

HAL WOOTTEN LECTURE 2014

How to Be a “Good Lawyer” Lessons from the American “War on Terror”

by

Professor Richard Abel

It is a privilege to honor Hal Wootten’s “life in the law” by celebrating those he called “the humbler servants of the law” who, “in the dark days through which democracies have been traveling” defended the “central values” of the legal profession: “the right of everybody to a fair hearing and a reasoned decision according to the facts and the law, by an honest and unintimidated judge.”¹ You will be more familiar than I with courageous Australian examples: lawyers like Stephen Keim, who represented Dr. Mohammed Haneef, Rob Stary and Jennifer Robinson, who are acting for Julian Assange, and Michael Mori (now an Aussie), who represented David Hicks.² I am going to talk about American lawyers who have resisted attacks on the rule of law in the years since 9/11. Why do I focus on the rule of law? Surely the Bush administration is guilty of far greater offenses—the Iraq war being the most egregious example. But I am interested in resistance to injustice; and, unfortunately, significant American opposition to that war collapsed soon after the March 2003 invasion. Still, you might ask, is the rule of law worth defending? Critical legal studies, which I helped to found in 1977, reiterated what we have long known: law cannot be separated from politics and is far more likely to reproduce and reinforce power inequalities than to oppose them. And yet....

The rule of law embodies fundamental notions of fairness. Those due process guarantees are what allow lawyers to redress other injustices. They have the potential to enlist support across the political spectrum. As a new law graduate in 1965, I saw first-hand what civil rights lawyers were able to achieve in Mississippi. A quarter century later I was privileged to witness the courage, commitment, competence, and surprising victories of lawyers in the struggle against apartheid in South Africa.³ When Abu Ghraib belatedly grabbed my attention in 2004, I knew I had to understand how the American legal system responded to the greatest threat to the rule of law in my adult life. I expected lawyers to be at least as successful as they had been in South Africa. After all, the U.S. had two centuries of experience in conforming executive and legislative actions to a written constitution with a bill of rights. Its judiciary was independent, its media free of government control, its legal profession large and diverse, and its NGOs sophisticated and well-resourced.

Yet like many others, I have been deeply disappointed by how little human rights lawyers have been able to achieve in the nearly 13 years of the American “war on terror.” This is not for want of trying. Organizations like the ACLU, Human Rights First, Human Rights Watch, Amnesty International, the Open Society Foundation, the Center for Constitutional Rights, Reprieve and others have fought vigorously. Hundreds of lawyers—from firms of all sizes, as well as legal aid and public defender offices—have brought habeas corpus petitions on behalf Guantánamo detainees.⁴ Military lawyers, from the

¹ Acknowledgement by Hal Wootten, following lecture by Michael McHugh AC QC (2007).

² Ellen Yaroshevsky, “Zealous Lawyering Succeeds against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay,” 15 Roger Williams U. L. Rev. (2008).

³ Politics by Other Means

⁴ Denbeaux & Hafetz; David Remes; Stafford Smith

general counsels of the four branches of the armed services to the Judge Advocate Generals and Staff Judge Advocates, have challenged the legal framework of the “war on terror” and aggressively represented accused before military commissions.⁵

Today, however, I will not discuss these heroes—although they cannot be honored too much.⁶ Instead, I want to explore what it has meant to be a “good lawyer” in the “war on terror” by addressing four lawyers whose experiences of injustice transformed them into champions of the rule of law.⁷

A. Matthew Diaz

Matthew Diaz is a Horatio Alger story with a tragic ending.⁸ After his parents went through a bitter divorce when he was six, Matthew and three siblings lived with their mother, moving so often that he had attended nine schools by seventh grade. Then he moved to his father, Robert, a nurse, who had remarried and was living the Southern California dream of a house with a swimming pool and a pair of horses. Two years later, however, his father was charged with euthanizing 12 elderly patients. Diaz dropped out of school at 16, moved into a motel room with his 28-year-old girlfriend, and washed dishes for a living. Having enlisted in the army as soon as he turned 18, he was in Germany when he learned that his father had been convicted of 12 murders and sentenced to death. Convinced of his father’s innocence, he completed an AA degree in law enforcement and then a BA in criminology. Although he planned to leave the military and become a cop, seeing the Jimmy Smits character on “LA Law” and hearing an Army lawyer speak in class persuaded him to go to law school. He graduated a semester early, while driving a mail truck on weekends, and then completed an LL.M. He transferred to the Navy, serving in the military for 18 years. Toward the end of his ten years as a Staff Judge Advocate he was recommended for early promotion to commander as a “consummate naval officer” and “a stellar leader of unquestionable integrity.” He volunteered for a six-month tour in Guantánamo, arriving in July 2004.

