

**THE VALUE OF CLAIMING TORTURE: AN ANALYSIS OF AL-QAEDA'S
TACTICAL LAWFARE STRATEGY AND EFFORTS TO FIGHT BACK**

*Michael J. Lebowitz**

I. INTRODUCTION.....	357
II. CLAIMING TORTURE TO SHAPE THE BATTLEFIELD.....	361
A. <i>Tactical Lawfare</i>	362
B. <i>Faux Torture</i>	364
C. <i>The Torture Benchmark</i>	366
D. <i>Legal Advice, Courtesy of al-Qaeda, Esq.</i>	369
III. MILITARY COMMISSIONS CIRCA 2010	375
A. <i>Reconciling the National Security Dynamic with Legal Proceedings</i>	376
B. <i>Tackling Torture Issue through Improved Military Commissions Act</i>	377
IV. PROPAGANDA V. REALITY.....	383
A. <i>GTMO over Supermax: Life's a Beach</i>	384
B. <i>Lawfare Tactic Backfires</i>	386
V. RECOMMENDATIONS	388
A. <i>A Uniform and Attached Detainee Documentation Form</i>	388
B. <i>Indigenous Training</i>	390
C. <i>A Unified Media Plan</i>	390
VI. CONCLUSION	391

I. INTRODUCTION

Rule #1: "Insist on proving that torture was inflicted.

This guidance was included in a notorious al-Qaeda handbook that was discovered in a Manchester, England safehouse.¹ That handbook raised

* J.D., Case Western Reserve University School of Law; B.A., Kent State University. Serve as a war crimes prosecutor in the Office of Military Commissions. Previously served as chief legal assistance attorney and military defense counsel in the Virginia Army National Guard as part of the U.S. Army Judge Advocate General's Corps. Deployed to Iraq in 2005–2006 as a paratrooper with the Pathfinder Company of the 101st Airborne Division. Also serve as litigation attorney and military defense counsel in private practice. The author would like to thank Professor Michael Scharf for the invitation to present this work at Lawfare!, Case Western Reserve University School of Law, September 10, 2010.

eyebrows for not only its meticulously cold direction toward facilitating terrorist operations, but also for its perceptive legal savvy relating to Western courts.² But, while the extent of how far this manual was followed is certainly questionable, the fact remains that accused terrorist operatives since September 11, 2001 have followed its principles relating to the torture message and are credited with “paralyzing” international intelligence services and military operations in a manner that is much more effective than bombs and rifles.³ As such, this tactic goes beyond merely scoring public relations points, and instead achieves tangible tactical victories, albeit in an unconventional manner. The weapon is an attorney and the battlefield is the courts. The battle cry is “torture.” It has taken nearly a decade for world governments to develop a means for fighting back.

Detainees and litigants ranging from Guantanamo Bay, Cuba to Pakistani courts have dutifully followed principles of the step-by-step al-Qaeda handbook instruction as their torture claims blitzed through the media and legal systems.⁴ Defense counsel and human rights organizations

¹ In *United Kingdom v. Abu Hamza*, a convicted terrorist was found to be in possession of the manual. Abu Hamza has since appealed to the European Court of Human Rights in Strasbourg. See *The Al Qaeda Manual*, http://www.justice.gov/ag/manualpart1_1.pdf (last visited Sept. 25, 2010).

² The U.S. Department of Justice posting of the manual was controversial because some worried that it would provide wider reach for potential terrorists. See Matthew Davis, *US Under Fire over al-Qaeda Guide*, BBC NEWS, July 27, 2005, <http://news.bbc.co.uk/2/hi/americas/4722833.stm>; see also Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 880–84 (2009) (describing how the al-Qaeda manual relates to lawfare as detainees provoke action from the guards in order to exploit and manipulate the system); see also David B. Rivkin et al, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11 (stating that the al-Qaeda manual instructs detained operatives to claim torture and mistreatment).

³ The deadly 2010 suicide bombing against CIA officials in Khost, Afghanistan and the 1993 shooting attack outside CIA headquarters in Northern Virginia caused some ripple effects, but did not directly cause massive effects on worldwide intelligence operations. In contrast, civil lawsuits filed in U.K. courts against British government security agencies such as MI5 and MI6 by accused al-Qaeda terror operatives such as Binyam Mohamad and Moazzam Begg are said to have “‘paralyzed’ the security services with legal paperwork.” See Tom Dunn, *Terror Camp Compensation Sham*, THE SUN, July 7, 2010, <http://www.thesun.co.uk/sol/homepage/news/3044275/Terror-camp-compo-sham-12-get-payouts-up-to-500k-each.html>.

⁴ Top JTF-GTMO officials, as well as Secretary of Defense Donald Rumsfeld offer detailed instances of detainees using manual guidance during and after detention. See Donna Miles, *Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay*, AM. FORCES PRESS SERVICE, June 29, 2005, <http://www.defense.gov/News/NewsArticle.aspx?ID=16270>; see also *Al-Adahi v. Obama*, 2010 WL 2756551, at 9 (D.C. Cir. Jul. 13, 2010) (emphasis added) (“The court’s omissions are particularly striking in light of the instructions in al-Qaida’s training manuals for resisting interrogation. For those who belong to al-Qaida, ‘[c]onfronting the interrogator and defeating him is part of your jihad.’ To this end al-Qaida members are instructed to resist interrogation by developing a cover story, by refusing to answer questions, by recanting or changing answers already given, by giving as vague an answer as poss-

continued the “torture” narrative as they amassed public relations, political, and legal victories.⁵ For example, federal judges in habeas corpus cases ordered accused terrorists freed because the government often could not prove the negative, or in other words, had no evidence one way or the other that could contest both detainee and witness assertions that torture occurred.⁶ A military commission case against an Afghani accused of attacking a U.S. Army convoy in 2002 did not fare much better for the government after confessions to American interrogators were thrown out due to assertions that Afghan forces issued verbal threats at the time of capture.⁷

All of this had occurred masterfully despite the fact that many other torture and mistreatment claims were quietly debunked.⁸ Still, the tactic was proving to be a winner with politicians and the media, as well as the courtroom. In 2009, Barack Obama’s first act as President was to remove the international rebuke over Guantanamo Bay (GTMO) by ordering its detainees transferred to a U.S. prison facility.⁹ This offered proof that the al-Qaeda guidance of using lawfare—legal recourse as a weapon in shaping the global battlefield—was reaping dividends.¹⁰ And, indeed, the law has been used as a weapon. Consider that the North Vietnamese military tactic in the late 1960s and early 1970s was to use battlefield attrition and guerrilla warfare to wear down the American public’s will to continue supporting the fight. In the case of the war against al-Qaeda, a calculated legal effort has accomplished similar tactical objectives without the need to conduct major

ible, and by claiming torture. Put bluntly, the instructions to detainees are to make up a story and lie.”).

⁵ See generally Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009). Efforts against others via administrative means also took place to include complaints with state medical boards relating to psychologists who treated Guantanamo Bay detainees. See Andrew Welsh-Huggins, *Psychologists Face Guantanamo Abuse Claim*, ASSOCIATED PRESS, July 7, 2010, available at http://www.cleveland.com/nation/index.ssf/2010/07/army_psychologists_face_guanta.html.

⁶ By suppressing statements and evidence derived by witnesses who were alleged to have been tortured, there was not enough evidence left to justify detention. See *Abdah v. Obama*, 2010 WL 1626073, at *6–7 (D.D.C. Apr. 21, 2010).

⁷ Military Commission Ruling, *United States v. Jawad* (CMCR) (No. 08-4), available at <http://www.defense.gov/news/d20081223Jawadexhibitsa-h.pdf>.

⁸ See *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (agreeing with the lower court’s ruling that found itself “left with lingering questions concerning the credibility of Mr. Abu Ali and his claim that he was tortured”); see also *United States v. Paracha*, 313 Fed.Appx. 347, 349–50 (2d Cir. 2008).

⁹ Mark Mazzetti, *Obama Issues Directive to Shut Down Guantanamo*, N.Y. TIMES, Jan. 22, 2009, <http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html>.

¹⁰ Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, THE ARMY LAW., Sept. 2006, at 1; see also *Lawfare, The Latest in Asymmetries*, Council on Foreign Relations (Mar. 18, 2003), <http://www.cfr.org/publication.html?id=5772> (“Lawfare is a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”).

offensive operations.¹¹ By following what was tantamount to scripted legal advice, detainees and their advocates in the aftermath of the 9/11 attacks launched a massive campaign through various court systems worldwide.¹² The common theme of these legal attacks was “torture.”¹³ And the weight of these attacks went beyond the confines of moral and public relations arguments as they also led to policy and strategic pressures that were far removed from the courtroom. The result often manifested itself into a form of tactical lawfare due to al-Qaeda’s ability to shape the physical battlefield through its cumulative legal approach.¹⁴

However, the story does not end there. Subtle but significant changes in 2010 toward how claims of torture are handled within the Military Commissions courtroom appear to offer a de facto method of fighting back against dubious assertions.¹⁵ And, perhaps even more significant, is widespread evidence that the detainees themselves—longtime adherents to the principles of the al-Qaeda guidance—began clamoring in 2009 to remain in the relative Geneva Convention-sanctioned luxury of GTMO rather than transfer to an awaiting life of isolation and institutionalization within the U.S. prison system.¹⁶ Finally, options exist that can be implemented to significantly phase out the ability of al-Qaeda and its supporters to use the

¹¹ Poll numbers have steadily dropped in regard to Afghanistan War support, while al-Qaeda and Taliban leaders such as Abdul Hafiz have been released from Guantanamo Bay and returned to the fight against the United States and its allies. See Susan Crabtree, *Republicans to Obama: No Detainee Transfers to Afghanistan*, THE HILL, Mar. 30, 2010, <http://thehill.com/homenews/administration/89819-gop-lawmakers-to-obama-no-detainee-transfers-to-afghanistan->. But like the Vietnam-era political climate where the majority of Americans were arguably in support of the war and were merely overshadowed by anti-war activists, a similar climate is occurring in regard to the Afghanistan War and Guantanamo Bay detention policy. See *75% Worried That Gitmo Closing will Set Dangerous Terrorists Free*, RASMUSSEN REPORTS, Aug. 25, 2009, http://www.rasmussenreports.com/public_content/politics/general_politics/august_2009/75_worried_that_gitmo_closing_will_set_dangerous_terrorists_free.

¹² While many of the landmark cases adjudicated broader detainee rights, the significant undercurrent revolved around torture and mistreatment. See *Boumediene v. Bush*, 579 F. Supp. 2d 191, 192–93 (D.D.C. 2008). See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

¹³ See generally *Abu Ali*, *supra* note 8; see also *U.S. v. Abu Ali*, 395 F.Supp.2d 338 (E.D.Va. 2008) (Mem. Opinion).

¹⁴ Dungan offers an excellent analysis on lawfare strategies employed by detainees at or near the point of capture. Captain C. Peter Dungan, *Fighting Lawfare at the Special Operations Task Force Level*, SPECIAL WARFARE, Mar.–Apr. 2008, at 9.

¹⁵ See DEP’T. OF DEF., THE MANUAL FOR MILITARY COMMISSIONS (Apr. 27, 2010) (signed into effect by Robert M. Gates, Secretary of Defense); See also Military Commissions Act of 2009, 10 U.S.C. § 948 (2009).

¹⁶ The author has conducted various interviews with sources that deal directly with the detainees. Alex Spillius, *Guantanamo Suspects Want to Stay, Say Officials*, TELEGRAPH, Nov. 1, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/6481071/Guantamo-suspects-want-to-stay-say-officials.html>.

cumulative mistreatment narrative as ammunition for waging tactical warfare.

II. CLAIMING TORTURE TO SHAPE THE BATTLEFIELD

If warfare was al-Qaeda's battlefield tactic, then the "torture" battle cry must also be construed as its ammunition. The first publicized claims of torture relating to the U.S. response to the 9/11 attacks occurred almost immediately after photographs emanating from Guantanamo Bay's Camp X-Ray leaked to the press.¹⁷ The photos featured men in orange jumpsuits living in outdoor cages.¹⁸ Interestingly, Camp X-Ray was initially built as a detention facility for Haitian migrants during the 1990s.¹⁹ And, despite the fact that the orange jump suits and Camp X-ray cages were limited to the first GTMO arrivals during a two-month span, the image and legacy endures.²⁰

From there, photographs from Iraq's Abu Ghraib prison became a national embarrassment while "waterboarding" became a household term, particularly after the U.S. government acknowledged that this activity took place against at least two detainees.²¹ But waterboarding was only one complaint relating to both the confirmed and alleged use of torture perpetrated

¹⁷ *In Pictures: Camp X-Ray Prisoners*, BBC News, Jan. 20, 2002, <http://news.bbc.co.uk/2/hi/americas/1771816.stm>.

