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The American Way of Justice

As his client, Salim Hamdan, is released from Guantanamo Bay, revisit one bold JAG lawyer's inside accounting of how he convinced the Supreme Court that President Bush had breached the Constitution.

By Lt. Cmdr. Charles Swift

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Swift
Photograph by Christian Weber

It's time for some perspective, please. It's time to close Guantanamo Bay. Yes, I am the military officer who sued my commander in chief and the secretary of defense on behalf of a Guananamo Bay detainee named Salim Hamdan.

What I sought was simply that the president, just like the soldiers, sailors, and marines under his command, be required to comply with the Uniform Code of Military Justice and the Geneva Conventions. Because I believe that resorting to secret prisons, coercive interrogations, and the abandonment of the rule of law is not the way to keep our country safe from a handful of fanatics. Last summer, with the help of my civilian co-counsel, Professor Neal Katyal, and the law firm of Perkins Coie, I won the case in the Supreme Court of the United States. The problem is that the victory, as big as it was, was disdained by the administration, which has attempted to defy the Supreme Court and the rule of law by building Guantanamo up in the wake of the decision, instead of down. That needs to change.

Why did I sue my chain of command?

Before I go any further, let me introduce myself. I am from a small town in western North Carolina called Franklin. I have been in the Navy since I entered the United States Naval Academy in the summer of 1980. Before going to law school, I spent seven years serving as a surface-warfare officer in the greatest navy the world has ever known. After law school, I returned to active duty in the Navy as a member of the Judge Advocate General's Corps. That means that I am both a uniformed officer in the United States Navy and a licensed and practicing attorney. This May I will retire from active service. Serving in the United States armed forces as both a combat officer and a lawyer is the greatest privilege I will ever have, because of both who we are and what we defend. And part of who we are and what we defend are the Geneva Conventions.

I say that not just because I am Hamdan's lawyer; I say that because it is what I was taught from

plebe summer on. General John Vessey, who retired after serving as chairman of the joint chiefs of staff under President Reagan, summed up those teachings better than I ever could in a recent letter to Senator John McCain. In the letter, he quoted General George Marshall:

"The United States abides by the laws of war. Its Armed Forces, in dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not terrorize helpless non-combatants, if it is within our power to avoid so doing. Wanton killing, torture, cruelty, or the working of unusual hardship on enemy prisoners or populations is not justified under any circumstance. Likewise respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes...."

It does not matter that Al Qaeda does all of the terrible things that General Marshall enumerated and more. It is not about them. It is about us.

That fact was driven home to me early in the Hamdan case. In the fall of 2004, I went back to the Naval Academy for my twenty-year reunion. My classmates were kidding me about being famous and asked what it was like to be a media star. Whether I was right or not in what I was doing did not come up until the end of the reunion. As the tailgate party was winding down, a friend I had gone through plebe summer with came up to me. After the academy, he had gone into the Marine Corps and done superbly. He made colonel, and everyone expects that he will be a general. When he took me aside, I was a little nervous. I believed in what I was doing, but I could understand why he might not. But what he said was all the inspiration I have ever needed when things got rough. He told me simply, "The rule of law is what I fight for. Men die for this. Don't stop."

This man is a hero.

Let's not forget what our heroes are dying for.

My first in-depth legal study of the Geneva Conventions was not until the summer of 1997, when I attended the Law of War course sponsored by the Naval Justice School in Newport, Rhode Island. The course was kicked off by the then-dean of the Center for Naval Warfare Studies at the War College, Robert S. Wood, who gave an address about a phenomenon he called tribal war. His point was that after the decline of the Soviet Union, the U. S. military would increasingly face enemies that were not organized in nation-states. There might be an occasional nation-state conflict like the Gulf war, but the principal threat we would face was increasingly going to be enemies bound together by religious and/or ethnic ties rather than the armed forces of another nation. This enemy was not going to use the tactics or follow the rules that we were about to study, and the provost said that we should start thinking about this new battlefield and how the rules of war would apply to it.