At the time his daughter was 15, close to the age he had been when his father was charged with murder—falsely, in Diaz’s view. At Guantánamo he was quickly outraged by government lies. He felt pity, not fear, for detainees maligned as “the worst of the worst.” In the wake of Abu Ghraib the administration constantly protested that “we do not torture.” But assigned to investigate abuse allegations, Diaz soon filled two large binders, including a senior FBI agent’s assertion that the military had ignored valid complaints. Diaz felt “a good case could be made for allegations of war crimes....”

He was ordered to argue to a U.S. District Court that the military should be able to eavesdrop when detainees met their civilian lawyers (even though military intelligence at Guantánamo thought this

⁵ Mahler; Bravin. The Constitution Project gave Alberto Mora, General Counsel to the Department of the Navy, its Constitutional Champion Award in 2009. www.constitutionproject.org/about-us/constitutional-champion-award.

⁶ Jameel Jaffer and Larry Siems, “Honoring Those Who Said No,” NYT (4.27.11); “Unsung Heroes,” NYT (7.2.11); “Honoring Those Who Stood Against Torture,” LAT (7.27.11).

⁷ Cf. Menkel-Meadow, “The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers,” in A. Sarat & S. Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* 31 (Oxford Univ. Press 1998); see Alexandra D. Lahav, “Portraits of Resistance: Lawyer Responses to Unjust Proceedings,” 57 UCLA L. Rev. 725 (2010).

⁸ Wilttrout, “Navy Lawyer Once Posted at Cuba Base Is Charged,” *Virginian Pilot* (8.29.06); “Prosecutor: A Valentine Held Names of detainees,” LAT (5.15.07); Egerton, “‘Moral Decision’ Jeopardizes Navy Lawyer’s Career,” *Dallas Morning News* (5.17.07); Rosenberg, “Lawyer: U.S. Policy Shield List of Captives,” *Miami Herald* (5.17.07); “Virginia: Navy Lawyer Is Guilty of Communicating Secret Information,” NYT (5.18.07); Golden, “Naming Names at Gitmo,” NYT (10.21.07).

unnecessary). The Department of Justice prepared an affidavit for the commander, asserting that some detainees had been trained to pass “coded messages in furtherance of terrorist operations.” Diaz was asked to show how 12 Kuwaiti detainees could do so; but he could find only three who were even plausibly dangerous. He saw the argument as “a reach. We were just throwing up these obstacles in the way of implementing the *Rasul* decision,” in which the Supreme Court had decided (a week before he arrived in Guantánamo) that detainees were entitled to petition for habeas corpus. He was copied on a letter from the Navy Secretary refusing to disclose detainees’ names to Barbara Olshansky, a lawyer at the Center for Constitutional Rights, which was arranging pro bono lawyers for habeas petitions. Diaz was convinced that “no matter what the courts said, [the military] would just keep stonewalling.”

Working late on January 2, 2005 he found a list of the names and nationalities of all 551 detainees, with codes indicating who had interrogated them and the value of the information elicited. The list was not marked secret. “I knew that if I didn’t do anything, nobody else was going to.” He printed the list, cut it into 39 sheets to fit inside a Valentine’s Day card, and mailed it to Olshansky in an unmarked envelope on January 15, his last day in Guantánamo. After agonizing for weeks, she called the chambers of the federal judge hearing her habeas petitions and was told by the clerk to give it to the FBI. Diaz was quickly identified through fingerprints and his computer hard drive.

By the time he was court martialed the government had released all the names in response to an Associated Press FOIA lawsuit. Diaz said “my oath as a commissioned officer is to the Constitution of the United States. I’m not a criminal.” “I made a stupid decision, I know, but I felt it was the right decision, the moral decision, the decision that was required by international law.” He realized he should have raised the issue up the chain of command: “but nothing I said would have ever left the island.” After a week-long trial he was acquitted of printing out national defense information with intent or reason to believe it would be used against the United States but convicted of knowingly communicating information “to a person not entitled to receive it.” Although he faced up to 14 years, he was sentenced to just six months and discharged. After being released he visited his father on death row and explained what had happened. Robert said proudly that Matthew had done the right thing. But the Kansas Supreme Court disbarred him, against the recommendation of its disciplinary committee, ending his legal career.