¹⁸ *Id.*

¹⁹ MAJOR CHRISTOPHER A. BROWN, *GUANTANAMO BAY: A COST-BENEFIT ANALYSIS*, 8 (Air University Press 2008); *see also* Joseph C. Sweeney, *Guantanamo and U.S. Law*, 30 *FORDHAM INT'L L.J.* 673, 715–16 (2007).

²⁰ Sweeney, *supra* note 19, at n.193. ("Guantanamo's uses as a detention center or prison, designed to produce intelligence for the war on terror rather than to serve punitive or correctional purposes, began in January 2002 when a temporary external stockade, Camp X-Ray, was hastily thrown together to receive prisoners from the Afghanistan War. A more elaborate facility, Camp Delta, was quickly constructed for interrogation as the number of prisoners multiplied; another facility, Camp Echo, would be constructed for client interviews after they were authorized. Prison construction has continued with Camp Five, a super-maximum security prison for the most incorrigible and uncooperative and Camp Six, a barracks with communal conditions for minimal risk prisoners. A temporary facility for juveniles was also provided."); *see also* Morris D. Davis, *In Defense of Guantanamo Bay*, 117 *YALE L.J. POCKET PART* 21 (2007).

²¹ Waterboarding—an interrogation technique that uses water to simulate drowning and suffocation—has been around in various forms since the 1400s. After WWII, a military commission convicted Japanese officer Yukio Asano for using waterboarding against a civilian. A U.S. soldier during the Vietnam War was court martialed after a Washington Post photograph captured an image of a waterboarding interrogation. Texas Sheriff James Parker was convicted in 1983 for waterboarding prisoners. Eric Weiner, *Waterboarding: A Tortured History*, NPR (Nov. 3, 2007), <http://www.npr.org/templates/story/story.php?storyId=15886834>.

by U.S. officials.²² In fact, the U.S. practice of officially condoning limited uses of torture, such as waterboarding, prior to 2005 provided a credible foundation for the al-Qaeda lawfare tactic as it festered and ultimately exhibited signs of exponential growth to be exploited.²³

Throughout the decade, countless purported terror suspects seized on this as they continuously invoked the torture message as a means of attacking and shaping policy on the so-called War on Terrorism.²⁴ By latching onto the torture narrative through the confirmed instances of mistreatment, and further taking this narrative onto the record in various legal forums, the tactic served to irreparably harm the image of the United States, removed the benefit of the doubt pertaining to government efforts to combat torture allegations, and consequently the government's ability to effectively prosecute both a war and its accused war criminals.²⁵ This, in turn, caused changes in U.S. military tactics. One prime example became known in early 2010 where it was opined that the Obama administration was seeking to kill potential al-Qaeda targets via aircraft and drones rather than capture them for higher intelligence exploitation.²⁶ That policy is cited as a direct response to the higher legal scrutiny derived from the many damaging torture claims that continue to be made.²⁷ In this regard, the lawfare tactic has gone beyond being a mere courtroom sideshow. It has actually caused military and intelligence operations to change in a manner historically reserved for battlefield adaption pertaining to enemy combat activity.

A. *Tactical Lawfare*

Captain C. Peter Dungan, an attorney attached to the U.S. Army's 3rd Special Forces Group, stated that the traditional concept of lawfare is "like a computer virus or a hacker's denial of service attack on a network,

²² See Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427, 444 (2006); see also Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 340-41 (2006).

²³ See Guiora, *supra* note 22, at 437-38.

²⁴ Dungan, *supra* note 14, at 10; see also Al-Adahi, *supra* note 4.

²⁵ See Sonni Efron, *Prison Abuse Seen as Hurting U.S. Credibility*, L.A. TIMES, Jan. 14, 2005, <http://articles.latimes.com/2005/jan/14/world/fg-rights14> (explaining that numerous foreign governments latched onto the mistreatment narrative while human rights organizations called for legal action to "restore U.S. moral authority.").

²⁶ Government officials expressed concern about where to house and interrogate such high-value individuals that could be effectively captured in light of the higher scrutiny and impending closure of GTMO. Therefore, while killing these individuals got them off the street, it robbed the government of valuable intelligence in regard to the terror operations. See Karen Deyoung & Joby Warrick, *Under Obama, more Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST, Feb. 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303748.html>.

²⁷ *Id.*

[where] meritless suits seek to grind the wheels of justice to a halt.”²⁸ While that analogy describes the effects of al-Qaeda’s cumulative legal approach into worldwide court systems, the concept of tactical lawfare goes a step further. Tactical lawfare is the added notion of using legal and administrative systems to more directly shape the physical battlefield.²⁹ For example, detainees captured by indigenous forces in Iraq and Afghanistan often reportedly make a point to claim abuse at the point of capture.³⁰ The same detainees will then claim abuse when turned over to U.S. or allied forces, and finally report additional abuse if they are retained in custody for pending legal action.³¹ What happens is that U.S. or allied forces are duty bound per regulations and law to investigate all claims of abuse.³² Furthermore, the burden of proof often is on the government when claims of torture or abuse are levied. The result pertaining to the tactical lawfare concept is that multiple layers of resources and manpower relating to both front-line and support roles are diverted directly away from the battlefield in order to participate in the investigatory process.³³ In short, the tactical lawfare approach of waging cumulative abuse claims is just as effective as conventional physical attacks in removing military/intelligence personnel and resources from the battlefield.

But tactical lawfare is not limited to the area of combat operations. As this cumulative approach of claiming abuse moves from the administrative regulations level and into the courts, a similar scenario plays out in

²⁸ Dungan *supra* note 14, at 10.

²⁹ The author in this current paper contends that tactical lawfare can be employed in a much wider-ranging scope in terms of a universal and cumulative approach to using global legal systems as a means to directly impact tactical and operational military endeavors. *See also* Major John W. Bellflower, *The Influence of Law on Command of Space*, 65 A.F.L. REV. 107, 113 n.31 (2010) (The tactical level of war is defined as “[t]he level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.”) (*citing* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 534 (Mar. 17, 2009) *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf) (Bellflower defines tactical lawfare in the context of an enemy taking advantage of the Law of War, with the example being that of the enemy employing human shields to avoid military action by those who abide by the Law of War.)

³⁰ Dungan, *supra* note 14, at 10 (“Intercepted Taliban communications, captured documents, and interviews with jailhouse informants at theater-level facilities confirm that it has become Taliban standard operating procedure to claim abuse every time a detainee moves from one facility to the next. Usually, the claim is leveled during initial in-processing into the field detention site or SOTF detention facility, either during the initial medical examination or during the first interrogation.”).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 13 (“When allegations of detainee abuse or violations of the rules of engagement, or ROE, enter the OPCEN, the reputation and combat effectiveness of the task force are on the line.”).

terms of using tactical lawfare to achieve the same results normally reserved for traditional battlefield or diplomatic victories. This includes the “paralyzing” of international intelligence services, releasing captured accused terror operatives back into the fight, altering military operations, opting for targeted killings to avoid having to capture, and loss of “operational momentum.”³⁴

B. *Faux Torture*

But what about these torture claims? Certainly a significant number are valid and have merit.³⁵ However, the al-Qaeda tactic appears to take a cumulative approach for maximum impact. This means that many torture claims may not necessarily have merit.³⁶ One example is former GTMO prisoner named Muhammad Saad Iqbal Madni. This Pakistani national detailed extremely provocative claims of abuse to his Pakistani advocate as part of lawsuit against the U.K. and Pakistani governments.³⁷

Talking about the nature and degree of torture (Madni) alleges that he was subjected to the third degree torture that included electric shocks to the body, particularly the knees, kicks and slapping, falling tap water on the head while blind-folded and hooded, a six month spell in a steel box measuring 6x4 feet in total nudity in extreme temperatures that could be absolutely chilling or humid. Was also kept hungry and thirsty.³⁸

Madni’s claims were certainly compelling. But the question remains as to whether his provocative torture claims are true or if the claims were merely part of a legal strategy in his effort to exert pressure on the Pakistani and U.K. Governments to press for the release of al-Qaeda suspects remaining in GTMO. There is precedent for this tactic as other lawsuits filed by family members of GTMO detainees within the Pakistani High Court work

³⁴ DeYoung, *supra* note 26, at 1; Dunn, *supra* note 3, at 2; A DIA study reported that 14 percent of former GTMO detainees were confirmed or suspected of returning to terrorism. DEF. INTELLIGENCE AGENCY, FACT SHEET: FORMER GUANTANAMO DETAINEE TERRORISM TRENDS (2009).

³⁵ The government also has acknowledged waterboarding purported 9/11 mastermind Khalid Shaykh Muhammad and also top al-Qaeda associate Abu Zabaydah. *See also* Ali et al v. Rumsfeld, Nos. 07–5178, 07–5185, 07–5186, 07–5187 (C.A.D.C. May 6, 2010) (Lawsuit on behalf of various former GTMO detainees was dismissed due to lack of standing and immunity of Secretary of Defense Donald Rumsfeld, but the court acknowledged that it believed torture had been conducted). *See also* Morris D. Davis, *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT’L L. 115, n.3 (2009).

³⁶ Dungan *supra* note 14, at 10.

³⁷ Syed M. Aslam, *Freed Gitmo Inmate Narrates Horrific Plight*, MAKEPAKISTANBETTER.COM (last visited Sept. 25, 2010), http://makepakistanbetter.com/why_how_what_forum_full.asp?ArticleID=10096&GroupID=5&Group_title=Pakistan; *see also* Madni v. Secretary of State for Foreign and Commonwealth Affairs, Royal Courts of Justice (2009).

³⁸ Madni, *supra* note 37.

to achieve the same goal.³⁹ For example, the wife of GTMO detainee Saifullah Paracha successfully convinced the High Court into forcing the Pakistani Government into providing quarterly reports on its progress of pushing for the release of Pakistani detainees.⁴⁰ The lawsuit also forced the Pakistani Government to compensate families of GTMO detainees.⁴¹ In her highly publicized lawsuit, the wife also invoked claims that Paracha was subjected to harsh treatment despite the fact that unclassified evidence suggests that Paracha has been consistently treated well.⁴² Regardless, in 2010, the Pakistani Government was deemed by the court to be in contempt for failing to adequately press for the release of Pakistani citizens that were detained at GTMO.⁴³

But again, the question remains as to the veracity of these torture claims. In his lawsuit, Madni invokes very detailed instances of torture and mistreatment.⁴⁴ His advocate even states that “he was incarcerated near the cages that Khalid Shaikh Muhammad, Saifullah Paracha, Dr. Ammar Balouch, an ex-husband of Dr. Afia Siddiqui, Majid Khan, Ghulam Rabbani and Ghulam Raheem Rabbani, brothers who belong to Karachi was kept in Guantanamo Bay.”⁴⁵ Madni then went on to quote the doctors, whom he claims stated that the detainees were viewed as the enemy.⁴⁶

The problem with Madni’s story is that his account—widely publicized in Pakistan—is not true. A tour through the various camps at GTMO revealed that none of the prisoners were kept in cages.⁴⁷ In fact, the cages were limited to a brief timeframe in 2002 that were highlighted in the aforementioned leaked photos. Most of the names Madni invoked had not

³⁹ Paracha v. Federation of Islamic Republic of Pakistan, (2003) Const. P. 926/2003 (D.B.) Principal Seat Karachi (Pak.).

⁴⁰ *Id.*; See also *SHC Directs Constitution of Medical Board: Medical treatment of Guantanamo Bay Detainee’s Wife*, APNAKARACHI.COM (Jun. 2, 2010), <http://www.apnakarachi.com/SHC-directs-constitution-of-medical-board.html>.