During the question period, I asked him, "If the armed forces abandon the rules that govern our conduct in fighting a war, won't we be subject to intense international and domestic opposition? And if we lose that support, like in Vietnam and Somalia, how will we be able to sustain a combat effort long enough to win?"

He answered with a story of an experience he had while teaching at Harvard in the 1960s. He wrote a paper recommending a U.S. approach to the Palestinian question. His paper circulated among the faculty until it landed on Henry Kissinger's desk. As Dr. Wood recalled it, Dr. Kissinger called him in and told him, "You Americans, you're all engineers. You think that all the world's problems are puzzles that can be solved with money and materiel. You are wrong. All of the world's great problems are not problems at all. They are dilemmas, and dilemmas cannot be solved. They can only be survived."

His answer, while thought provoking, struck me as no answer at all. The rest of the course ignored the question. Besides, way back in 1997 at least, there remained a certain theoretical quality to the whole discussion.

Are our civilian and military courts the problem?

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Photograph by Christian Weber

It stopped being theoretical for me in March 2003, when I reported to the chief defense counsel's Office for Military Commissions. From the start, the commissions appeared legally point less. If all of the detainees in Guantanamo had been captured on a battlefield carrying weapons, as had been claimed publicly by the Department of Defense, why have trials at all? The Geneva Conventions clearly give the United States both the legal and moral authority to hold combatants and even civilians of an enemy nation until the end of hostilities, and hostilities were certainly ongoing. What is the point of holding a trial when the prize for conviction or acquittal is the same — back to the cell?

The reasons the Departments of Defense and Justice gave for using a commission instead of the regular military or civilian court were simply not accurate. For example, it was suggested that if a court-martial or a federal court was used to try members of Al Qaeda or the Taliban, then our soldiers would have to get a warrant before they could search a cave. This is not true. The Supreme Court, in *The United States* v. *Verdugo-Urquidez,* ruled unequivocally that there is no requirement for a search warrant outside the United States. Under no circumstances would our armed forces have to get a warrant to search anywhere overseas, much less a cave.

Another claim, made by a spokesman of the Department of Defense to the Senate Judiciary Committee, is that in order to conform with the Uniform Code of Military Justice, military interrogators would have to read detainees their rights before questioning them. Again, this is contrary to what military courts had already said in a case called *Lonetree* v. *The United States*. Clayton Lonetree was a Marine sergeant assigned to the United States embassy in Moscow. He had a Russian girlfriend who turned out to be working for the KGB. Lonetree gave an accomplice of hers classified information about the embassy. He became a spy for them. Eventually he was arrested and interrogated. At trial, Lonetree argued that because the investigators who interrogated him had failed to read him his rights, his statements to them should be excluded. The Court of Appeals for the armed forces rejected Lonetree's argument. The court ruled that because the purpose of the interrogation was to learn how badly the embassy's security had been compromised, it was for operational intelligence and was not conducted as part of a criminal investigation, and so the investigators were not required to read Lonetree his rights.

It is a safe bet that if it was not necessary to read a U.S. marine his rights during an interrogation, then a court is not going to require intelligence officers to do so when interrogating enemy combatants.

Even calling the case I was assigned to a "military commission" is misleading. Historically, military commissions have punished battlefield crimes and been run by the uniformed services and overseen by the Judge Advocate Generals of whatever service was holding the commission. They largely followed the same rules as courts-martial and in all cases were required to afford the accused all of the protections necessary for a fair trial. This time, however, the general counsel of the Defense Department — a political appointee — rather than the uniformed JAGs, who are the recognized experts on both military justice and the laws of war, wrote the rules and oversaw the process. When the JAGs expressed concern about the procedures proposed by the general counsel, they were cut out of the conversation to the point that when the final draft was sent around, the JAGs were given only a few hours to comment, effectively removing them from the process. There was no actual desire to get the professionals' opinions.