B. Stephen Abraham

Stephen Abraham was a conservative Republican who cried when Richard Nixon resigned.⁹ As the son of a Holocaust survivor who emigrated to the U.S. after World War II, Abraham felt an obligation to repay his country for the opportunities it had given his family. He spent 26 years as an Army reserve intelligence officer, rising to lieutenant colonel and being decorated twice: in the 1980s for heading a counterespionage operation that led to the detention of three Soviet agents; and after 9/11 for exceptionally meritorious services as “lead counterterrorism analyst.” In September 2004 he jumped at

⁹ Glaberson, “Reserve Officer Criticizes Process of Identifying ‘Enemy Combatants’ at Guantánamo,” NYT (6.23.07); Goldwert, “Gitmo Panelist Slams Hearing Process,” CBS News (6.23.07); Leonnig & White, “An Ex-member Calls Detainee Panels Unfair,” WP (6.23.07); Stockman, “Officer Criticizes Military Tribunals,” Boston Globe (6.23.07); Glaberson, “Military Insider Becomes Critic of Hearings at Guantánamo,” NYT (7.23.07); Glaberson, “Critic and Ex-Boss Testify on Guantánamo Hearings,” NYT (7.27.07); Selsky, “Files Raise Questions on Gitmo Decisions,” WP (10.3.07); “U.S. Military Reviews Guantánamo Enemy Combatant Hearings that Kept Hundreds Behind Bars,” AP (10.11.07); Levin, “Making a Case against Tribunals,” LAT (1.5.08); Worthington, “An interview with Guantánamo whistleblower Stephen Abraham,” www.andyworthington.co.uk (12.22.08); Talking Dog, “Interview with Stephen Abraham,” The Moderate Voice (9.28.09).

the “fantastic opportunity” of a six-month tour at Guantánamo in the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), helping to build the evidentiary database for the Combatant Status Review Tribunals determining whether detainees could be held and sitting on the tribunal for Abdel Hamid al-Ghizzawi. He quickly became skeptical of the claim that all detainees were jihadists.

As an intelligent, I would have written “junk statement” across that. ... Anything that resulted in a “not enemy combatant” [finding] would just send ripples through the entire process. The interpretation is, “you got the wrong result. Do it again.” ...the hearings amounted to a superficial summary of information, the quality of which would not have withstood scrutiny in any serious law-enforcement or intelligence investigation.

As a lawyer, he began to feel he should not be involved. “There were too many assumptions. Too many presumptions.” He wrote Rear Admiral James M. McGarrah on December 10, asking to be relieved because my participation “may be in conflict with my obligations as an attorney,” but he got no reply. After his tour ended he returned to his two-person commercial practice in Newport Beach, California. But during visits to Washington he stayed with his sister, a lawyer whose colleagues began representing Guantánamo detainees in 2006. In June 2007, after she related Abraham’s concerns to those colleagues, Matthew J. MacLean asked Abraham to look at McGarrah’s affidavit in opposition to a habeas petition. Outraged by what he saw as its distortions, Abraham wrote his own declaration on June 18.¹⁰

I communicated to Rear Admiral McGarrah...the fundamental limitations imposed upon my review of the organization’s files and my inability to state conclusively that no exculpatory information existed relating to CSRT subjects. ... It was well known by the officers in OARDEC that any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to explain their finding to the OARDEC Deputy Director. There would be intensive scrutiny of the finding by Rear Admiral McGarrah who would, in turn, have to explain the finding to his superiors, including the Under Secretary of the Navy.

In the CSRT on which he served “all of us found the information presented to lack substance.”

[W]e determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. Rear Admiral McGarrah and the Deputy Director immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to reopen the hearing to allow the Recorder to present further argument.... Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination. ... In each of the meetings that I attended with OARDEC leadership following a finding of NEC [not enemy combatant], the focus of inquiry on the part of the leadership was “what went wrong.” I was not assigned to another CSRT panel.

The detainee, Hamid al-Ghizzawi, had hepatitis B and tuberculosis. He not seen or talked to his family for almost six years and “is rapidly losing his mind as he sits in total isolation. He’s about my age. He’s got a daughter,” as did Abraham. “He hasn’t seen her in a long time. He’s close to death.”

¹⁰ Reply to Opposition to Petition for Rehearing, *Al Odah v. U.S.*, USSC No. 06-1196 (6.22.07).

Two weeks after MacLean filed Abraham's declaration the Supreme Court agreed to hear the appeal in *Boumediene*, ultimately reaffirming the right to habeas. The habeas lawyers subsequently learned that two months after Abraham's CSRT unanimously found that the detainee was "not properly classified as an enemy combatant," the Defense Department rejected the finding and resubmitted it to another CSRT, which unanimously found the opposite. Abraham said: "conducting new CSRTs—even discussing the possibility—repudiates every prior assertion that the original CSRTs were valid acts. ...they are, in essence, both a hypocritical act as well as an act of moral cowardice." The CSRTs "were specifically designed to reach a result and, in the few instances where a contrary result was reached, pressure was exerted to change the decision, a new tribunal was selected," or the decision was disregarded. An Army major who had sat on 49 tribunals also submitted an affidavit criticizing them. After Abraham testified before the House Armed Services Committee that the evidence before the CSRTs was "garbage," McGarrah told the Committee that Abraham saw only "a very narrow piece of the process." Perhaps. But 539 of the 578 CSRTs (93%) found detainees to be enemy combatants (even though nearly three-fourths of them have already been released).¹¹ President Obama replaced the CSRTs with Periodic Review Boards offering more due process. The first two split, one recommending release, the other detention.