⁴¹ *Id.*

⁴² See also SAIFULLA PARACHA DETAINEE 1094 TAKE ACTION!!!!, FREEPARACHAS.ORG <http://web.archive.org/web/20080219151328/http://www.freeparachas.org/> (accessed by searching for www.freeparachas.org in the Internet Archive index). . This Web site is run by the family of Saifullah and Uzair Paracha and mirrors many of the complaints found in the lawsuit. Most notable is that as of July 11, 2010, the Web site erroneously stated that Saifullah Paracha “has suffered 2 heart attacks due to extremely harsh interrogations and torture.” Unclassified documentation of FBI interviews with Saifullah Paracha reveal a less provocative picture of the situation.

⁴³ Tariq Siddiqui, *Remand Home shifted to Civil Defence building*, DAWN (Pakistan), June 2, 2010, available at <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn-the-newspaper/local/remand-home-shifted-to-civil-defence-building-260>.

⁴⁴ Aslam, *supra* note 37; Madni, *supra* note 37.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Statement based on author’s multiple tours to GTMO, as well as access gleaned from position as prosecutor with the Office of Military Commissions.

even been captured while the GTMO cages were briefly in use. Instead, these detainees live in climate-controlled cells that include beds and personal effects.⁴⁸ In addition, detainees have significant access to recreation yards and classrooms, and many detainees live in a communal setting where they can roam and interact within the camp confines for most of the day.⁴⁹ Moreover, unclassified records indicate that Paracha and the Rabbani brothers have always been in completely different camps than Muhammad, Khan, and Ammar—so called High-Value Detainees (HVD)—consequently making it highly unlikely Madni was incarcerated amongst that select group of Pakistanis.⁵⁰ And, as a non-HVD, Madni would not have been housed or granted access to that camp, which is separated from the rest.⁵¹

C. *The Torture Benchmark*

Madni is not the only prisoner to make such detailed accounts of torture. Some claims of abuse by U.S. personnel have indeed been corroborated, while the veracity of others remains murky at best.⁵² But the effects of even claiming torture per the al-Qaeda manual guidance resulted in significant legal and public relations victories for the terrorist organization and its supporters.⁵³ In addition, significant time and resources are required to investigate and possibly fend off even the murkiest of mistreatment claims, which again constitute victories for al-Qaeda.⁵⁴ In fact, these legal actions often are just as tactically successful in terms of disrupting intelligence operations as more conventional battlefield or terror operations.⁵⁵ At the same time, the tactical gains of this lawfare approach serve to spin the public

⁴⁸ Brown, *supra* note 19, at 8–11 (Brown presents a detailed listing of GTMO amenities by camp.).

⁴⁹ *Id.*

⁵⁰ Andrew O. Selsky, *AP: Military Confirms Secret Lockup for Top Detainees Inside Guantanamo*, ASSOCIATED PRESS, Feb. 6, 2008, available at Westlaw2/6/08 AP Worldstream 21:36:58 (The HVDs were placed in their own top secret camp upon arrival at GTMO and have been segregated from the rest of the detainee population. The HVD camp is so top secret that many top GTMO commanders are not told of its location and very few details have been released.).

⁵¹ *Id.*

⁵² Dungan, *supra* note 14, at 10; Al-Adahi, *supra* note 4, at *9 (The U.S. Circuit Court of Appeals stated under the context of torture claims, “Put bluntly, the instructions to detainees are to make up a story and lie.”); *See also* Davis, *supra* note 20, at 2 (GTMO detainee David Hicks, his family, and attorneys constantly blitzed the media on claims of torture and abuse. However, once his case was brought to a military commission, Hicks stipulated through his attorney that no mistreatment took place and also thanked U.S. service members for the way he was treated.).

⁵³ Yin, *supra* note 2, at 879–83.

⁵⁴ *Id.*; *See generally* ARMY REGULATION 15–6: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY (June 9, 2005), available at <http://www.defense.gov/news/Jul2005/d20050714report.pdf>.

⁵⁵ Dunn, *supra* note 3, at 2.

backlash toward western governments as opposed to historic revulsion pertaining to bloody terrorist attacks.⁵⁶ And, all of the time and resources used to litigate the torture or mistreatment claims ultimately have caused a wearing down on the American and British public, which in turn empowers al-Qaeda and its allies to hang on and continue the fight.⁵⁷ The tactical lawfare result also has proven to wear down individual military forces deployed to the battlefield at all levels of hierarchy due to the heightened oversight and seemingly never-ending investigatory process.⁵⁸ As such, operational efficiency and momentum in physically fighting against terrorist organizations is stunted.⁵⁹ Much of this has been accomplished by ingratiating torture claims into virtually all legal proceedings regardless of validity, as the examples of Madni and Paracha demonstrate.

Paul Rester is the director of GTMO's Joint Intelligence Group that oversees the detainee camps and its interrogators.⁶⁰ Rester is a known advocate for non-coercive interrogation techniques since assuming his position in 2006.⁶¹ Rester confirmed that two instances of excessive harsh treatment occurred at GTMO in the early days of the detainee camp.⁶² One of those instances related to a Saudi detainee named Mohamed al Qahtani, a man purported to be the 20th hijacker during the 9/11 attacks.⁶³ Leaked information and a subsequent investigation suggests that al Qahtani was forced into nudity, sleep deprived, faced a variety of verbal threats, and was even forced to succumb to enemas.⁶⁴

Al Qahtani made his claims of torture in 2005 around the time that he was charged within the military commissions system. What happened as a result was a significant legal victory for al Qahtani. Because of the torture allegations, Susan Crawford, the convening authority of the Military Com-

⁵⁶ *Id.*

⁵⁷ *But see* Crabtree, *supra* note 11.

⁵⁸ Dungan, *supra* note 14, at 10.

⁵⁹ *Id.*

⁶⁰ Terry Moran, *Exclusive: Guantanamo's Chief Interrogator Says 'We Don't Employ Torture'* (ABC News television broadcast June 26, 2006), available at <http://abcnews.go.com/Nightline/story?id=2123335&page=1>.

⁶¹ Andrew O. Selsky, *Gitmo Interrogator Describes Tactics*, ASSOCIATED PRESS, Feb. 16, 2008, available at Westlaw 2/16/08 APONLINELAMCARB 20:51:39.

⁶² Moran, *supra* note 60.

⁶³ *Id.*

⁶⁴ *See generally* Arthur J. Lachman, *The Torture Memos and the Demands for Legality*, in Volume XII, PLI'S CALIFORNIA MCLE MARATHON 2009: LATEST ISSUES IN LEGAL ETHICS – SUBSTANCE ABUSE – ELIMINATION OF BIAS IN THE PROFESSION 107-123 (2009); *See also* *Interrogation Log Detainee 063*, available at <http://www.time.com/time/2006/log/log.pdf> (purportedly obtained by TIME Magazine from the Department of Defense).

missions, ordered that all charges be dropped against al Qahtani.⁶⁵ The rationale was that his case was tainted beyond repair.⁶⁶ In fact, Crawford specifically acknowledged that the harsh treatment of al Qahtani was to be construed as “torture.”⁶⁷ As such, despite strong evidence against al Qahtani, prospects for reintroducing charges against him languished well into the second decade of the 21st Century.

This legal victory, coupled with the unrelated Abu Ghraib prisoner abuse scandal in Iraq, cascaded into the perception that GTMO was the home to countless similar activities.⁶⁸ That perception in turn offers credibility to al-Qaeda propaganda measures, as well as efforts by individuals such as Madni, to claim meritless torture in order to achieve their goals. In a news interview, Rester confirmed as much when he told the Associated Press that most of the stories of GTMO detainee abuse are directly derived from the success of al Qahtani and the other unnamed individual.⁶⁹

Upon being charged in a Military Commission, Muhammad Jawad, the Afghani charged with attacking the U.S. Army convoy when he was approximately seventeen years old, is another who described threats made against him, although his claims related to instances at the point of capture.⁷⁰ The military judge in Jawad’s case agreed to suppress admissions made to U.S. forces due to his treatment at the hands of Afghan troops prior to being turned over to U.S. custody.⁷¹ Jawad has since been released. Omar Khadr, fifteen at the time of capture, is another example of someone who detailed torture claims upon being charged in a Military Commission. Meanwhile, Uzair Paracha, the son of GTMO detainee Saifullah Paracha who was implicated in the same conspiracy as his father, initially cooperated with the U.S. Federal Bureau of Investigation (FBI) to include making proffer statements and authorizing consent searches.⁷² But, upon the prospect of a criminal conviction in federal court, Uzair claimed that he was mistreated by the FBI. Uzair was eventually convicted of terror-related charges and sentenced to thirty years in prison. Although Uzair’s mistreatment claims were rejected at the appellate level, Uzair’s advocates in the United States and abroad continue to press for his release based on those

⁶⁵ Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A01 (Crawford stated “we tortured Qahtani. His treatment met the legal definition of torture and that’s why I did not refer the case.”).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ GTMO also became synonymous with waterboarding, despite the fact that the waterboarding activity occurred elsewhere and specifically not at GTMO.

⁶⁹ Selsky, *supra* note 61.

⁷⁰ Jawad, *supra* note 7.

⁷¹ *Id.*; Carol Rosenberg, *Young Afghan freed; spent 61/2 years at Guantánamo*, MIAMI HERALD, August 24, 2009, available at 2009 WLNR 16485195.

⁷² *US v. Paracha*, 2008 WL 2477392 (N.Y. 2008).

claims. A similar tactic was employed by Syed Hashmi, a U.S. citizen who in 2010 received fifteen years in prison for attempting to secure equipment for al-Qaeda and Taliban fighters. During a rant against U.S. foreign policy, Hashmi added—in what can almost be construed as an afterthought—the unsubstantiated notion that his pre-trial treatment was physically “cruel.”⁷³

D. Legal Advice, Courtesy of al-Qaeda, Esq.

The commonality of all of these claims is that they follow the accepted al-Qaeda manual for handling a trial.⁷⁴ This manual has 18 chapters that range from waging terrorist attacks to enduring torture.⁷⁵ Chapter 18 of the manual details a set list of rules.⁷⁶ The chapters regarding custody opine that torture should be claimed no matter what.⁷⁷

Rule number one advises “at the beginning of the trial, once more the brothers must insist on proving that torture was inflicted on them by the State Security [investigators] before the judge.”⁷⁸ The second rule is to “complain [to the court] of mistreatment while in prison.”⁷⁹ From there, the manual advises a litany of items, which include that the prisoner “do his best to know the names of the state security officers, who participated in his torture and mention their names to the judge.”⁸⁰

The tactic of seeking to identify state security officers is perhaps one of the savviest elements of the al-Qaeda handbook. This is because “outing” an intelligence officer is regarded as a major national intelligence concern and causes many sleepless nights within the intelligence community.⁸¹ A secondary effect is that such identifications, or even allegations of

⁷³ See Benjamin Weiser, *Courtroom Tirade Offers Insight Into Mind of Would-Be Times Sq. Bomber*, N.Y. TIMES, July 6, 2010, at A21.

⁷⁴ See The al Qaeda Manual, *supra* note 1.

⁷⁵ *Id.*

⁷⁶ *Id.* at Lesson 18.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ CIA Director Leon E. Panetta declared in 2010 that disclosure of such information would result in “exceptionally grave damage to clandestine human intelligence collection and foreign liaison relationships.” *American Civil Liberties Union v. Department of Defense et al*, 2010 WL 308810 (S.D.N.Y.); see also *NYC Judge Rejects Release of CIA Materials to ACLU*, ASSOCIATED PRESS, July 15, 2010, available at <http://dailycaller.com/2010/07/15/ny-judge-rejects-release-of-cia-materials-to-aclu/> (“Courts are not invested with the competence to second-guess the CIA director regarding the appropriateness of any particular intelligence source or method”); Lesley Clark, *Pentagon Allows Banned Reporter to Return to Guantanamo*, MCCLATCHY NEWSPAPERS, July 8, 2010, <http://www.mcclatchydc.com/2010/07/08/97219/pentagon-allows-banned-reporter.html> (JTF-GTMO also temporarily banned reporters from the base after they reported the names of certain interrogators that had been classified, even though those names were published elsewhere).

implication, cause significant embarrassment to a wide variety of governments.⁸² This has proven on numerous occasions to create division among allies in what has been known as the “War on Terror.”⁸³ That division has in turn granted victories for the detainees and their supporters that exist well beyond mere legal procedure.⁸⁴ In other words, it demonstrates how tactical lawfare can shape the battlefield for asymmetrical actors such as al-Qaeda.

