a significant factor militating against charging Mr. Jawad had they possessed such knowledge.

14. Likewise, at the time Mr. Jawad was charged we were not particularly focused or even much concerned about Mr. Jawad's status as a juvenile, since we regarded Mr. Jawad's age as relevant only to the sentence we believed he would eventually receive, rather than to the threshold issue of his guilt or innocence. There were, however, discrepancies in the files about his age. The working assumption was that Jawad was probably 18 or 19 and that he had lied about his age when questioned about the matter. In any event, OMC-P had charged Omar Khadr, who was evidently fifteen years old at the time of his alleged offenses, and there seemed to be little concern about the propriety of charging minors as war criminals. I later became firmly convinced that Mr. Jawad was a minor at the time he was captured, probably 15 or 16, but certainly no older than 17. The photos of Mr. Jawad taken the day of his capture and the testimony of the eyewitnesses who observed him, plus the medical records reflecting his height and weight and the growth that he experienced at Guantanamo all strongly suggest that he was an adolescent in December 2002, and that is my personal belief. Virtually all of the documentation concerning Mr. Jawad from his first year or so at Guantanamo lists his age as approximately 17 years, so one would be hard pressed to argue that U.S. officials at Guantanamo were unaware of his juvenile status. For reasons still unclear to me, medical personnel at Guantanamo performed a bone-density scan of one of Mr. Jawad's hands in the fall of 2003 in order to determine his age. The scan determined his "bone age" to be "approximately 18", consistent with him being 17 at the

⁵ I obviously cannot say definitively in hindsight what I would have done; as I explain, failing to charge Mr. Jawad might very well have resulted in his indefinite detention as an enemy combatant, an eventuality I hope I would not have countenanced had I known the actual facts. Charging him would have at least offered the opportunity to secure his eventual release through a negotiated plea, as abhorrent as this sort of calculation should be to any lawyer bound by ethical rules and a commitment to justice.

time of capture. Although there is no question that JTF-GTMO knew or should have known that Mr. Jawad was a minor when he arrived at Guantanamo, I never saw any documentation that they ever afforded him any special treatment as a juvenile. As far as I know, JTF-GTMO housed and treated Mr. Jawad as an adult prisoner throughout the period of his minority.

15. As part of my ongoing effort to develop the case against Mr. Jawad, in December 2007, I travelled to Afghanistan to depose the Afghans who had participated in Mr. Jawad's capture and subsequent interrogation at the Afghan district police station. These witnesses included three police officials, and the Afghan Interior Minister at the time of Mr. Jawad's arrest. While I was puzzled by the minister's participation in Mr. Jawad's post-capture interrogation, he explained under oath that his interest proceeded from "the fact that the attack was one of the first ones on American forces by an Afghan." He also alluded to police corruption and the obligation he felt to ensure that Jawad would be treated properly. Given the resistance the Afghans displayed toward transferring Mr. Jawad to U.S. custody, however, I privately concluded the minister's presence had been motivated by the opposite of what he claimed during his deposition, and that in actuality he thought the Americans might pay the Afghans to relinquish Mr. Jawad. In any case, each of the witnesses deposed in Kabul, and cross-examined by Jawad's acting defense attorney at the time, denied any physical abuse of Mr. Jawad.

16. I continued to prepare the case against Mr. Jawad throughout the winter and spring of 2008, and was also assigned to prepare at least five other cases for charging during this same period. At one point, I served as the lead prosecutor for approximately one out of every three cases pending at OMC-P. The Convening Authority referred the charges against Mr. Jawad to a Military Commission on January 30, 2008. According to Commission procedure, Mr. Jawad's arraignment should have been held within 30 days of the date of referral, but the defense counsel then assigned to the case asked for a delay so he could build sufficient rapport with Mr. Jawad so that Mr. Jawad would consent to his representation. While I understood the reluctance of most detainees to accept representation by "those who wear the uniform of my enemies," I viewed the arraignment as an essentially ministerial act that should have been accomplished within the time prescribed. I suppose I gave short shrift to the immense difficulty that our military defense counsel have in overcoming the suspicion and hostility harbored toward them by the detainees they are detailed to represent. Of course, I now know that, at least in Mr. Jawad's case, the mistreatment he suffered at Guantanamo only exacerbated the defense counsel's difficulties. Given my limited information at the time and my untempered zeal, I opposed the delay, but the Military Judge granted one anyway. The Commission finally conducted the arraignment on March 12, 2008, at which, predictably, Mr. Jawad rejected his detailed defense counsel. Mr. Jawad was apparently unmoved by the defense counsel's risking of

his own life to travel to Kabul on Mr. Jawad's behalf. As it turned out, the defense counsel, a highly-accomplished lawyer and reservist, had reached the end of his one year tour and asked to be excused from the case. I knew of no basis in law to oppose the request, and the Military Judge, though manifestly displeased, granted the request. Again, Mr. Jawad said he wanted no part of the proceedings and did not believe he could get justice or a fair trial. It took me several months before I arrived at the very same conclusion.