C. William C. Kuebler

Two other military lawyers were deeply affected by participating in military commissions. William C. Kuebler married the first girl he dated in high school, always voted Republican, and practiced business law in San Diego. In his late twenties, however, his mother's death prompted him to become a born again Christian and join the Navy.¹² His sister said he realized "there's more to life than driving a BMW and having your initials on your cuff." In 2007 he was appointed to represent Omar Khadr, a Canadian accused of killing Sgt. 1st Class Christopher J. Speer with a grenade when Khadr had been a juvenile. Dennis Edney, the Khadr family's Canadian lawyer, complained that "Kuebler has no trial experience, no criminal or terrorism law experience. He was a tax lawyer."

But Kuebler enthusiastically embraced his new role. He criticized the DC Circuit's refusal to stay the proceedings "despite significant doubts as to the commission's legality." At the first hearing he accused the prosecution of having concealed for five years an eyewitness it had identified soon after the July 2002 firefight. "They weren't going to tell us who he was or how to get in touch with him or where he was." "This is a process that's not designed to be fair, it's designed to produce convictions." Affidavits

¹¹ Department of Defense Combatant Status Review Tribunal Summary, at <http://www.defense.gov/news/crstsummary.pdf>.

¹² Williams, "Canadian's Terrorism Trial Is Expected to Be Rocky," LAT (11.8.07); Williams, "Terror Case Could Turn on Eyewitnesses," LAT (11.9.07); Glaberson, "Decks Are Stacked in War Crimes Cases, Lawyers Say," NYT (11.9.07); Williams, "Guantánamo Defense Lawyers See Stacked Deck," LAT (11.13.07); Glaberson, "Witness Names to Be Withheld from Detainee," NYT (12.1.07); Glaberson, "Guantánamo Judge Is Urged to Get on with Proceedings," NYT (4.12.08); Williams, "Detainee's Lawyer Says Death Was Possibly by Friendly Fire," LAT (4.12.08); Austen, "Lawyer Urges Canada to Try a Citizen Held by U.S. Forces," NYT (4.30.08); Glaberson, "Army Judge Is Replaced for Trial of Detainee," NYT (5.31.08); Melia, "Defense Lawyer: US Urged Interrogators at Gitmo to Destroy Notes in Case They Had to Testify," WP (6.9.08); Glaberson, "An Unlikely Antagonist in the Detainees' Corner," NYT (6.19.08); Austen, "Citing New Report, Lawyers for Canadian Detainee Denounce Abuse," NYT (7.11.08); el Akkad, "Khadr Lawyers Demand Independent Psychiatrist Assessment," Globe & Mail (8.13.08); Rosenberg, "Judge Delays Omar Khadr War Crimes Trial," Miami Herald (9.11.08); al Akkad, "Khadr's Lawyers Argue for Trial Delay," Globe & Mail (10.22.08); CanWest News Service (4.8.09); Danzig, Khadr Case Goes Nowhere at Gitmo (Again), HuffPost (10.7.09).

by Pakistani bounty hunters were classified secret. The prosecution was exerting “enormous political pressure...to get these trials moving...practically pounding the table.” He challenged the judge, Col. Brownback, who had barred the defense from contesting the constitutionality of the military commission at this stage. In a closed-door meeting Brownback said he had “taken a lot of heat” for ruling earlier that the commissions were illegitimate, over objections by the Defense Department and White House. Brownback was angry with Kuebler for disclosing that conversation. When it emerged that Brownback had secretly ordered the defense not to reveal the names of any prosecution witnesses, Kuebler objected: “instead of a presumption of innocence and a public trial, we start with a presumption of guilt and of a secret trial.” He had earlier told the judge and prosecution that “the manner in which this is being dealt with (i.e., off the record, via e-mail), creates an added level of difficulty by making it appear that the government is trying to keep the secrecy of the proceedings a secret itself.”