One example is the curious case of Mamdouh Habib. Habib is an Australian citizen who was born in Egypt.⁸⁵ He was arrested in Pakistan on charges of assisting al-Qaeda in various activities, which include training for some of the 9/11 hijackers.⁸⁶ Habib ultimately was sent to GTMO.⁸⁷ During the course of administrative proceedings, Habib claimed numerous graphic accounts of torture that he said occurred during overseas incarceration prior to finding himself in U.S. military custody.⁸⁸ The most striking allegation charged that Australian and American personnel were on-hand during the torture.⁸⁹ While certainly not a new allegation, Habib’s allegations stood out due to his level of detail relating to Australian intelligence officer involvement.⁹⁰ Habib further initiated a row between the United States and Australia when he added that there also were individuals involved with American accents.⁹¹

Habib was ultimately released from GTMO, and Australia’s attitude toward GTMO became irreparably damaged and likely became a precursor

⁸² Dominic Casciani & Steve Swann, *Guantanamo Papers: The UK’s Handling of Detainees*, BBC NEWS, July 15, 2010, <http://www.bbc.co.uk/news/uk-10641330> (In the United Kingdom, about 80 government lawyers sifted through more than 500,000 documents located in a secure area in order to respond to lawsuits and inquiries relating to detainee issues in conjunction with the United States).

⁸³ *H.X.A. v. The Home Office*, [2010] EWHC 1177 (QB).

⁸⁴ *Id.* (The division among allies causes less participation and consequently less coordinated manpower to be directed at specific targets or operations).

⁸⁵ *Habib v. Nationwide News Pty Ltd*, [2010] NSWCA 34 (Austl.).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Declaration of Teresa A. McPalmer, *Habib v. Bush*, (No. 02-CV-1130); COMBATANT STATUS REVIEW TRIBUNAL RECORD OF PROCEEDINGS, SUMMARY OF BASIS FOR TRIBUNAL DECISION (Sept. 27, 2004), available at <http://wid.ap.org/documents/detainees/mamdouhhabib.pdf#16>.

⁸⁹ *Id.*; see also Dana Priest, *Terror Suspect Alleges Torture*, WASH. POST, Jan. 6, 2005, at A1.

⁹⁰ *Documents Reveal Habib’s Torture Allegations*, ABC NEWS AUSTR., January 6, 2005, available at <http://www.abc.net.au/news/newsitems/200501/s1277343.htm> (last visited on Sept. 25, 2010) (“The Australian officials stood by while what we believe were CIA officials engaged in the type of abuses we’ve seen at Abu Graib, where Mamdouh Habib’s clothes were cut off, he’s handcuffed, held down with women around him,” Habib’s Australian attorney told the media. “The photos were taken and he was mocked.”).

⁹¹ *Id.*, See also Dana Priest, *Terror Suspect Alleges Torture*, WASH POST at A1, Jan. 6, 2005.

to a later military commissions case where Australia pressured U.S. officials into releasing another Australian terror suspect named David Hicks.⁹² Such “on-the-record” accusations also changed the nature of allied cooperation between the United States and the United Kingdom as U.K. officials began outright refusing to transfer terror suspects into U.S. custody out of fear that suspects would “be subject to extraordinary rendition to Guantanamo Bay.”⁹³ Meanwhile, the allegations coming from Habib continued to endure well into 2010 as Habib became embroiled in a libel and defamation lawsuit over his statements. An Australian court initially found that Habib was exaggerating his torture claims. An appellate court later overturned the previous ruling.⁹⁴

The guidance pertaining to identifying these “state security officers,” incidentally, also has resulted in a veritable cloak-and-dagger dynamic between detainee advocates and the intelligence community.⁹⁵ Reports have quietly arisen of detainee advocates conducting their own investigations in order to glean the identities of the interrogators to use in both criminal trial and habeas corpus litigation.⁹⁶ Because this tactic runs completely contrary to intelligence community policy, an environment of distrust was increasingly cultivated.⁹⁷ In one instance, a JTF-GTMO attorney affiliated with

⁹² Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, N.Y. TIMES, December 29, 2007, available at http://www.nytimes.com/2007/12/29/world/asia/29hicks.html?_r=1&ref=david_hicks (Shortly after the publicized details of Habib’s case, Australian Prime Minister John Howard began facing significant domestic pressure to push for the release of Hicks. Howard raised the issue directly with U.S. Vice President Dick Cheney, and a plea bargain securing Hicks’ repatriation quickly followed).

⁹³ See generally *H.X.A. v. The Home Office*, [2010] EWHC 1177 (QB) (Court documents revealed that the U.K. government, in 2005, ceased all transfers of terror suspects to the United States until a memorandum of understanding could be reached whereas the detainees would be assured of humane treatment by the United States and specifically not transferred to GTMO).

⁹⁴ See *Habib v. Nationwide News Pty Ltd*, [2010] NSWCA 34 (Austl.).

⁹⁵ Peter Finn, *Detainees Shown CIA Officers’ Photos*, WASH. POST, Aug. 21, 2009, at A1 (detailing a federal investigation that began in 2009 relating to the “John Adams Project.” This project involved researchers from the ACLU and National Association of Criminal Defense Lawyers who conducted a private investigation into various covert and non-covert CIA personnel involved in detainee cases. The researchers reportedly managed to identify some of these covert personnel and took photographs of them. These photographs were then reportedly brought to GTMO via defense counsel and shown to the detainees); Charlie Savage, *Inquiry Into Whether Detainees Were Shown Photos of C.I.A. Agents*, N.Y. TIMES, Aug. 21, 2009, at A20 (investigating reportedly included three military defense attorneys, who were read their rights prior to responding to the investigation).

⁹⁶ Finn *supra* note 95; Savage *supra* note 95. See also Bill Gertz, *Pentagon to Brief 2 Lawmakers on CIA Risk*, WASH. TIMES, April 12, 2010, at A1.

⁹⁷ See generally Marc Thiessen, *Investigating the John Adams Project — It’s About Time*, The Journal of the American Enterprise Institute, May 27, 2010, available at <http://blog.american.com/?p=14632> (last visited Sept. 25, 2010) (For example, Rep. Jeff

the Center for Constitutional Rights, disclosed then-secret information and names to the advocacy group by containing the coded information within a Valentine's Day card.⁹⁸ The boiling point may have occurred in 2010 when a Congressional budget committee proposed funding for investigating ethics violations that may have been committed by detainee defense counsel.⁹⁹ A major factor for proposing this controversial policy was directly rooted in the alleged campaign to follow the al-Qaeda guidance on prisoners doing "his best to know the names of the state security officers."¹⁰⁰

Practically, however, from the government's perspective, it employs more traditional national security litigation techniques. In the Military Commissions, for example, government agencies, in conjunction with prosecutors, frequently file what are known as Rule 505 motions specifically designed to protect the identity of the interrogators.¹⁰¹ This motion allows for the use of pseudonyms and other identity safeguards.¹⁰² In fact, Rule 505 motions are the government's direct legal response to the lawfare tactic of trying to "out" interrogator identities.¹⁰³ Government justification relates to safety and liability concerns for the interrogators, as well as parallel national security protections.¹⁰⁴ While Rule 505 is similar to its federal court counterpart relating to national security protections, the military commissions structure of limiting discovery to material and exculpatory facts as opposed to typical open discovery does offer some increased leeway in protecting interrogator identities as well as national security.¹⁰⁵ This is in part because it prevents discovery from going off on needless tangents while limiting "fishing expeditions" relating to the discovery process.¹⁰⁶ Meanwhile, other countries, such as the United Kingdom, are beginning to develop a system

Miller (R-FL) referred to the alleged John Adams Project activities as "devious" and "illegal." Meanwhile, others decried efforts to investigate as "McCarthyite").

⁹⁸ U.S. v. Diaz, No. 09-0535/NA (C.A.A.F. 2010), available at <http://www.armfor.uscourts.gov/opinions/2009SepTerm/09-0535.pdf> (upholding conviction of a Navy Lt. Commander who used his staff attorney position to reveal names of all detainees being held at GTMO).

⁹⁹ Charlie Savage, *Bill Puts Scrutiny on Detainees' Lawyers*, N.Y. TIMES, May 25, 2010, at A19 (propose a bill to direct the Pentagon's Inspector General to investigate suspected misconduct of detainee defense attorneys).

¹⁰⁰ See The Al Qaeda Manual at 176-80, *supra* note 1.

¹⁰¹ MIL. COMM'N. R. EVID. 505.

¹⁰² *Id.*

¹⁰³ *Id.*; See also Classified Information Procedures Act, 18 U.S.C. App. III, § 1-16 (2010) (the statutory equivalent of MIL. COMM'N. R. EVID. 505).

¹⁰⁴ MIL. COMM'N. R. EVID. 505; Classified Information Procedures Act, 18 U.S.C. App. III, § 1-16 (2010).

¹⁰⁵ See U.S. DEP'T. OF DEF., *supra* note 15.

¹⁰⁶ *Id.*

where they address the mistreatment allegations while further protecting the source of the evidence.¹⁰⁷

The al-Qaeda guidebook continues with items such as rule number six, which includes established Western court items such as “during the trial, the court has to be notified of any mistreatment of the brothers inside the prison.”¹⁰⁸ The practical approach of this al-Qaeda guidance is that detainees with legitimate claims of torture will have a step-by-step instruction into ensuring their claims are properly addressed in court.¹⁰⁹ At a minimum, the guidebook authors were savvy enough in their tactical lawfare strategy to note that valuable time and resources will be committed toward investigating claims of mistreatment, which certainly become cumulative in terms of strategic impact.¹¹⁰ So, the tactic of claiming torture in all cases regardless of merit has developed into a formidable tactical lawfare strategy due to the tactical inhibitions imposed onto various intelligence services and military means at all levels of operation.¹¹¹

The al Qahtani case is a prime example of how the contents of the manual reaped dividends in a legitimate torture issue. Once al Qahtani was charged and afforded defense counsel, the torture complaints were investigated and filed in extensive detail and he ultimately prevailed in court.¹¹² And for other detainees with more murky claims, chapter 17 of the manual suggests that detainees “give torture examples from Egypt, Syria, Jordan, Saudi Arabia and all other Arab countries” where torture is notoriously brutal.¹¹³ The allegations on behalf of Paracha and Madni, as well as Ahmed Abu Omar Ali, are examples of these stereotypical claims.¹¹⁴

Another example is that of Ahmed Ould Abdel Aziz, a Mauritanian citizen accused by the United States of fighting for the Taliban and al-Qaeda.¹¹⁵ According to JTF-GTMO logs, Abdel Aziz levied claims of “excessive use of force.”¹¹⁶ However, GTMO medical records and logs are exceptionally detailed, even for those related to such valid torture victims as

¹⁰⁷ See Richard Norton-Taylor et al., *Government to Compensate Torture Victims as Official Inquiry Launched*, THE GUARDIAN, July 6, 2010, at 1 (noting that in July 2010, the recently elected British Prime Minister David Cameron announced a plan that would initiate an official judicial inquiry into the torture claims via secure judicial officers while at the same time preventing the disclosure of vital intelligence assets).

¹⁰⁸ See The Al Qaeda Manual at 176–80, *supra* note 1, at Lesson 18.

¹⁰⁹ *Id.*

¹¹⁰ See Yin, *supra* note 2, at 881–82.

¹¹¹ See Dungan, *supra* note 14, at 10.

¹¹² See ARMY REGULATION 15–6, *supra* note 54.

¹¹³ See *The Al Qaeda Manual*, *supra* note 1, Lesson 17.

¹¹⁴ See Paracha, *supra* note 8; Abu Ali, *supra* note 8, at 232–40; Madni, *supra* note 37.

¹¹⁵ *CSRT Record of Proceedings, Summary of Basis for Tribunal Decision*, (Nov. 1, 2004).