17. After the arraignment, there ensued a two-month delay in the case while the Office of Military Commissions-Defense waited for a qualified defense attorney to arrive who could be detailed as Mr. Jawad's new defense counsel. Major David Frakt reported for duty on April 28, 2008, and I received notice the very next day that Major Frakt had been detailed to Mr. Jawad's case. The day Major Frakt was detailed, I received a comprehensive discovery request from him seeking, among other materials, all the records relating to Mr. Jawad's detention. The new Military Judge assigned to the case, COL Peter Brownback, was commendably eager to get the case moving again and promptly set a new arraignment hearing for the following week, on May 7th, at Guantanamo.

18. At the hearing, I was the sole prosecutor and Major Frakt the sole defense counsel. At the beginning of the hearing, the judge asked Mr. Jawad if he would accept Major Frakt as his counsel. Major Frakt announced that he had reached a compromise with his client whereby Jawad would permit Major Frakt to represent him for the limited purposes of challenging the legitimacy of the commissions and the conditions of his confinement. The judge, recognizing this as significant progress, approved the compromise. I am ashamed to say that I denounced the idea as "idiotic," a comment I immediately retracted on the record at the urging of the Military Judge. At some point during the hearing, Mr. Jawad erupted into a series of harsh complaints about his mistreatment at Guantanamo, in which he described having been moved repeatedly from cell to cell in order to deprive him of sleep. Having at that point seen no evidence substantiating this claim, and for which I could divine no legitimate purpose, I dismissed his speech as an exaggeration. When JTF-GTMO later produced evidence that verified Mr. Jawad's claims, I realized I had made a misrepresentation to the tribunal, however unintended, and I specifically retracted my denunciation in a filing with the Commission. In any case, Judge Brownback announced a schedule for further hearings. While I argued vociferously for an early trial date, Judge Brownback – wisely, as it turned out -- declined to set one at all.

19. Over the next few weeks, I set about trying to gather the records in response to Major Frakt's discovery request. I obtained a copy of the Detainee Incident Management System (DIMS) records maintained by JTF-GTMO. The DIMS are the official prison logs of all actions and activities for each detainee. Every move, medical appointment, chaplain visit, interrogation, and disciplinary action is recorded, and much more. While reviewing the records, I noticed that they referred to a suicide attempt by Mohammed Jawad on

December 25, 2003, which he sought to accomplish by banging his head repeatedly against one of his cell walls. I sent a copy of the records to Major Frakt. Shortly thereafter, Major Frakt contacted me with some follow-up questions about the records. The records reflected 112 unexplained moves from cell to cell over a two week period, an average of eight moves per day for 14 days. Upon further investigation, we were able to determine that Mr. Jawad had been subjected to a sleep deprivation program popularly referred to as the “frequent flyer” program. I realized that Mr. Jawad had been telling the truth at the last hearing. I lack the words to express the heartsickness I experienced when I came to understand the pointless, purely gratuitous mistreatment of Mr. Jawad by my fellow Soldiers.

20. Over the course of the summer, my concerns and doubts about the strength of the case continued to mount. Despite a diligent search for the videotape of Mr. Jawad’s original interrogation by U.S. personnel, a search that included a service-wide inquiry about the tape and where it might be located, I was never able to find the tape. I also failed to locate two alleged eyewitnesses to the attack who had allegedly told a U.S. investigator that they had personally witnessed Jawad throw the grenade. All I had were two paragraph summaries of interviews conducted through an interpreter of these witnesses several months after the attack. The information on the summaries identifying these two witnesses consisted solely of their names, both of which were common in Afghanistan. The few statements that I did have were inconsistent in some respects with each other, but I convinced myself that the discrepancies were the natural and expected fading of witness recollections over time. Again, while this development gave me pause, I did not see it as fatal to the case because I continued to credit the accounts of Mr. Jawad’s supposed confessions to the crime. Nonetheless, I understood that attempting to reconstruct a crime that had occurred several thousand miles away, over five years earlier, in an active war zone, and in which little visible effort had been made to collect and preserve the evidence, was at best a daunting challenge, even if I did not see these deficiencies then as insurmountable.