And despite the Pentagon's claim that both regular military and civilian courts would be unable to

deal with terrorists captured on a battlefield, the fact is that no one has asked the federal prosecutor's office in New York — which has great experience trying and convicting terrorists — whether they have sufficient evidence that was legally obtained to try and convict those responsible for the attacks of 9/11. And absent that, the fact is that *more than one hundred* terrorism trials have been held in the United States since 9/11.

I like to give the example of Sheik al-Moayad, from Yemen, who was raising funds for Osama bin Laden. The FBI lured him to Germany and arrested him in a sting operation. We chose not to treat him as a combatant and send him to Guantanamo. Instead we marshaled evidence and put him on trial, and it was a fair trial, and even the Islamic opposition party in Yemen would have to say, Well, he got a fair trial. He did not become a martyr, just a common criminal.

And on the battlefields of Afghanistan and Iraq, we've had more than three hundred courts-martial. There was no need to delay justice for the victims of 9/11 for five years in order to create a new justice system, because the system we have works.

By contrast, commission proceedings are political trials. Any time the president of the United States is the guy signing the order to have your trial — each individual person — that's a political trial. The military doesn't even get any discretion over who they think is the most guilty. And what's the problem with that? Well, there's a significant possibility that you'll convict innocent people. And it gives the Khalid Sheik Mohammeds of the world the ability to say it's a political trial. And they're right! Khalid Sheik Mohammed can take the moral high ground for an afternoon. How could we get ourselves to such a point?

In fact, the commissions violated the very law of war they were supposedly enforcing, so it is not that surprising that the Supreme Court unequivocally rejected them, holding that the president had failed to give any justification for deviating from the rules of evidence and procedures governing the military and civilian court systems.

I submit to you, my fellow Americans, that the real reason the president abandoned 250 years of American jurisprudence was that doing so was the only way to use confessions obtained through physical and mental coercion, and to shield the methods being used to obtain these confessions from public scrutiny.

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Photograph by Christian Weber

I didn't see Professor John Yoo's infamous torture memo — written when he was deputy assistant attorney general — until it was posted on the Web by *The Washington Post*. I did not need to see it, though, to conclude that the United States was probably interrogating people using the highly coercive methods countenanced by Professor Yoo. Why did I believe that? Well, the rules for commissions allowed evidence that had been obtained by coercion — some call it torture — to be both admitted at trial and kept secret forever. Commissions were not necessary for justice, but they were necessary if this kind of evidence was going to be used.

Here's how the commission rules permit such a thing to happen. Some of the nation's most classified materials fall into the category of "sources and methods." Normally, sources and methods refers to things like the location and capabilities of intelligence satellites and the identities of spies and informants, information that gets people killed in the intelligence business. Prior to 9/11, the methods of interrogation approved for the questioning of combatants

were not classified and were in fact published in the Army's interrogation manual. However, when the president announced that he had transferred fourteen high-value detainees, including Khalid Sheik Mohammed, from undisclosed prisons to Guantanamo, he refused to answer questions regarding the methods of questioning detainees, beyond admitting that the interrogations were "tough," on the grounds that the specific interrogation techniques were classified sources and methods.

Classifying the physical and mental abuse of a detainee as "sources and methods" of intelligence guarantees that the way these interrogations were conducted will never be discussed in an open session of a commission. The public will know that an accused person confessed to something, but the conditions in which the confession was obtained will remain secret.

It goes further than that. The commission itself may never know. Because the military interrogations of my client are classified, I cannot show them to Hamdan. That's right. Even though he was present at the interrogation, Hamdan cannot see them. Nor can I ask him about what he allegedly said, because he does not have security clearance. The result is that a defense counsel cannot ask his client why he confessed. His client, for example, may have confessed because he was strapped down, unable to breathe because a wet towel was over his face, and, after passing out a third time, was ready to admit to anything. That would be the end of any trial in military or federal court, but commission rules prevent the attorney from discussing this classified interrogation with his client, because to do so might reveal a method or source to his uncleared client.