¹¹⁶ *GTMO records for ISN 757*, WEBCITATION.ORG, at 8, <http://www.webcitation.org/query?url=http%3A%2F%2Fwww.defenselink.mil%2Fpubs%2Fpdfs%2FApp4.pdf&date=2009-06-01> (last visited Sept. 25, 2010).

al Qahtani.¹¹⁷ Medical issues and complaints are often recorded on a daily and sometimes hourly basis.¹¹⁸ In addition, these records have always been discoverable during military commissions proceedings and investigations. When the only “proof” of torture that Abdel Aziz could muster was a bandage on his thigh, an investigation determined that the claims were “unsubstantiated.”¹¹⁹ Subsequent claims of torture against Abdel Aziz were also investigated and debunked, which is in stark contrast to al Qahtani’s investigation and confirmation of mistreatment.

The success of al Qahtani, as well as the knowledge of waterboarding activities, perpetuated a significant effort to cloud all relevant legal proceedings with torture claims.¹²⁰ This effort was not limited to al-Qaeda operatives, but also humanitarian advocates and defense attorneys who would advise their clients to make such torture claims as a practical matter. Soon, documents similar to portions of the Manchester Manual were popping up inside detainee cells.¹²¹ One of the more overt examples includes an Amnesty International brochure that was covertly hidden from screeners by being included among protected attorney-client correspondence.¹²² That brochure included the Camp X-Ray photos and essentially directed detainees to claim torture due to the brochure’s assertion that Americans were waging a torture campaign against Muslims.¹²³ Such instances then led to additional legal battles relating to the attorneys who assisted in distributing contraband brochures or violating secrecy orders, which further highlighted the torture issue while also providing an additional battlefield over the rights to counsel.¹²⁴

¹¹⁷ *See Id.*

¹¹⁸ *See Id.*

¹¹⁹ *Id.* at 7.

¹²⁰ *See Selsky, supra* note 61.

¹²¹ *See* Debra Burlingame & Thomas Joscelyn, *Gitmo’s Indefensible Lawyers*, WALL ST. J., Mar. 15, 2010, , at A23_(discussing that interviews conducted with JTF-GTMO personnel revealed similar concerns; at GTMO, attorney-client privilege is respected and consequently, legal material that is brought into such attorney-client meetings is not reviewed by outside personnel); *See* DEP’T OF DEF., CAMP DELTA STANDARD OPERATING PROCEDURES, sec. II – Operations, 24-6, at 13.1 (2003).(distinguishing legal mail from other forms of mail); Jane Sutton, *Mystery Underwear Stymies Guantanamo Investigators*, REUTERS, Oct. 18, 2007, available at <http://www.reuters.com/article/idUSNASUA170120071018> (discussing another investigation revolving around detainee legal counsel related to smuggled underwear and swimsuits, which elicited some snickers but also concern relating to potential use as means for committing suicide).

¹²² Burlingame & Joscelyn, *supra* note 121.

¹²³ *Id.*

¹²⁴ *See* Diaz, *supra* note 98, at 5–7.

III. MILITARY COMMISSIONS CIRCA 2010

When Obama was sworn in as President in January 2009, the efforts to prosecute accused terrorists were at a crossroads. The Detainee Treatment Act had already become law, consequently limiting detainee interrogations and treatment to the relatively benign articulation of the U.S. Army Field Manual.¹²⁵ This means waterboarding was officially illegal, as was anything even close to resembling the treatment described and later confirmed to have been committed against al Qahtani.¹²⁶ But, debate continued to rage over the proper venue to prosecute what was then referred to as unlawful enemy combatants. Many in the U.S. Government preferred to use the federal justice system to prosecute these detainees. They cited numerous successes in gaining convictions. Others argued that the military commissions were the proper venue, often citing the fact that military commissions have been used in war crimes cases since the American Revolution, and virtually all major wars since.¹²⁷ An important compromise was enacted in October 2009, when the Military Commissions Act was revised.¹²⁸ The 2009 version was lauded in many circles for specifically banning the courtroom use of virtually any information gleaned from torture, while still permitting the venue to proceed.¹²⁹ In that manner, government officials such as Attorney

¹²⁵ Detainee Treatment Act of 2005, 10 U.S.C. § 801-1002(a) (2005) [hereinafter DTA] (stating that “no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”); *see also* Provision of Military Commissions Act of 2006, 28 U.S.C. § 2241(e)(2) (serving to make the Detainee Treatment Act the exclusive “action” for alien detainees, who have been determined to have been properly detained as enemy combatants or are awaiting such determination, does not abridge remedial powers of the Court of Appeals); *Belbacha v. Bush* 520 F.3d 452, 454–56 (D.C. Cir. 2008), *cert. denied*, 552 U.S. 1033 (2007).

¹²⁶ *See* DTA, *supra* note 125.

¹²⁷ *See* Marguerite Feitlowitz, *Introduction to Prosecuting Al Qaeda: September 11 and its Aftermath*, CRIMES OF WAR PROJECT (Dec. 26, 2001), <http://www.crimesofwar.org/expert/alqaeda-intro.html> (stating that military commissions have been used by numerous presidents, to include George Washington, Andrew Jackson, Abraham Lincoln and Franklin D. Roosevelt).

¹²⁸ *See* Military Commissions Act of 2009, *supra* note 15.

¹²⁹ *See* Warren Richey, *Obama Endorses Military Commissions for Guantanamo Detainees*, CHRISTIAN SCI. MONITOR, Oct. 29, 2009, <http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html> (last visited Aug. 27, 2010); *see also* David Frakt, *New Manual for Military Commissions Disregards Commander-in-Chief, Congressional Intent and the Laws of War*, HUFFINGTON POST, Apr. 29, 2010, *available at* http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html (Frakt, a former lead defense counsel in the military commissions system, acknowledges that “on the whole, the 2009 MCA is substantially fairer than the 2006 version of the law and the new Manual also contains some significant improvement over the previous version. The standards for admissibility of coerced statements and hearsay evidence, for example, now are much closer to the standards

General Eric Holder could initiate the prosecution of detainees accused of participation in the 9/11 attacks. Meanwhile, it would also allow a military commission to convene in the prosecution of more classic alleged war criminals such as Abd al-Rahim al-Nashiri, a detainee accused of masterminding the deadly 2000 maritime attack on the U.S.S. Cole.¹³⁰

A. *Reconciling the National Security Dynamic with Legal Proceedings*

Although the general phrase of “protecting national security assets” is often cited as the justification for having military commissions, the true and related utility is providing a venue that permits the use of unwarned, un-Mirandized statements.¹³¹ This means that intelligence agencies, such as the Central Intelligence Agency (CIA), can use interrogations to glean information relating to terrorist cells and infrastructure. These interrogation statements can then be theoretically introduced for both inculpatory and exculpatory use in a military commission prosecution.¹³² Agencies such as the CIA and NSA are historically intelligence-gathering organizations, as opposed to law enforcement groups such as the FBI and the Criminal Investigation Task Force (CITF). As a result, the military commissions process allows the CIA to focus on national security while not voiding the prospects of seeking a conviction in either federal court or via military commission. A successful example in terms of intelligence value and necessity is the immediate interrogation of Khalid Shaykh Muhammad, which open source information reveals led to the capture and ultimate federal court convictions of Iyman Faris (relating to a plot against New York City bridges), Jose Padilla (purported “dirty bomber”), Ali Saleh Kahlah al-Marri (purported al-Qaeda sleeper agent), and Uzair Paracha, as well as the detention and pending military commission trials of Majid Khan (accused of plotting to attack U.S. gas stations), and Saifullah Paracha.¹³³

which apply in general courts-martial and federal court.” However, Frakt states that there are “some very troubling language in the new Manual relating to the proof required to convict for certain offenses, which undermines the Obama Administration’s claims of respect for the law of war and adherence to the rule of law.”)

¹³⁰ See U.S. DEP’T OF DEF., MILITARY COMMISSIONS, ABD AL-RAHIM AL-NASHIRI, *available at* <http://www.defense.gov/news/commissionsalnashiri.html> (select “sworn charges”) (last visited Sept. 25, 2010).

¹³¹ See U.S. DEP’T. OF DEF., *supra* note 15 at M.C.R.E. 304(a)(4).

¹³² *Id.*

¹³³ Phil Hirschhorn, *Lawyer: Detained Pakistani to Face Terrorism Charges*, CNN.COM, Aug. 6, 2003, <http://www.cnn.com/2003/LAW/08/04/alqaeda.suspect/> (discussing how the interrogation of Khalid Shaykh Muhammad led to the arrest of Uzair Paracha, Ali Saleh Kahlah al-Marri, Majid Khan, and Saifullah Paracha); see also Thomas Joscelyn, *KSM’s Sleeper Agents Posed a Serious Threat*, WEEKLYSTANDARD.COM (Sept. 11, 2009), <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/937zmvqs.asp> (discussing the many individuals named by Khalid Sheikh Mohammed as being involved in al Qaeda attacks in the United States).

With the fixes and modifications to the military commissions rules and mandate, these statements are only permitted for prosecution so long as the circumstances of the treatment adhered to the U.S. Army Field Manual.¹³⁴ As a result, Muhammad's statements would now not be admissible because they were tainted by waterboarding. Muhammad's statements were not used in the aforementioned legal proceedings.¹³⁵ But, with the rules enacted since 2005, any non-tainted information can be elicited for intelligence value and military commissions prosecution.¹³⁶ This follows in line with the military commissions structure where only information that is material, helpful or exculpatory to the defense is discoverable.¹³⁷ That is in contrast to traditional open discovery rules relating to providing opposing counsel with anything that is relevant. Therefore, discovery does not need to go off on a tangent, which protects extraneous national security assets. The military commissions then can proceed with its additional protections of "national security assets" as prescribed in the rules.

B. Tackling Torture Issue through Improved Military Commissions Act

The Rules for Military Commissions, which were approved by Secretary of Defense Robert Gates in April 2010, provide guidelines for what statements can be used during legal proceedings.¹³⁸ As mentioned above, anything gleaned contrary to the Army Field Manual is not admissible by the government.¹³⁹ Instead, the rules mandate that admissible statements be

¹³⁴ See 42 U.S.C. § 801(a) ("In general. No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."); see also *Belbacha v. Bush*, 520 F.3d 458–459 (discussing the DTA's ability to limit the court's jurisdiction).

¹³⁵ See 42 U.S.C. § 801(a) ("In general. No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."); see also *Belbacha*, 520 F.3d at 458–459 (discussing the DTA's ability to limit the court's jurisdiction); see also Gregory S. McNeal, *A Cup of Coffee after the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943, 976 (2010) (discussing that statements found to be involuntarily derived under torture are not admissible in court).

¹³⁶ McNeal, *supra* note 135, at 976 (stating that any statement obtained through torture after the enactment of the DTA in 2005 is inadmissible); see also *United States v. Ghailani*, No. S10 98 Crim. 1023(LAK), 2010 WL 2756546, at *16-17 (S.D.N.Y. July 12, 2010) (holding that 6th Amendment rights were not violated against a former GTMO detainee because the CIA and law enforcement had a national security interest in engaging in custodial interrogations over the course of several years).

¹³⁷ U.S. DEP'T OF DEF., *supra* note 15, at M.C.R.E. 701.

¹³⁸ *Id.*

¹³⁹ See 42 U.S.C. § 801(a) ("In general. No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility

deemed “voluntary.”¹⁴⁰ Since Miranda warnings and signed consent statements are often replaced with uncomfortable rooms and shackles during intelligence interrogations, the rules go on to discern what may be constituted as “voluntary statements.”¹⁴¹ For example, age, education, and otherwise sophistication are listed as circumstances to be taken into account under the totality of the circumstances when assessing the voluntariness of a statement.¹⁴² Circumstances surrounding the taking of the statement also are taken into account, as well as lapse of time and location between the statements sought for admission and any prior questioning.¹⁴³ Was the individual coerced in any way? Did the interrogator cross the line in terms of deceptiveness? All of these items are taken into account under the rules.¹⁴⁴ This means that Jawad, who was about seventeen at the time of his interrogations, or Khadr, who was fifteen, may have a stronger case of making involuntary statements than someone such as Saifullah Paracha who was in his fifties, highly educated, and westernized. An additional result of this somewhat innocuous “voluntary statement” guidance is that it likely will be contested in virtually every non-speedy trial military commission case.