21. Nonetheless, I could not do anything about the immutable facts: the victims of the attack had not seen the attacker, so they could not identify Mr. Jawad. Media accounts and intelligence reports indicated that at least three other Afghans had been arrested for the crime and had subsequently confessed, casting considerable doubt on the claim that Mr. Jawad was solely responsible for the attack. To the extent that any evidence indicated that Mr. Jawad was present at the scene and may have thrown the hand grenade, there was also evidence that he may have acted under duress and that he may have been drugged by unscrupulous recruiters. I learned that the written statement characterized by the Afghan police as Jawad’s personal confession could not possibly have been written by him for any number of reasons. First, Jawad was functionally illiterate and could not read or write. Second, the statement was not even in his native language of Pashto; the Afghan police

officer who created the statement wrote it by hand in his own native Dari. Moreover, when I compared the Afghan statement with a summary of the interrogation by the U.S. interrogators conducted later the same day – a summary that required a ludicrous amount of time for me to obtain – the comparison revealed that the two statements suffered from material differences, causing me and other prosecutors to wonder whether either could be used to establish the truth. It seemed increasingly likely that the statement attributed to Mr. Jawad in his original interrogation had simply been contrived by one of the Afghan policemen, which they then amateurishly sought to “authenticate” by having Jawad place his thumbprint on the document.

22. There were a number of other aspects to the case which I found deeply troubling. Major Frakt filed a motion to dismiss the charges based on the alleged unlawful influence of the Legal Advisor, Brigadier General Hartmann. My putative superior, Chief Prosecutor Colonel Lawrence Morris, detailed himself to the case in order to litigate this motion, which he promptly lost. As I sat in the courtroom during the hearing on the motion, I was astonished to observe that Colonel Morris, whose integrity I had had no reason to question before, allowed the General to give answers to questions, which, while certainly truthful as far as they went, did not represent the whole truth. Colonel Morris permitted the incomplete answers to stand without elaboration, an ethically questionable decision, in my view, and certainly a tactical blunder that would bedevil the case in the future. Major Frakt, as astute and intelligent a lawyer as I have ever faced in my many years of practice, rightly and skillfully exposed this lack of candor to the tribunal, significantly undermining the integrity of OMC-P and the integrity of the Commissions process as a whole.

23. Of course, I continued to discover additional documentary evidence of Mr. Jawad’s mistreatment at Guantanamo. For example, I reviewed a redacted copy of a report prepared by a Behavioral Science Consultation Team psychologist, who prepared an assessment of Mr. Jawad’s mental condition. The psychological assessment was not done to assist in identifying and treating any emotional or psychological disturbances Mr. Jawad might have been suffering from. It was instead conducted to assist the interrogators in extracting information from Mr. Jawad, even exploiting his mental vulnerabilities to do so. This rank betrayal of a supposed healer’s professional obligations toward a detainee entitled to humane treatment struck me as particularly despicable. From my perspective, this officer had employed his or her professional training and expertise in a profoundly unethical manner.

24. I also uncovered additional documents relating to the frequent flyer program. Prior investigations had concluded that this program had been ordered stopped in March 2004 by then Commander of JTF-GTMO, US Army MG Jay Hood, but the records I found disclosed that the frequent flyer program was carried out systematically on a large number of detainees at least until 2005, in what seemed to me to be a direct contravention of MG

Hood's express order. Working from the records, I managed to locate at least one officer who had been in charge of the program, and he testified that the senior leadership (although I do not recall that the officer's testimony implicated MG Hood) at the detention camps were well aware of the program and that it was part of the standard operating procedure at the time.

25. At approximately the same time, by sheer happenstance, I stumbled across a summary of an interview, taken by an Army Criminal Investigation Division Special Agent from Mr. Jawad himself, which had been added to the record of trial in a case where a guard at Bagram prison had been charged with the murder of a detainee. The statement – essentially a recitation of Mr. Jawad's account -- indicated that Mr. Jawad had experienced extensive abuse while at Bagram prison from December 18, 2002 to early February 2003. This abuse included the slapping of Mr. Jawad across the face while Mr. Jawad's head was covered with a hood, as well as Mr. Jawad's having been shoved down a stairwell while both hooded and shackled. I immediately provided the statement to the defense. The interviewer, a veteran Army CID agent, later testified as a defense witness at an August hearing in the Jawad case that Mr. Jawad's statement was completely consistent with the statements of other prisoners held at Bagram at the time, and, more importantly, that dozens of the guards had admitted to abusing the prisoners in exactly the way described by Jawad. My cross-examination, which I quickly ended, only served to reinforce the agent's testimony on direct.