In either a civilian or military trial, the prosecutor would be obligated to both find out and tell me if my client was subjected to coercion. Again, that is not the case in commissions. In both the military and the federal systems, a prosecutor is in charge at the trial, and if he fails to give the defense potentially exculpatory evidence — like, say, if the accused was kept awake for twenty-four hours before the interrogation — that alone can be grounds for dismissing the entire case. So the prosecutor has both the power and obligation to search all of the evidence in the government's possession for any exculpatory evidence.

What is the real reason for the commissions?

In the commissions, the prosecutor doesn't control the information he sees or is permitted to turn over to the defense. The CIA, the FBI, and military intelligence decide what they are willing to turn over. They decide what I get to see. The result is, if information is damaging to the government's case, there is no guarantee that I am going to see it.

This is not speculation. This is exactly what has happened. In fact, after meeting with a government agency, military attorneys assigned to the prosecution expressed concern to the chief prosecutor that the agency had made it clear that it was going to withhold 10 percent of the evidence, and that the exculpatory evidence, if there was any, would be among the evidence withheld. Translation: We are going to leave out how we got these statements. The chief prosecutor's response was blunt: The rules do not require us to look into this. Don't worry about it. After the officers filed a complaint, both they and the chief prosecutor left the commissions. The rules, though, did not change.

The rules also permit hearsay, which means that the agent who conducted the interrogation does not have to actually appear before the tribunal and be subjected to cross-examination. Instead, a written summary of the interrogation is entered — an edited summary, of course. You cannot cross-examine a piece of paper to find out what happened. So all the commission and the public ever see is the confession.

Each of these things is a perversion of justice. All of them, taken together, mean we really have arrived at a kafkaesque kind of justice.

What happens when 250 years of jurisprudence is thrown out?

I was assigned to represent Salim Ahmed Hamdan, a Yemeni national who had been picked up in

Afghanistan and had once worked as Osama bin Laden's driver. When I met Hamdan, he was in solitary confinement awaiting trial. I was told that he would stay in solitary confinement until his trial was over and that my access to him was conditioned on negotiating a guilty plea. So I put in a demand for a speedy trial. And the answer was no, Hamdan did not have the right to a speedy trial. In other words, he could be held in solitary until he pleaded guilty. That made me think of a time years ago, when I was in Quito, Ecuador, and I took a tour of the city. The tour went by the prison. I asked about the justice system, and the guide explained that everyone just pleaded guilty. When I asked why, he explained that trials were not held until after the prisoners had already been held for the length of the sentence they would have served if convicted. So if they pleaded guilty, they could go home. If they pleaded not guilty, they had to wait for a trial and spend years more in jail. It was a great way to ensure a conviction, and no way to ensure justice.

So I filed suit against my chain of command, including my commander in chief.

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Photograph by Christian Weber

When it became clear that Hamdan's case would be heard in federal court, the prosecution finally brought charges against him of conspiracy to commit terrorism. From the start, though, it was clear that Hamdan was not going to get a fair trial. The trouble started when the court was seated. Two of the officers of the court had played key roles in Afghan operations. One was a senior intelligence officer, the other was in charge of transporting prisoners to Guantanamo. But when I tried to ask them about what their roles had been, the judge kicked Hamdan out of the courtroom — he couldn't hear what they said they did, because that information was classified. Ultimately, the officer in charge of the trial refused to remove them from the court, saying that he was confident in their ability to be impartial.

Why would you put guys who were involved in the operation on the court in the first place? Surely there are enough people in the United States military who were not involved in operations in Afghanistan to have an unbiased panel. But of the five officers on the court, two were directly involved. How did that happen?

Either the screening process is grossly incompetent or intentionally unfair. I do not know which it was. I do know that the same prosecutors who objected to evidence being hidden also reported that the chief prosecutor had stated that the courts would be handpicked and that they did not need to worry about acquittals.