But perhaps the most prominent change between the initial military commissions rules and the 2010 revision relates specifically to claims of torture.¹⁴⁵ The old version prohibited the admission of torture-derived statements.¹⁴⁶ That antiquated version simply mandated that “[a] statement obtained by use of torture shall not be admitted into evidence against any party or witness.”¹⁴⁷ However, that prohibition was often maligned because many legal and political minds contended that activities such as waterboarding were not necessarily “torture.”¹⁴⁸ Instead, methods such as waterboard-

shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”); *see also* *Belbacha v. Bush*, 520 F.3d at 458–459 (discussing the DTA’s ability to limit the court’s jurisdiction).

¹⁴⁰ *See* U.S. DEP’T OF DEF., *supra* note 15 at M.C.R.E. 304(a)(4).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See generally* U.S. DEP’T OF DEF., *supra* note 15, at M.C.R.E. 304.

¹⁴⁵ *See* *Habib v. Nationwide News Pty Ltd*, [2010] NSWCA 34 (Austl.) (discussing admissibility of testimony made under torture).

¹⁴⁶ DEP’T U.S. DEP’T OF DEF., *MANUAL FOR MILITARY COMMISSIONS 2006* at M.C.R.E. 304(a)(3).

¹⁴⁷ *Id.*

¹⁴⁸ *See generally* *Ashcroft Defends Waterboarding Before House Panel*, CNN.COM, July 17, 2008, <http://edition.cnn.com/2008/POLITICS/07/17/ashcroft.waterboarding/> (Former Attorney General John Ashcroft told Congress that “I believe a report of waterboarding would be serious, but I do not believe it would define torture.”); *see also* Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, Office of Legal Counsel on Interrogation of al Qaeda Operative for John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency (Aug. 1, 2002) available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf> (concluding that many interrogation methods do not constitute torture); *see also* Katherine

ing, extreme sleep deprivation activities, and excessive temperature changes were officially referred to under the innocuous term “enhanced interrogation techniques,” with the acronym EIT.¹⁴⁹ The differentiation between EITs and unquestionable torture became confused and intertwined.¹⁵⁰ Citing early Bush-era memos defending EITs, opponents of the military commissions frequently attacked the military commissions rules as illegitimate and condoning of these EITs, since an argument could theoretically be made against what exactly constituted torture. This argument persisted and further tarnished the image of the military commissions as a fair and transparent form of justice. At the same time, the innocuous language of the earlier rules afforded organizations ranging from al-Qaeda to Amnesty International to maintain the focus on torture.

In an effort to combat this line of attack, the Obama administration ordered that new military commissions cases be halted until the rules could be modified.¹⁵¹ As a result, the 2010 rules offered a much more specific manifestation.¹⁵² MCRE 304(a)(1) was refined with the title “Exclusion of Statements Obtained by Torture or Cruel, Inhuman, or Degrading Treatment.”¹⁵³ The modified rule went on to mandate that “[no] statement, obtained by the use of torture, or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a trial by military commission.”¹⁵⁴ For the first time, the rules squarely defined the parameters of “torture,” with the Detainee Treatment Act serving as the benchmark.¹⁵⁵ This simple change caused frequent critics of the military commissions to acknowledge, grudgingly, the improved nature of the rules.¹⁵⁶

The 2010 rules also became more specific in other ways. For example, the old rules had a general prohibition against statements made by the

Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 J. INT’L CRIM. JUST. 1087, 1087 (2008) (describing how U.S. government memos offer legal support for various interrogation techniques, including waterboarding).

¹⁴⁹ Gallagher, *supra* note 148, at 1094 (referring to enhanced interrogation techniques as “EIT”).

¹⁵⁰ See Yin *supra* note 2 (offering different classifications of torture).

¹⁵¹ Peter Finn, Obama Seeks Halt to Legal Proceedings at Guantanamo, WASH. POST, Jan. 21, 2009.

¹⁵² DEP’T OF DEF., *supra* note 15.

¹⁵³ *Id.* at pt. III, M.C.R.E. § 304(a)(1).

¹⁵⁴ *Id.*

¹⁵⁵ Compare *id.* (defining torture within the parameters of the Detainee Treatment Act), with DEP’T OF DEF., *supra* note 15, at § 304(a)(1) (2007) (offering a definition of torture that is vastly less specific).

¹⁵⁶ See Frakt, *supra* note 129.

accused derived from coercion.¹⁵⁷ The 2010 version of MCRE 304(a)(2) now relates to “other statements of the accused” and mandates that “[a] statement of the accused may be admitted in evidence in a military commission only if the military judge finds that the totality of the circumstances renders the statement reliable and possessing sufficient probative value . . . and that the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or the statement was voluntarily given.”¹⁵⁸ The genesis of this modification may very well be rooted in the above-mentioned Jawad case. In that case, Jawad successfully argued for the suppression of his statements because they were made shortly after he was purportedly threatened by Afghan forces prior to being turned over to U.S. custody.¹⁵⁹ The old rules were far from clear and left the door open for confusion and inconsistency among various judges. In contrast, the 2010 rules are written in a more understandable and detailed manner that is closer to traditional military courts-martial and civilian legal code.

The 2010 update to MCRE 304(a)(3) offers similar changes when it comes to “statements from persons other than the accused.”¹⁶⁰ This update also defines torture under the guidance of the Detainee Treatment Act.¹⁶¹ The practical effect of this element is that EITs such as waterboarding, that may previously have been in dispute as to whether or not they constituted legal torture, were outright prohibited from use against a different detainee.¹⁶² This means that confessions elicited from accused 9/11 mastermind Khalid Shaykh Muhammad via waterboarding would unquestioningly be prohibited for use against Muhammad’s alleged co-conspirators.¹⁶³

However, while the 2010 changes provide much more detailed guidance when it comes to statements of the accused and persons other than the accused, the rules do not completely close the door on statements from such EIT recipients as Muhammad.¹⁶⁴ If the government so chooses, it can still make a compelling argument for the admission of statements obtained years after the EIT process ceased.¹⁶⁵ The government could conceivably

¹⁵⁷ See DEP’T OF DEF., *supra* note 15.

¹⁵⁸ DEP’T OF DEF., *supra* note 15, at M.C.R.E. § 304(a)(2).

¹⁵⁹ Ruling on Def. Mot. To Suppress, at 1–3, *United States v. Jawad* (No. 08-004), *available* at <http://www.defense.gov/news/commissionsJawad.html>.

¹⁶⁰ DEP’T OF DEF., *supra* note 15, at M.C.R.E. § 304(a)(3).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ McNeal, *supra* note 135, at 977–78.

¹⁶⁴ See generally DEP’T OF DEF., *supra* note 15.

¹⁶⁵ See *United States v. Ghailani*, 2010 WL 1839030, at *3 (S.D.N.Y. May 10, 2010) (denying a suppression motion on the grounds that Ghailani’s treatment by the CIA bore no logical relationship to his prosecution, particularly since the prosecutors had rejected the use

argue that statements made to the FBI, CITF, or military investigators were voluntary after the Detainee Treatment Act went into effect in 2005. This is because many of the detainees had legal counsel by this time. Individuals such as Muhammad would also fit the definition of an educated, older detainee.¹⁶⁶ In addition, detainees such as Muhammad—or KSM as he is known in the intelligence and law enforcement community—were no longer forced to cooperate.¹⁶⁷ Instead, waterboarding and other varying forms of EITs were replaced with what some insiders referred to as “cookieboarding.”¹⁶⁸ Rewards such as additional food, treats, entertainment, recreation, and increased freedom to interact with fellow detainees were granted to those who were deemed cooperative.¹⁶⁹ This means that a detainee desiring to eat a specialty New York style cheesecake or have an opportunity to play numerous soccer games with fellow detainees would first need to behave themselves and play ball with their questioners. Those who would not cooperate with their questioners would merely live in a more austere environment.

As such, many of these post-2005 statements continue to be recorded in what the FBI refers to as Letterhead Memorandums (LHMs). These LHMs are summarizations of the interrogations and, in the context of Guantanamo Bay detainees, specifically relate to unwarned but otherwise voluntary interview sessions.¹⁷⁰ In many cases, the detainee will cut an interview short due to health concerns or general “not feeling up to it.”¹⁷¹ LHMs differ from some of the early classified CIA summaries that delve into statements made under EIT conditions. It should, however, be noted that countless CIA interrogations since 2001 were conducted under the same degree of unprovocative and/or “cookie boarding” tactics as the FBI, CITF, and military

of any statements by Ghailani from after his capture). A similar approach can be applied in a military commission.

¹⁶⁶ Muhammed is in his late 40s and received a college degree from North Carolina A&T State University. Muhammad also experienced a brief period in a local North Carolina jail relating to a car accident. *Khalid Sheikh Mohammed's Isolated U.S. College Days*, Dina Temple-Raston (Nat'l Pub. Radio broadcast Nov. 18, 2009), <http://www.npr.org/templates/story/story.php?storyId=120516152>.

¹⁶⁷ Detainee Treatment Act of 2005, 10 U.S.C.A. § 801 (West 2010).

¹⁶⁸ One publicized early example from 2001 relates to that of al Qaeda operative Abu Jandal who reportedly offered up a wealth of information relating to the 9/11 attacks after nearly a year of antagonistic failure to cooperate. Jandal, a diabetic, reportedly opened up after guards provided him with sugar-free cookies as an incentive item. The interrogator who used the cookieboarding approach has become a harsh critic of the pre-DTA Bush-era interrogation practices. See Bobby Ghosh, *After Waterboarding: How to Make Terrorists Talk?*, TIME, June 8, 2009, at 41, 41.

¹⁶⁹ *Id.*; The author also has reviewed countless GTMO interrogation reports that detail the sheer amount of rewards offered, accepted and refused by detainees.

¹⁷⁰ The author has sifted through countless LHMs during the trial preparation phase of cases held at GTMO. The content of many LHMs remain classified.

¹⁷¹ *Id.*

investigations, although most of the CIA summaries remain classified due to national security protections.¹⁷² So, in theory, these untainted statements, particularly LHMs, could be classified as voluntary depending on the sophistication of the detainee along with other tangible circumstances. From a practical point of view, the defense would still likely be able to seek the introduction of earlier mistreatment in order to diminish the effects of the later statements, but again, in theory, the LHMs could very well be considered “voluntary” and consequently admissible under the 2010 rules.

Moreover, individuals, such as Muhammad, admitted under oath to various war crimes during the yearly Combatant Status Review Tribunals (CSRT).¹⁷³ These are administrative proceedings that are designed to determine whether a detainee should continue to be classified as an “enemy combatant,” a term that was changed in the MCA 2009 to “unprivileged enemy belligerent” and the legal basis for jurisdiction to hold a non-citizen in detention.¹⁷⁴ An argument can certainly be made that these admissions were voluntary because they were made under both the CSRT oath and an Islamic oath.¹⁷⁵ In addition, attendance or participation in a CSRT is voluntary, with a personal representative assigned to assist the detainee if desired.¹⁷⁶ Checklists and a script specifically inform the detainee that he is not required to attend, but certainly may do so if desired. Detainees also are asked if they want to make a statement.¹⁷⁷ Muhammad, for example, prepared a pre-arranged statement that refuted some assertions but corroborated others.¹⁷⁸ For example, Muhammad admitted to his role in 9/11, as well as other terrorist plots, while also asserting that he was not the leader of al-Qaeda’s Military Committee as had been alleged at one time.¹⁷⁹ So, again, while the defense would likely seek to muddy the waters by introducing previous EIT treatment to show how it correlates to the CSRT admission, that statement also would in theory be deemed admissible as voluntary.

¹⁷² An in-depth article in the New York Times revealed that more than two-thirds of all CIA interrogations conducted in the few years after 9/11 involved no element of coercion. See Scott Shane, *Inside a 9/11 Mastermind’s Interrogation*, N.Y. TIMES, June 22, 2008, at A1.

¹⁷³ Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024 17–20 (Mar. 10, 2007), available at http://www.defense.gov/news/transcript_isn10024.pdf.

¹⁷⁴ Davis, *supra* note 20.

¹⁷⁵ McNeal, *supra* note 135, at 977 (discussing the totality of the circumstances test as an analytical framework for determining the voluntariness of the statements).