26. In response to various motions filed by Major Frakt, I again reviewed international law regarding so-called "child soldiers," and I undertook a more comprehensive review of the traditional laws of war. Against my every philosophical inclination, I began to accept that the weight of authority supported the defense position that Mr. Jawad's alleged acts, even if provable, were not violations of the law of war. At approximately the same time, I learned that the Military Judge in the very first case to be tried before a US military commission in some fifty years, *United States v. Hamdan*, had issued a panel instruction virtually indistinguishable from the position advocated by Major Frakt and his law of war expert, Professor Madeline Morris of Duke University School of Law, who later testified as a defense witness. I also began to credit Major Frakt's repeated assertions that child soldiers are entitled to be treated differently than adults, and that we are obligated by treaty to provide them with opportunities for rehabilitation and reintegration. I was deeply bothered by the fact that no such opportunities had been afforded to Mr. Jawad, who, no matter what he was alleged to have done, retained his fundamental rights as a human being, Optional Child Soldier protocol or not. Although I served in Iraq, and hold no brief for terrorists, any Soldier (or any parent whose son or daughter may serve in the defense of our country) should have serious concerns about the President's decision not to apply the Geneva Conventions to the prisoners or to afford the detainees prisoner of war status, since

one of the oft-repeated rationales for adherence to the law of war is that it encourages one's enemies to reciprocate. I was also appalled that none of the prisoners whose files I had reviewed had been afforded any meaningful opportunity to establish their status before a tribunal legitimately interested in ascertaining the truth. The CSRT and ARB records that I reviewed in Mr. Jawad's case and others seemed to me to be the worst sort of cruel joke. I concluded personally that the hearings were little more than a heavily-bureaucratized charade.

27. For these and other reasons, I became convinced that Mr. Jawad should not be prosecuted, but I knew that I would not be able to convince my superiors to seek the withdrawal of the charges. In any event, I also knew that dismissing the case would not result in Mr. Jawad's release. The Administration, it seemed clear, would continue to hold Mr. Jawad indefinitely as an enemy combatant, no matter the paucity or unreliability of the evidence asserted against him. I therefore, and with great reluctance, decided to focus my efforts on brokering a plea bargain that would enable Mr. Jawad to be released. I tried in vain to convince my superiors to approve a plea to time served or to a short period of additional custody (Mr. Jawad had, by this time, been imprisoned for almost six years), with Mr. Jawad's remaining months in captivity devoted to rehabilitating him and preparing him to reintegrate into civilian society. My efforts were repudiated, and my loyalty to the Commissions began to be viewed with the sort of suspicion harbored by only the truly embattled, as OMC-P had certainly become by that point. The Chief Prosecutor was harshly dismissive, and even contemptuous of any proposal to resolve the case for less than a multi-year sentence -- even after Salim Hamdan, whom the government argued should receive a sentence of *thirty years*, received an effective sentence of little more than five months.

28. There were other problems with OMC-P, beyond the glacial pace at which it undertook its work, its descent into chaos following the departure of Colonel Davis and LTC W.B., and its obdurate and credibility-destroying pursuit of laughable legal positions. While many of the prosecutors were essentially harmless time-servers, others -- primarily the civilians who de facto run the Commissions -- could not accept the poverty of their legal arguments and continued to press meritless arguments well past any recognizable degree of rationality.⁶

⁶ I do not wish to tar all of OMC-P with the same broad brush. There were in fact several highly-skilled, vastly-experienced, and unquestionably ethical lawyers who understood the fundamental principle that "justice" is a noble concept not always defined by securing convictions at any cost. In particular, and I mention them in order to avoid any implication that they are to be confused with the dim ideologues just described, Mr. F.R., Majors O.A., J.G., and CPTs S.B. and K.P. embody the very highest aspirations of our shared profession. Not surprisingly, these prosecutors are the ones heard about the least.