When I appealed, the officers were removed and the press reported that I had won that round. The

truth was that I had won nothing, because the officers were not replaced. Under the rules for commissions, the government has to get two thirds of the court to vote guilty to get a conviction. Hamdan's court started with five members, so the prosecution needed four votes for a conviction, and Hamdan needed two votes for an acquittal. After the two officers were removed and not replaced, the prosecution needed two votes for a conviction and Hamdan needed two votes for an acquittal. The prosecution's job had actually gotten easier.

The justification for all of this is that after 9/11, this is what it takes to keep us safe. Never mind that terrorism has been around forever and we have faced far greater threats — like the Soviet Union, with enough nuclear weapons to destroy this planet many times over, whose leader banged his shoe, and said he would bury us. That was a threat. German submarines lying off our coast and sinking our ships. That was a threat. A rebel army capable of destroying Washington encamped within fifteen miles of the capital. That was a threat. And none of those grave threats caused us to jettison our most basic idea of justice: that we do not use coercion to get a confession. For that you have to go back to the witchcraft trials in Salem, or to England and the infamous treason prosecutions, or to the Spanish Inquisition.

The president has said that these methods have allowed us to obtain evidence that saved lives. I have not seen this evidence. I have not been allowed to see the list of methods that were authorized to obtain these and other statements from detainees. I do not know if they saved lives. What I do know is that if we use such evidence at trial, then we are hurting both the war against terror and our own soldiers in the long term.

Professor Yoo has cited the prosecution of Zaccarias Moussaoui as an example of why the federal justice system does not work. I completely disagree. In fact, Moussaoui is the perfect victory. Our system is shown to be fair. The court wrestled with difficult evidentiary issues and struck a balance that protects both our values and our security. We didn't lose anything. Moussaoui ultimately showed himself to be a fool — deranged, a joke, hardly someone that we'd think of as a great Middle East martyr. Ultimately he's imprisoned in a place where his name will be forgotten forever. How is that not a great victory?

Last fall, just before the elections, Congress reinstated the commissions that the Supreme Court had struck down. The bill, passed in haste, may have been good politics, but it is bad policy.

The push for this new Military Commissions Act started after the Supreme Court ruled in our favor last June that Common Article 3 of the Geneva Conventions applied to Al Qaeda. Immediately the White House claimed that legislation was necessary in part because Common Article 3 was too ambiguous. But when the Judge Advocate Generals testified before the Senate Armed Services Committee and were asked whether Common Article 3 was too ambiguous for our troops to follow, they unanimously answered no. Our troops understand Common Article 3. We train Common Article 3. There is no ambiguity. It seems that no one had taken the time to ask the experts.

This reminded me of something I was taught once by a Marine colonel during an exercise. I was assigned to write up rules of engagement for a Marine platoon going ashore to confront an embassy situation. I spent an evening and came up with my two-and-a-half-page neatly typed, carefully written and thought-out memo. And the Marine colonel threw it at me. "What is this garbage? You expect a Marine rifleman to read that? I need a three-by-five card with three sentences. Make it clear. Make it simple. Make it so he knows what he can do. He's going to have to decide this not with ten minutes to deliberate; he's going to have to decide it when somebody shoots at him."

The brilliance of the Geneva Conventions is that they are written simply and clearly for the military. It's when you try to avoid the Geneva Conventions that ambiguity is created. Ambiguity is bad for soldiers. It breaks down discipline. War is a difficult situation to begin with. There's a foreign culture for which you feel very little affinity. It's hot. You're scared to death. Following the rules is going to be tough enough, and now you don't know what the rules are. Who did we capture today? We captured fifty terrorists. Not criminals, not soldiers, combatants, or detainees even. We have fifty

terrorists. Why not just kill them?

Discipline breaks down. An Abu Ghraib happens, and we suffer a huge defeat.

The commander in chief should have significant powers during a war. When the country is at war, a president's hands should not be tied. But war should not be a blank check, either.