In February 2008 Kuebler revealed that the military knew that another enemy fighter had been alive when Speer died and might have thrown the grenade. The next month Kuebler added that an American commander reported that Speer’s assailant had been killed. Canadian newspapers headlined stories about these revelations: “U.S. Doctored Evidence to Implicate Khadr, Lawyer Says” (*Toronto Star*) and “Khadr Was Likely Tortured” (*Edmonton Journal*). In April Kuebler urged Canadians to pressure their government to ask that Khadr be returned for trial. “I don’t believe anyone can get an acquittal at Guantánamo Bay.” Some eyewitnesses said Speer might have been killed by friendly fire. The prosecution originally claimed that Khadr was the only fighter alive when Speer’s unit stormed the compound and there had been only one grenade blast. But a report made available to defense counsel in February disclosed that forces continued to throw grenades during the chaotic final confrontation. Denouncing these “inconsistent and contradictory” accounts, Kuebler accused the prosecution of trying to rush the case to trial because its “mythical assessment” of events was rapidly falling apart. He had just learned from a Canadian diplomat about another report—which the prosecution previously claimed had “gone missing”—and asked Brownback to order its production. In April Kuebler testified to a Canadian House of Commons subcommittee on international human rights that “lies have been told about Omar.” “Justice will not result from a military commission that cannot try U.S. citizens and treats a Canadian as worth less than an American. Bring this young man home to face due process under a legitimate system.” The prosecution retorted that “the time the defense has spent lobbying the Canadian Parliament would be better spent interviewing the witnesses.”

At the end of May the Convening Authority abruptly substituted Col. Parrish for Brownback, whose return to retirement was a “mutual decision.” Defense lawyers attributed the action to Brownback’s anger at the prosecution’s failure to produce exculpatory evidence and his threat to halt the proceedings if this were not done promptly. Brownback complained of having been “badgered and beaten and bruised” by the chief military prosecutor, who wanted to accelerate the trial. Kuebler called the replacement “very odd.” “The judge who was frustrating the government’s forward progress in the Kahdr case is suddenly gone.” The prosecution denied having “anything to do with a new judge being assigned to this case.”

In June Kuebler denounced military commissions as “designed to get criminal convictions” with “no real evidence.” Prosecutors “launder evidence derived from torture.” “You put the whole package together and it stinks.” Guantánamo’s Standard Operating Procedures manual advised that because “the mission has legal and political issues that may lead to interrogators being called to testify, keeping the number of documents with interrogation information to a minimum can minimize certain legal issues.” Kuebler feared that “if handwritten notes were destroyed in accordance with the SOP, the government intentionally deprived Omar’s lawyers of key evidence with which to challenge the

reliability of his statements.” Col. Morris, the chief prosecutor, accused Kuebler of having “habitually flouted the rules” and “greatly distorting” and “fabricating information.” A Navy spokesman said lawyers had an obligation to defend, but “it is disappointing when counsel do not live up to these [professional] standards.” Kuebler replied that serving as defense counsel was “a powerful way to be a witness for Christ by demonstrating your capacity to not judge the way everybody else is judging and to serve unconditionally.”

In July Kuebler obtained a secret Canadian intelligence report on a visit to Khadr in 2004, which Canadian lawyers had persuaded a Canadian court to order the Department of Foreign Affairs to release. It described the notorious “frequent flyer program”: in order to make Khadr “more amenable and willing to talk,” he was moved to a new cell every three hours for three weeks, “denying him uninterrupted sleep.” Other abusive treatment reduced him to tears. The prosecution tried to recover the report, prompting Kuebler to seek a judicial investigation into its behavior. Col. Parrish reprimanded the prosecution for the time it had taken to decide whether another report could be given to the defense and imposed a deadline. The prosecution objected to Kuebler’s request that two independent psychiatrists examine Khadr and testify about his alleged “confession.”

During argument over postponing the trial for the psychiatric examination it emerged that the prosecution had given the defense incomplete medical records for Khadr. Parrish demanded an explanation, warning the prosecution that when someone decides to violate a court order “those decisions have consequences.”

On April 3, 2009, chief defense counsel Col. Masciola fired Kuebler for unnamed ethical violations. Four days later Parrish reinstated him, declaring that he had to approve any firing, which could only be for cause. Kuebler said Masciola had a conflict of interest because he wanted to ensure that his office would continue to represent detainees tried in civilian courts. Kuebler wanted to argue to the new administration’s review team that Khadr should be repatriated to Canada. But in October Khadr himself fired all his military lawyers, including Kuebler. A year later he pleaded in a deal carrying an eight year sentence; two years later he was transferred to Canada, which could parole him in a year.

D. Darrel Vandeveld

My last example is Darrel Vandeveld, a devout Catholic, father of four and senior deputy state attorney general in Erie, Pennsylvania, in charge of consumer protection.¹³ Any acquaintance, he said, “will probably tell you that I’ve been a conformist my entire life.” As a reservist he was called to active duty after 9/11, serving as a military lawyer for seven years in Bosnia, the Horn of Africa, Afghanistan and Iraq and rising to lieutenant colonel. In June 2006 his commanding officer praised the