¹⁷⁶ Davis, *supra* note 20; see also Transcript of Combatant Status Review Tribunal Hearing for ISN 10024, *supra* note 173.

¹⁷⁷ See also Transcript of Combatant Status Review Tribunal Hearing for ISN 10024, *supra* note 173 (providing details of the CSRT Hearing).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (Muhammad maintained that he was in fact the head of al-Qaeda’s Media Committee, as well as head of the terror organization’s anthrax program.).

Despite the political affirmation of military commissions, the process was still under the same torture claim attack in both legal and media venues, with voluntariness of statements front and center. The first major military commissions hearings to take place in 2010 revolved around defense efforts to suppress detainee statements due to alleged torture or otherwise harsh treatment.¹⁸⁰ Interrogators were called to the stand where they relayed, among other items, witness testimony that the detainee, who was seriously injured in the 2002 firefight that led to his capture, was shackled to a hospital bed while being interrogated.¹⁸¹ As a result, numerous advocacy and legal groups were provided additional ammunition to continue their torture arguments.

Moreover, the torture and mistreatment argument was even used in real-time while these suppression hearings were going on. At Guantanamo Bay, detainees are held in various camps located about ten miles from the courthouse. JTF-GTMO security rules require that detainees be frisked, blindfolded, and have soundproof earmuffs placed on their heads as a van transfers them to and from court. On the first day of suppression hearings, the detainee, Omar Khadr, refused to attend the hearing because he objected to these security precautions, arguing through his attorneys, that the transfer van already had blacked out windows so such extreme security precautions were merely designed to be humiliating.¹⁸² In addition, the detainee also claimed that the guards violated him during the frisking process.¹⁸³ These claims soon overshadowed the actual hearings. The next day of the hearings, the detainee again claimed mistreatment due to his contention that being forced into blindfolds had caused immense pain to his eye that was damaged in the 2002 firefight.¹⁸⁴ This claim again overshadowed the hearings, despite the fact that the detainee was observed playing basketball with other detainees later that evening.¹⁸⁵

IV. PROPAGANDA V. REALITY

There is little doubt that accused al-Qaeda detainees and their advocates have succeeded in shaping the negative public and legal perceptions of

¹⁸⁰ Steven Edwards, *Khadr's Health Becomes Issue at U.S. Base Hearings*, CANWEST NEWS SERVICE, Apr. 29, 2010, <http://www.canada.com/news/Khadr+health+becomes+issue+base+hearings/2965681/story.html>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Michelle Shephard, *At Omar Khadr Hearing, U.S. Officer Explains Changing Battle Report*, THE STAR, May 1, 2010, available at <http://www.thestar.com/specialsections/article/803378--at-omar-khadr-hearing-u-s-officer-explains-changing-battle-report>.

¹⁸⁴ *Id.*

¹⁸⁵ Shephard, *supra* note 183 (“Military judge Col. Patrick Parrish ordered the proceedings to continue over the objections of the defence, noting guards reported Khadr had played basketball Friday night and was therefore fit enough to come to court.”).

GTMO. It is exceptionally common in both the United States and abroad to equate detainee detention with torture, orange jumpsuits, and cages.¹⁸⁶ Shaping the GTMO reputation and policy through lawfare tactics in and of itself is a victory for those who constantly flood the legal and administrative process with accusations of torture. Moreover, the cumulative approach to using the torture narrative under the tactical lawfare concept also has directly affected operations on the battlefield.¹⁸⁷ However, is it a victory for detainees that likely will remain incarcerated for many years to come?

A. *GTMO over Supermax: Life's a Beach*

While much of the world views GTMO as a horror-filled prison, the detainees know better. Individuals such as Ali al-Bahlul, who received a life sentence in a 2008 military commission for assisting Usama bin Laden's propaganda efforts, have many more freedoms at GTMO than they would in federal prison.¹⁸⁸ In fact, given the choice between the federal "supermax" prison in Florence, Colorado or GTMO, a seeming majority of detainees have indicated they would prefer to stay.¹⁸⁹ "They know that there will not be the same privileges as [GTMO]," a detainee liaison recently said, "Given the choice of being sentenced forever in Guantanamo or moved to supermax, it is 'no, can I stay at GTMO?' Here they can be outside, they can smell the sea."¹⁹⁰

The differences between federal prison, which is governed by federal law, and the Department of Defense-run GTMO prison camps, which adhere to Geneva Conventions rules, is striking in terms of quality of life.¹⁹¹ The federal supermax prison is where many of the most notorious federally convicted foreign terrorists reside.¹⁹² This includes those responsible for the 1994 World Trade Center bombing, as well as Uzair Paracha. Supermax prisoners typically spend more than twenty-two hours a day locked within a single nine-by-nine foot cell.¹⁹³ Their only source of natural light is seen through a skylight.¹⁹⁴ Prisoners are not permitted to go outside.¹⁹⁵ Exercise

¹⁸⁶ See Andleeb Abbas, *View: An Inconvenient Freedom*, DAILY TIMES (PK), July 11, 2010, available at http://www.dailytimes.com.pk/default.asp?page=2010%5C07%5C11%5Cstory_11-7-2010_pg3_3 (Pakistani editorial writer and political consultant offers as fact an ill-informed and factually incorrect legal assessment of Guantanamo Bay as "a Gestapo-type concentration camp in violation of all human rights laws and conventions").

¹⁸⁷ Dungan, *supra* note 14; See also Bellflower, *supra* note 29 (noting that lawfare is a variant of warfare).

¹⁸⁸ United States v. al Bahlul (CMCR) (No. 09-001).

¹⁸⁹ Spillius, *supra* note 16 (comparing GTMO to Supermax).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

is limited to about an hour a day during the week.¹⁹⁶ Various reports indicate that many inmates suffer psychological trauma for what is described as “severe isolation.”¹⁹⁷

In contrast, throughout GTMO’s first decade, it has adapted to rules typically required to prisoners of war under the Geneva Conventions.¹⁹⁸ These freedoms are even more extensive than the Miami incarceration of ousted Panamanian dictator Manuel Noriega, who was treated as a prisoner of war from 1990 to his extradition to France in 2010 and consequently had among other items better food and was permitted to wear his military uniform.¹⁹⁹ This means that even the most non-compliant GTMO detainees have access to the outdoors. Food is diverse and caters to religious diets.²⁰⁰ Food and water also often is the same as what the guards and military personnel eat. In some of the camps, detainees are free to come and go from their rooms.²⁰¹ One camp in particular includes a large soccer field that lies in view of classrooms and recreation rooms.²⁰² Another camp for less compliant detainees provides shaded and unshaded areas for detainees to exercise or converse with others.²⁰³ Even the high-value detainees often have unfettered access to recreation, outdoors, and interaction among themselves. Cable television, books and newspapers are prevalent, where news channels such as al Jazeera are available for those who wish to watch.²⁰⁴ “The Twilight,” a series of books geared toward teens involving a vampire/werewolf love triangle was reportedly particularly popular in early 2010.²⁰⁵ A typical day in any of the camps revolves around detainees walking, talking, and

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Peter Finn et al., *Review Finds Detainees’ Treatment Legal; Pentagon Report on Guantanamo Urges More Interaction for Some, Official Says*, WASH. POST, Feb. 21, 2009, at A03 (citing Pentagon report verifying that GTMO does comply with typical Geneva Conventions guidance).

¹⁹⁹ David Margolick, *Better Prison Digs?: Noriega: Public Enemy Becomes Prisoner of War*, N.Y. TIMES, Dec. 13, 1992, at 2; See also Matthew Reichstein, *The Extradition of General Manuel Noriega: An Application of International Criminal and Humanitarian Law to Answer the Question, ‘If so, Where Should he go?’*, 22 EMORY L.J. 858, 858–63 (2008) (discussing Noriega’s imprisonment and rights under Geneva III).

²⁰⁰ Brown, *supra* note 19.

²⁰¹ *Id.* at 9; The author also has extensively toured the camps; See also Mike Levine, *Gitmo Detainees Serve Time by Playing Games, Talking to Family on Skype, Taking Classes*, FOX NEWS, Jul. 13, 2010, available at <http://www.foxnews.com/politics/2010/07/13/gitmo-detainees-serve-time-playing-games-talking-family-skype-taking-classes/> (addressing Gitmo detainees’ access to Skype, Playstation 3 and classes).

²⁰² Levine, *supra* note 201.

²⁰³ Brown, *supra* note 19, at 10.

²⁰⁴ Brown, *supra* note 19, at 10; Levine, *supra* note 201.

²⁰⁵ Levine, *supra* note 201.

often joking around amongst each other, as well as praying together.²⁰⁶ During the 2010 World Cup soccer tournament, GTMO officials arranged for detainees to have unrestricted access to the televised coverage.²⁰⁷ Red Cross officials or legal counsel often make their way into the camps and can be seen conversing with detainees on any given day as well.²⁰⁸ Detainees also have relatively frequent access to their families back home via ICRC-sponsored video/telephone communications (VTC).²⁰⁹ According to internal records, detainee complaints to camp personnel often relate to such mundane issues as the salt and pepper levels in the food. But, GTMO is still a prison and is far from perfect. In 2009, a Pentagon review recommended that high-value detainees have even more interaction amongst each other.²¹⁰ And, controversies surrounding what some refer to as mind games between GTMO personnel and detainees, as well as isolation, continue to exist.²¹¹

B. Lawfare Tactic Backfires

But, again, how many of those stories are truly legitimate? The issues surrounding al Qahtani were certainly valid. But then there are items such as Abdel Aziz's "unsubstantiated" thigh issue.²¹² In addition, hunger strikes often develop among the detainees. Speculation exist that these hunger strikes are not organized by the detainees themselves, but instead coordinated via the "Detainee News Network (DNN)."²¹³ The goal of the hunger strikes is speculated to force GTMO personnel to attempt to force feed the detainees, thus providing some sort of recorded evidence to present in public cases of "mistreatment." Moreover, speculation exists where detainees often make pre-determined plans among each other on when they will be disobedient.²¹⁴ This is because it is well known in the camps that if a detainee refuses to leave his cell, GTMO personnel will conduct what is referred

²⁰⁶ *See id.*

²⁰⁷ *Id.*

²⁰⁸ Brown, *supra* note 19, at 10; *See also* Davis, *supra* note 20 (discussing the author's view of the humane treatment of Guantanamo detainees).

²⁰⁹ *Pakistan: helping families connect with loved ones in Guantanamo*, ICRC (Dec. 29, 2010), <http://www.icrc.org/web/eng/siteeng0.nsf/html/pakistan-feature-091229>.

²¹⁰ Finn, *supra* note 198.

²¹¹ William Glaberson, *Pentagon Finds Guantanamo Follows Geneva Conventions*, N.Y. TIMES, Feb. 20, 2009, at A11 (contending that Camps 5 and 6 should be closed immediately and accused JTF-GTMO personnel of "whitewashing" the Pentagon review).

²¹² GTMO records for ISN 757, *supra* note 116, at 7.

²¹³ *See* Michael Melia, *Messages on "Detainee News Network" Call for Detainees to Boycott War-Crimes Trials*, ASSOCIATED PRESS, May 9, 2008, available at Westlaw (searching AP-ALL database); *see also* *Inside Guantanamo*, NAT'L GEOGRAPHIC, available at <http://channel.nationalgeographic.com/series/explorer/4085/facts-1> (last visited Sept. 26, 2010).

²¹⁴ Melia, *supra* note 213.

to as a Forced Cell Extraction.²¹⁵ These extractions, which are reportedly often anticipated and directed by outside advocates, follow a detailed standard operating procedure and, more importantly to the defense, are recorded and documented.²¹⁶ In other words, these outside influences, knowing that everything is documented, are seeking to use hunger strikes and forced cell extractions to manufacture evidence to be used as ammunition in legal proceedings as well as public opinion.