29. Contrary to the Chief Prosecutor's claims of running a highly ethical organization, the actual practice of the Commissions is quite different. I asked to be permitted to leave the Commissions for reasons I've explained at length in the foregoing paragraphs, and in testimony before the Commissions. In essence, I became utterly convinced that if I were unable to certify to the Commission and to Major Frakt that I had complied with the discovery obligations mandated by our rules of professional conduct in a case as seemingly uncomplicated as Mr. Jawad's, no Commissions prosecutor could make such representations accurately and honestly, even if he or she wholly believed the representations to be true and accurate when made. The chaotic state of the evidence, overly broad and unnecessary restrictions imposed under the guise of national security, and the absence of any systematic, reliable method of preserving and cataloguing evidence, all of which have plagued the Tribunals and Commissions since their inception in 2002 and 2006, make it impossible for anyone involved (the prosecutors) or caught up (the detainees) in the Commissions to harbor even the remotest hope that justice is an achievable goal.

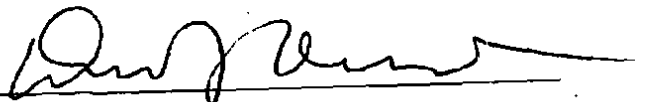
30. Irrespective of the Commissions' dismal state, I believe I know more about Mohammed Jawad and the case against him than any other individual in the U.S. government. I lived with that case, day in and day out for over a year. In my opinion, any chance at a successful prosecution was lost forever – and justifiably so -- when Judge Henley rejected the government's theory of the case and held in his D-007 ruling that it was not enough for the government to show a defendant was an unlawful combatant; it also had to show that the alleged crime was a violation of the law of war, and then denied the government's motion for reconsideration, both of which occurred after I had left the Commissions. Subsequently, the government conceded in writing that it had no evidence to prove a violation of the law of war; it seems a manifest violation of the rules of professional responsibility to continue to advocate for an outcome so decisively rejected and frivolous in the extreme. Long before these concessions, I thoroughly researched other potential theories to support the exercise of jurisdiction over Mr. Jawad, such as perfidy – a separate crime under the law of war and in the MCA -- and simply could not make a good faith argument for any other law of war violation. Furthermore, if the government's case against Mr. Jawad was on emergency life support after Judge Henley's ruling in D-007, any hope of reviving the prosecution evaporated when Judge Henley suppressed all of Mr. Jawad's allegedly self-incriminating statements because Judge Henley specifically found the statements to be the product of torture.⁷ Without these confessions, there is simply no possibility of a conviction.

⁷ Both events occurred after I had left the Commissions.

31. Irrespective of the failed Commissions proceedings, I personally do not believe there is any lawful basis for continuing to detain Mr. Jawad. There is no reliable evidence of any voluntary involvement on Jawad's part with any terrorist groups. Even a statement that we believed linked him to HIG, and was thought to contain Mr. Jawad's fingerprint, was sent to the Army's crime lab for analysis, which concluded that the fingerprint was not Mr. Jawad's.

32. Ultimately, I decided that I could no longer ethically prosecute Mr. Jawad or, in good conscience, serve as a prosecutor at OMC-P. I have taken an oath to support and defend the Constitution of the United States, and I remain confident that I have done so, spending over four of the past seven years away from my family, my home, my civilian occupation – all without any expectation of or desire for any reward greater than the knowledge that I have remained true to my word and have done my level best to rise to our Nation's defense in its time of need. I did not "quit" the Commissions or resign; instead, I personally petitioned the Army's Judge Advocate General to allow me to serve the remaining six months of my two year voluntary obligation in Afghanistan or Iraq. In the exercise of his wisdom and discretion, he permitted me to be released from active duty. However, had I been returned to Afghanistan or Iraq, and had I encountered Mohammed Jawad in either of those hostile lands, where two of my friends have been killed in action and another one of my very best friends in the world had been terribly wounded, I have no doubt at all – none – that Mr. Jawad would pose no threat whatsoever to me, his former prosecutor and now-repentant persecutor. Six years is long enough for a boy of sixteen to serve in virtual solitary confinement, in a distant land, for reasons he may never fully understand. I respectfully ask this Court to find that Mr. Jawad's continued detention is unsupported by any credible evidence, any provision of the Detainee Treatment Act of 2005, the MCA, international law or our own hallowed Constitution. Mr. Jawad should be released to resume his life in a civil society, for his sake, and for our own sense of justice and perhaps to restore a measure of our basic humanity.

Pursuant to 28 U.S.C. § 1746, I hereby declare and state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



Darrel J. Vandeveld

Executed on: January ²⁷ 2009.