¹³ Rosenberg, “Army Prosecutor Quits Gitmo War Court Case,” *Miami Herald* (9.24.08); Melia, “Guantánamo Prosecutor Quits over Detainee Case,” *Miami Herald* (9.25.08); Meyer, “Guantánamo Prosecutor Quits amid Controversy,” *LAT* (9.25.08); Finn, “Guantánamo Prosecutor Quits, Says Evidence Was Withheld,” *WP* (9.25.08); Glaberson, “Guantánamo Prosecutor Is Quitting in Dispute over a Case,” *NYT* (9.25.08); “Guantánamo Ex-prosecutor Demands Immunity to Testify,” *LAT* (9.26.08); Melia, “Former War Crimes Court Prosecutor Blasts Tribunals,” *Miami Herald* (9.27.08); Meyer, “Guantánamo Prosecutor Who Quit Had ‘Grave Misgivings’ about Fairness,” *LAT* (10.12.08); Sullivan, “Confessions of a Former Guantánamo Prosecutor,” *Salon* (10.23.08). See E. Press, *Beautiful Souls: Saying No, Breaking Ranks, and Heeding the Voice of Conscience in Dark Times* 175-83 (Farrar, Straus & Giroux 2012).

absolutely outstanding, first-class performance by an extraordinarily gifted, intelligent, knowledgeable and experienced judge advocate, whose potential is utterly unlimited. One of the [JAG] Corps' best and brightest. Save the very toughest jobs in the Corps for him.

In May 2007 he was sent to Guantánamo and assigned to prosecute seven detainees, including Mohammed Jawad, who had been a juvenile when he allegedly threw a grenade in an Afghan bazaar in December 2002, wounding two American soldiers and their Afghan interpreter. Vandeveld initially disparaged all allegations of prisoner abuse as “embellishment” and “exaggeration.” He dismissed a defendant’s “idiotic” challenge to the legitimacy of the commissions. He believed Jawad was a war criminal taught by an al Qaeda affiliate to kill Americans and claim, if caught, that he was a juvenile and had been tortured. But Vandeveld began developing doubts. He kept finding sources of information and documents confirming that Jawad had been under age and drugged before the attack and had been abused during interrogation. But he encountered obstacles in releasing them. Maj. David Frakt, the defense lawyer, gave him records showing that in mid-2003 Jawad had been removed from the Pashto-speaking wing, isolated, and deprived of books and mail. In September 2003 interrogators observed him talking to posters on the wall. That Christmas he tried to commit suicide by banging his head against metal bars and hanging himself. Like Khadr, he was moved 112 times during two weeks, more than once every three hours and even faster between midnight and 2am. Vandeveld responded by seeking to negotiate a minimal sentence and rehabilitation before Jawad returned to Afghanistan. On May 22 he wrote Frakt: “if I ever thought this job required me to do anything I considered unethical, I’d be out the door.” Frakt answered:

I appreciate that and I believe you. You may have to take back your comments about Jawad’s complaints being embellished and exaggerated. It looks like he was telling the truth. Did you notice that he tried to commit suicide in 2003?

Vandeveld replied “I did notice that saddening episode...which is one of the reasons I am pushing for a plea in this case, and why I wanted to get this information in your hands asap.” Later that day he wrote: “BTW, I will correct my misstatements on the record the next time we’re in session. I know I am obliged to do so.” Soon thereafter Frakt moved to dismiss the charges for “outrageous government misconduct,” citing Jawad’s torture. Vandeveld responded that Jawad’s abuse should just mitigate punishment. Superiors were furious at this admission, reprimanding Vandeveld and making him withdraw it and resubmit a motion declaring that Jawad “suffered no ill-effects from his alleged sleep deprivation.” But the following summer Vandeveld’s doubts increased. Photos of Jawad’s arrest showed a naked, terrified boy being strip searched. In July Vandeveld chanced to see a report on a colleague’s desk about the death of another man detained by the U.S. in Afghanistan. Investigators had taken a statement from Jawad, who said that at Bagram he had been shackled, forced to stand, beaten if he tried to sit, and made to wear a black bag over his head. Vandeveld later said this changed him from “true believer” to “truly deceived.” He told Frakt he was disturbed about the abuse and the absence of any system to provide such evidence to the defense.

On August 5 Vandeveld e-mailed Father John Dear, a well-known Jesuit peace activist.

I am beginning to have grave misgivings about what I am doing, and what we are doing as a country.... I no longer want to participate in the system, but I lack the courage to quit. I am married, with children, and not only will they suffer, I'll lose a lot of friends.¹⁴

Dear replied: "God does not want you to participate in any injustice, and GITMO is so bad, I hope and pray you will quietly, peacefully, prayerfully, just resign and start your life over." This might "save lives and change the direction of the entire policy." Two days later Vandeveld asked Frakt: "how do I get myself out of this office?" He was seeking "a practical way of extricating myself from this mess." By late August he told Frakt there were other "disquieting" things about Guantánamo, but his superiors would not let him address them or quietly transfer out. Frakt replied: "Now might be a good time to take a courageous stand and expose some of the 'disquieting' things that you alluded to...." He expected a change in government after the November election. "It wouldn't be a bad idea to distance yourself from a process that has become largely discredited, or at least distinguish yourself as one of the good guys, an ethical prosecutor trying to do the right thing." He suggested that Vandeveld tell the Convening Authority about his efforts to reach a plea agreement. Vandeveld replied: "let me think about that some more; I have to consider the impact on my family."