That balance is demonstrated very well by the Supreme Court decision during the Civil War, a ruling referred to as the *Prize Cases*. At the beginning of the war, Lincoln initiated a blockade of the East Coast and seized four ships. Merchants and shipowners were upset that their vessels and cargo had been seized and wanted it back, so they sued. The merchants argued that the rebels were merely criminals and that Lincoln did not have wartime powers to confiscate their goods. The Supreme Court disagreed, saying, No, he can seize them. There's a war on. Seizure conforms to the laws of war. So the president can exercise those commander-in-chief powers, and he gets to keep the ships and most of the cargo — but some he has to give back because it was bought and paid for before the war broke out. The president wasn't all-powerful — even he had to follow the rules of war. That is exactly what the Court ruled in *Hamdan*. Regardless of whether the president attempts to label Hamdan a civilian defendant or an enemy combatant, the president is still bound by the rule of law. That is not a recipe for defeat; it is a recipe for victory. And it is how we survive this dilemma.

What do we do next?

In most countries, when a military officer openly opposes the president, it is called a coup. In the United States, it is called *Hamdan* v. *Rumsfeld*. After the Supreme Court's decision last summer, the world was rightly in awe of our system. On June 29, 2006, we proved once again that we are a nation of laws and not of men.

If we are to be a great nation, then we must be willing to be a nation bound by the rule of law in our treatment of all people. That means we have to be willing to be held accountable for our past actions. That means giving each detainee the fair and neutral hearing that was set out by the Supreme Court in another recent decision (*Hamdan* v. *Rumsfeld*). That means holding regular criminal trials as required by the Supreme Court in Hamdan. That means using something other than coerced confessions to convict our enemies. That means closing Guantánamo Bay, because in a nation dedicated to the rule of law, there is no need for a legal black hole.

Both Guantánamo Bay and the Military Commissions Act were deemed necessary because of a decision to interrogate prisoners in violation of both domestic and international law. To interrogate a handful of religious fanatics, we created this legal black hole and turned our back on 250 years of our jurisprudence. This is not a problem that can be fixed by trying to change the law after the fact in an effort to cover up what we did. This is not a problem that can be fixed by cutting off access to the courts so that we will not be held accountable. This is not a problem that can be fixed by building a $125 million court complex in an effort to create an illusion of justice. None of those things will solve the problem, because it is not a problem at all. As Dr. Kissinger might say, it is a dilemma. The question is not, Will we survive uantánamo, because of course we will survive Guantánamo. The question is: Will we survive Guantánamo as a great nation?

When I was a kid, my father was a forest scientist, and we began to have a scientific exchange with Russia under Nixon, and these Russian scientists would come and stay with us. They were fascinated with toasters. They didn't have toasters. My mom had one. She pushed it down, the bread popped up toasted. They liked toast. They wanted a toaster, badly. They wanted a better life. It's what every human being wants for his children.

When I was in Yemen, I went to Hamdan's house with a female attorney. On the next-to-last night the grandmother called all the little girls living in the house together. There had to have been at least ten of them. They all had on blue jeans and tennis shoes and little T-shirts with Care Bears. It's not a rich family, but they're clean and they're dressed well and they look like little girls the world over. Their faces are shining and their eyes are bright and so full of promise. The grandmother

pointed at my colleague and said, "She went to school and studied very, very hard and she got very good grades, and now she's a lawyer." And then she looked at them and said, "If you go to school and study very, very hard, you can be anything."

The toaster in my mother's kitchen was tangible evidence to the Soviet scientists that democracy and capitalism created a better life. Ultimately, the people of the Soviet Union saw what we had and rejected communism. The grandmother in Yemen wants her granddaughters to be treated not as rightless, faceless women but as people. If we are about equal rights, then the grandmother is with us.

President Ronald Reagan was right: In our best moments we are the shining city on the hill. The world is angry with us because they think we've failed in that promise. But if we are committed to the rule of law and remain faithful to our principles, then America will be a beacon to that grandmother, and her promise will have a chance of coming true.

My views on what needs to change are expressed in my capacity as Hamdan's lawyer, and are mine alone. They do not necessarily reflect those of the United States government, the Department of Defense, or the United States Navy.

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