However, perhaps the intended consequence of these actions was to put pressure on the U.S. Government to close the GTMO detention facility and transfer the detainees to U.S.-based prison facilities. Ultimately, the tactic was always to cast GTMO in the most negative light in order to bring down the entire wartime system of handling detainees. But, now that the goal is close to being achieved, the lawfare strategy of using the legal system to force U.S. policy has been thrust in disarray as detainees begin to rebel against their advocates to some degree. As the option of actually being transferred became more real in 2009 as opposed to some far off goal, insiders and detainee attorneys both report that many detainees are starting to become uneasy with a potential move.²¹⁷ Detainees reportedly relish the fact that they can enjoy the tropical environment and general liberties of GTMO while still maintaining street credentials as their peers back home continue to believe that they are suffering every day. At the same time, detainees shudder at the thought of being transferred to some place such as northern Illinois where they would have to remain indoors for much of the year.²¹⁸ Moreover, Algerian detainees in 2010 demanded in federal court that they be permitted to remain at GTMO rather than be repatriated to their home country where they feared actual torture.²¹⁹

Mark Falkoff, an attorney who represents numerous detainees ranging in citizenship from Yemen to Pakistan, acknowledged the increasingly prevailing view in an early 2010 interview.²²⁰ Falkoff told Newsweek Magazine that while his clients clearly want to go home, they are at least being held under Geneva Convention conditions at GTMO.²²¹ A transfer to a place

²¹⁵ DEP'T OF DEF., CAMP DELTA STANDARD OPERATING PROCEDURES, sec. II – Operations, 24–6 (2003).

²¹⁶ *Id.* at sec. III – Documentation.

²¹⁷ See Spillius, *supra* note 16; see also Michael Isikoff, 'Gitmo Forever?', NEWSWEEK, Jan. 6, 2010, available at <http://www.newsweek.com/blogs/declassified/2010/01/06/gitmo-forever.html>.

²¹⁸ See Spillius, *supra* note 16 (describing the Guantanamo detainees' benefits as including outdoor recreation, DVDs and newspapers, bottled water, and a gravel football field).

²¹⁹ Peter Finn, *Six Detainees Would Rather Stay at Guantanamo Bay than be Returned to Algeria*, WASH. POST, July 10, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070904926.html>.

²²⁰ Isikoff, *supra* note 217.

²²¹ *Id.*

such as Illinois, Falkoff continued, would equate to throwing the detainees into a supermax-type prison under near-lockdown conditions. Falkoff indicated that “[a]s far as [his] clients are concerned, it’s probably preferable for them to remain at Guantanamo.”²²²

The case of Ahmed Khalfan Ghailani offers an additional example of detainee regret and sign of a flaw in the lawfare strategy. Ghailani was accused of involvement in the 1998 simultaneous bombings of U.S. embassies in Kenya and Tanzania.²²³ He was captured and ultimately detained at GTMO.²²⁴ Ghailani raised issues of torture and mistreatment at the hands of the CIA, and ultimately won his release from the military commissions system.²²⁵ Instead, he was to be tried in federal court in New York. But, similar to a tactic used by Khadr, Ghailani continuously refused to attend his federal court hearings because he objected to the strip searches that were required to be conducted prior to transfer to court.²²⁶ Ghailani then expressed his desire to return to GTMO and be tried via a military commission.²²⁷ It is unknown whether this is merely another legal tactic or genuine desire, but it is interesting to note that Ghailani’s psychologist was the initial person to raise this request during a hearing as opposed to an advocate or legal counsel.

V. RECOMMENDATIONS

In order to wage a sustained counterattack to the tactical lawfare initiatives, it is recommended that legal options be complimented with less theoretical and consequently more practical solutions. This includes: 1) a uniform and attached detainee documentation form; 2) indigenous training; and 3) a unified media plan.²²⁸

A. *A Uniform and Attached Detainee Documentation Form*

The government should adopt a uniform document relating to detainee treatment and physical/mental health. This proposed internal-use document would be standardized across all government agencies and geared

²²² *Id.*

²²³ *United States v. Ghailani*, No. S1098, 2010 WL 1839030, at 1 (S.D.N.Y. May 10, 2010).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Larry Neumeister, *Guantanamo Detainee Claims Post-Traumatic Stress*, ASSOCIATED PRESS, May 18, 2010, available at <http://www.lasvegassun.com/news/2010/may/18/guantanamo-detainee-claims-post-traumatic-stress/>.

²²⁷ *Id.*

²²⁸ This section is based on the author’s experience of physically capturing detainees in Iraq as part of the Pathfinder Company of the 101st Airborne Division and later serving as a war crimes prosecutor in the Office of Military Commissions. The author also uses his experience as a journalist in Israel and the United States in regard to the media plan.

specifically toward detainees captured on the battlefield. The form will attach itself to the detainee as soon as the detainee is taken into custody or as soon as practical as may be the case when large numbers of suspected combatants are captured. In this manner, as the detainee passes through various stages of confinement, information can continue to be added to this document, which will follow the detainee through the life of his or her detention. Information will include preexisting injuries, breaks in reporting, and medical reviews at each stage so that oversight will always be available.

Much of the relevant information is currently gathered and passed into detainee files via various scattered means depending on the custodial agency and location, as well as portable biometric equipment that can be collected at the initial point of capture. However, it is recommended that a single, standardized form be created beginning from as close to the point of capture as possible that encompasses all of the elements relating to the issue of detainee treatment. This standardized approach will compensate for the modern asymmetrical warfare approach where law enforcement agencies, military, and intelligence agencies have all engaged in capturing suspected enemy combatants on the global battlefield. This standardized form also may be classified at each level of the detainee's custody by a designated security reviewer. In this manner, the overall governmental interest in protecting national security assets will not be compromised by the need to document detainee treatment. A legal officer embedded in the operational area as opposed to detached administrative locations also can better assist in a timely manner in ensuring proper and standardized documentation or action as it pertains to each individual detainee. While an extra layer of bureaucracy is not always needed to fight an asymmetrical battle, this proposal would actually streamline the number of layers relating to individual detainee treatment as well as the process of investigating claims.

The practical approach of this proposed standardized form is that it provides an easy review process for when abuse claims are reported. This means that commanders on the ground can quickly investigate such abuse claims and dispense of the erroneous ones quickly and seamlessly as opposed to engaging in a long and intensive process for each complaint. Moreover, the document, which for practical purposes will nearly always be classified as at least secret, will provide signed information of witnesses, medical personnel and chain of custody that can streamline the investigative process at all levels of the detainee's custody. Remember, the government typically has the burden of proof when a detainee alleges mistreatment in court. Therefore, this proposed document can become the standard and accepted courtroom and administrative rebuttal evidence to combat such allegations. In military commissions and federal court, CIPA or MRCE 505 can be used to initiate classified court proceedings to review the document. In this post Detainee Treatment Act environment, creating and using this standardized evidentiary tool could cause the aforementioned tactical lawfare

approach to gradually fizzle out in the future as the complaints are seamlessly disproven in an organized fashion. At the same time, legitimate complaints can be better separated from the faux torture.

B. Indigenous Training

Related to the standardized documentation proposal, it is further recommended that indigenous forces be specifically trained to document detainee treatment prior to transfer of custody. The issue of indigenous abuse has been reported in places such as Iraq and Afghanistan. Such abuse was cited, for example, as a prime reason for the suppression of Muhammad Jawad's admissions and ultimate release from GTMO. Although it could take some time to fully gain compliance among indigenous forces, proper training in documenting detainee treatment in this area can only help in separating legitimate claims from fake or exaggerated allegations.

C. A Unified Media Plan

A unified media and public relations plan needs to be implemented, particularly when it comes to military commissions cases. The current military public relations structure revolves almost exclusively around a Public Affairs Officer (PAO). The problem with this structure is that military PAOs are inherently reactionary to outside attacks. This means that the typical military public relations strategy is to wait for negative attention to develop before a response is levied. By the time a PAO releases the government side of the story, it is too late and public opinion is already slanted. This is true even if the government story is one hundred percent accurate. In an operational environment in Afghanistan, for example, unfounded claims of detainee abuse can quickly spiral into real-time violence and attacks against allied forces as literally hours matter in the war over public relations. At a grander level, the cumulative approach of claiming abuse causes such fallacies as the perception that GTMO is home to incessant torture, cages, and orange jumpsuits. At the trial level, outside organizations and advocates often control the narrative through spin that can be proven either fabricated or grossly uninformed.

The unified media plan is meant to be proactive while maintaining ethical standards. Standard operating procedure should be to get the word out via traditional unclassified means as soon as practical in terms of manpower and operational intelligence. Relating to a trial scenario, it is recommended that two distinct teams operate to get the message out. In this plan, Team 1 will be the PAO. The PAO is the subject matter expert for the overall media universe and will be on hand for all press conferences and informed of all media endeavors relating to the specific case. The PAO is best equipped to comment on overall and generalized questions pertaining to the legal process. Meanwhile, Team 2 relates to the prosecutors. The prosecu-

tors are the subject matter experts for the specific case. In other words, the prosecutors' lane focuses solely on the case-specific factual information as prescribed under American Bar Association or complimentary ethical guidelines. All other questions will be deferred to the PAO. Once charges are sworn, the government will be able to state the case-specific truth under the ethical bar guidelines afforded to the prosecution. In fact, these ethical rules would provide a safeguard in terms of preventing the prosecution from deviating beyond the general, unrheterical facts. But, the ultimate goal of this unified media recommendation is to place the government on equal footing in terms of getting the real story out as opposed to a completely skewed version.

VI. CONCLUSION

Taliban and al-Qaeda operatives have engaged in a nuanced form of lawfare that is more tactical in nature.²²⁹ This tactical lawfare concept has a direct impact on military and intelligence operations from the lowest levels on up.²³⁰ While traditional lawfare approaches relate to broader, bigger attacks against mostly western governments, the use of tactical lawfare has manifested itself directly on the battlefield by achieving tactical goals that historically were limited to conventional physical acts of warfare.²³¹ As such, military and intelligence tactics have changed, personnel are diverted from engaging in operational or support roles, and operational momentum is stunted among other results.²³²

Much of the tactical lawfare success revolves around the principle of claiming detainee abuse regardless of merit. Of course, the U.S. Government did itself no favors by condoning limited instances of detainee abuse between 2001 and 2005.²³³ But, while those instances were certainly limited in scope, they essentially removed the government's benefit of the doubt on the detainee treatment issue and consequently left an opening within the legal and administrative system to be exploited.²³⁴ In addition, U.S. allies such as the United Kingdom, Pakistan, and Australia were deemed complicit and ultimately fell under similar levels of courtroom exploitation.²³⁵ Armed with this foundation of documented abuse, accused terror operatives initiated a cumulative practice of inundating legal and administrative sys-

²²⁹ Dungan, *supra* note 14 at 10.

²³⁰ *Id.* at 10; *See also* Bellflower, *supra* note 29, at 113; DeYoung & Warrick, *supra* note 26; Dunn, *supra* note 3.

²³¹ Dungan, *supra* note 14, at 10.

²³² *Id.* at 10.

²³³ *See* Guiora & Page, *supra* note 22, at 427; Sadat, *supra* note 22, at 311.

²³⁴ *See* Selsky, *supra* note 61 (describing a military investigation concluding that an inmate had been subjected to harsh treatment during interrogation).

²³⁵ *See, e.g.*, H.X.A. v. Home Office, [2010] EWHC 1177 (QB).

tems with allegation after allegation of torture. Some claims had merit while many others were murky at best. But, regardless of the merits, the global and cumulative tactic succeeded in directly altering the fight on the battlefield. Hence, the concept of tactical lawfare.

While the overall lawfare approach has been rather successful, it has perhaps been waged too well to some degree.²³⁶ Particularly with the Obama administration's attempt to transfer GTMO detainees to a U.S. prison facility, the impact of this cumulative approach has come to roost at the individual detainee level.²³⁷ Starting in late 2009, detainees and their advocates have found themselves in the awkward position of demanding that they remain at GTMO due to the better living conditions and/or to avoid torture in their home countries.²³⁸ Meanwhile, although western governments have been slow to recognize the tactical lawfare effect on their ability to wage war against terrorist organizations, efforts have begun to fight back. As such, a system is needed that can counter the tactical lawfare attacks at every stage of the detainee process. This means recognizing that tactical lawfare is an enemy strategy and working to diminish its success as early as possible during the course of a detainee's custody. By starting at the beginning of detention to cut off a detainee's ability to wage a meritless claim of abuse, the tactical lawfare practice as discussed above will gradually fizzle out.

²³⁶ Isikoff, *supra* note 217.

²³⁷ *Id.*

²³⁸ Finn, *supra* note 219.