In mid-September Vandeveld resigned, asking to serve the rest of his reserve duty in Iraq or Afghanistan.

I didn't express my concerns to [my superiors] before asking to be reassigned, largely because I knew both are highly-indoctrinated ideologues whose likely response would have been to have my security clearance revoked as a punitive and preventative measure. (This concern is not happenstance; I could give examples were I not bound by my clearance itself.) The hostile, dismissive way I'd seen [another concerned officer treated by superiors] was enough for me to conclude my reservations would not be well-met.

He expected retribution for cooperating with the defense, noting that an officer who had done so got a mediocre Officer Evaluation Report.

In a four-page declaration filed with the military commission he complained that "potentially exculpatory evidence has not been provided."¹⁵

I have been "accused" of forming an attorney-client relationship with [Frakt].... Major Frakt and I have developed a cordial relationship of mutual respect, nothing more. I have divulged to Major Frakt those items of discovery that in my professional judgment the Rules for Professional Conduct, the Military Commissions Act, and the Manual for Military Commissions...have required me to relinquish, consistent with my ethical obligations as a prosecutor. ... I have observed that a number of defense requests which I considered to be reasonable and in some cases indicated support for were nevertheless rejected by the Convening Authority, presumably on the advice of the Legal Advisor [Hartmann]. ...

My ethical qualms about continuing to serve as a prosecutor relate primarily to the procedures for affording defense counsel discovery. I am highly concerned, to the point that I believe I can

¹⁴ Complicity in injustice often is attributed to fear of retribution. But it is noteworthy that the very few German government lawyers who refused to collaborate with the Nazis suffered little or no punishment. I. Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard Univ. P. 1991).

¹⁵ Declaration of Lt. Col. Darrel Vandeveld, U.S. v. Mohammed Jawad (9.22.08).

no longer serve as a prosecutor at the commissions, about the slipshod, uncertain “procedure” for affording defense counsel discovery. One would have thought that after six years since the commissions had their fitful start, that [sic] a functioning law office would have been set up and procedures and policies not only put into effect, but refined. ... In my view, evidence we have an obligation as prosecutors and officers of the court has not been made available to the defense. ... I have decided to come forward at this point and share some of my reasons for offering my resignation because I believe I have an obligation to provide truthful information to the court regardless of which side calls me as a witness.

Jawad might have been duped into joining Hezb-e Islami Gulbuddin (previously allied with the U.S.). “It seems plausible to me that Jawad may have been drugged before the alleged attack.” The Afghan Interior Ministry said two other men confessed to the crime. Vandeveld also was troubled by Jawad’s treatment in custody and had given the Defense Department documents indicating sleep deprivation. “As a juvenile at the time of his capture, Jawad should have been segregated from the adult detainees, and some serious attempt made to rehabilitate him. I am bothered by the fact that this was not done.” “I am a resolute Catholic and take as an article of faith that justice is defined as reparative and restorative and that Christ’s most radical pronouncement—command, if you will—is to love one’s enemies.”

The chief prosecutor countered that Vandeveld said he was quitting for personal reasons. He was just a disgruntled prosecutor “disappointed that his superiors did not agree with his recommendations in the case.” “There are no grounds for his ethical qualms. We are the most scrupulous organization you can imagine in terms of disclosure to the defense.” “When in doubt we disclose every scrap of paper and piece of evidence.” He refused to say whether his office had rejected a plea deal. The Defense Department official then ordered Vandeveld to get a psychiatric examination, but that cleared him to remain on active duty. Vandeveld e-mailed Father Dear: “The reaction was the expected outrage and condemnation. I have and will maintain my equanimity and, while scared for me and for my family, know that Christ will watch over me.”

Called as a witness for Jawad, Vandeveld dropped his initial request for immunity. When the prosecutor’s office prevented him from traveling to Guantánamo, he testified by video that military commissions “are not served by having someone who may be innocent be convicted of the crime.” “My views changed. I am a father, and it’s not an exercise in self-pity to ask oneself how you would feel if your own son was treated in this fashion.” “I think it is impossible for anyone in good conscience to stand up and say he or she is provided all the discovery in a case.” The chief prosecutor retorted that Vandeveld had “never once” raised substantive concerns. These unfair allegations were “a broad blast at some very ethical and hardworking people whose performances are being smudged groundlessly.” The prosecution complied “beyond what the rules require.” “The idea of holding out the specter of a wrongful conviction is outrageous.” “It is because of the nature of this war and that there are so many elements fighting in it, information doesn’t come in a tidy package.” But Vandeveld named Defense Department reports not disclosed to defense lawyers, some suggesting that another suspect had confessed to the alleged crime. The judge, Col. Steven Henley, ordered the prosecution to deliver these by October 3. Frakt again moved to dismiss, alleging “gross government misconduct.”

Before being “reminded” that he could not talk to the press until being released from active duty, Vandeveld vowed in an e-mail to do so then.

I don't know how else the creeping rot of the commissions and the politics that fostered and continued to surround them could be exposed to the curative powers of the sunlight. I care not for myself; our enemies deserve nothing less than what we would expect from them were the situations reversed. More than anything, I hope we can rediscover some of our American values.

The prosecution dismissed without prejudice the charges against five detainees Vandeveld had prosecuted.¹⁶ The chief prosecutor denied this had anything to do with Vandeveld, claiming that new evidence required a "re-analysis" of the cases to draft the "best possible charges." But Clive Stafford Smith, who represented a detainee whose case was dismissed, said "Vandeveld was willing to testify for us if subpoenaed. They want new prosecutors to review the case before refiling charges so they can argue that Vandeveld is irrelevant."¹⁷

At the end of October Col. Henley excluded Jawad's initial confession.¹⁸ Because the prosecution had not timely disclosed evidence, he accepted the claim that Jawad had been drugged before the attack and he and his family threatened with death if he did not confess. Vandeveld said this "eviscerated" the government's case. Jawad's other incriminating statements were "clearly tainted by mistreatment." Vandeveld expected to be called by the defense in other cases. "The commissions are in such disarray and continue to be in such chaos." A month later Col. Henley excluded Jawad's second confession because "the effect of the death threats which produced the accused's first confession to the Afghan police had not dissipated by the second confession to the U.S." Vandeveld declared: "it's not the death knell of the case--it buries the case."

In an interview soon thereafter he said:¹⁹

I know so many fighting men and women who are stained by the taint of Guantánamo, so I'm here to tell the truth about Guantánamo and how a few people have sullied the American military and the Constitution. I went down there on a mission...to convict as many of those detainees as possible and put them in prison for as long as I possibly could. I had zero doubts. I was a true believer.

He had "lived in dread" that Father Dear would urge him to resign. "I never suffered such anguish in my life about anything. It took me too long to recognize that we had abandoned our American values and defiled our Constitution." But three months later he had no regrets. "No justice will be obtained at Guantánamo."

In January 2009 he filed a declaration in support of Jawad's habeas petition.²⁰ "It is my opinion, based on my extensive knowledge of the case, that there is no credible evidence or legal basis to justify Mr. Jawad's detention." Afghan police had made Jawad place his thumbprint on a statement in Farsi, which he did not speak; indeed, he was functionally illiterate. Although American interrogators

¹⁶ "U.S. Drops Charges against 5 Gitmo Detainees," AP (10.21.08); Williams, "U.S. Drops Charges against 5 Terrorism Suspects," LAT (10.22.08); Finn, "Charges against 5 Detainees Dropped Temporarily," WP (10.22.08).

¹⁷ See also C. Stafford Smith, *Eight O'Clock Ferry to the Windward Side: Seeking Justice in Guantánamo Bay* (Nation Books 2007).

¹⁸ "Afghan detainee's confession excluded on torture grounds at Guantánamo trial," G (10.29.08); Melia, "Former Prosecutor Says Ruling Wrecks U.S. Case," Miami Herald (10.29.08); McFadden, "Gitmo Judge Tosses Out Detainee's 2nd Confession," AP (11.20.08).

¹⁹ Corera, "Guantánamo's a stain on US military," BBC News (12.2.08).

²⁰ Finn, "Evidence in Terror Cases Said to Be in Chaos," WP (1.14.09); Wilber, "ACLU Says Government Used False Confessions," WP (7.2.09).

videotaped a statement by Jawad, Vandeveld was never able to get it. The “complete lack of organization” in the prosecutor’s office affected nearly every case. “It was like a stash of documents found in a village in a raid and just put on a plane to the U.S.” Evidence was scattered throughout databases, in desk drawers and vaguely labeled containers, or “simply piled on tops of desks.” “Most physical evidence that had been collected had either disappeared” or been lost. As recently as June 2008 Jawad had been “beaten, kicked and pepper-sprayed while he was on the ground with his feet and hands in shackles, for allegedly not complying with guards’ instructions.” The government was still using the confessions Col. Henley had excluded as coerced.

The chief prosecutor, Morris said he would be “happy to respond under oath to any of the allegations.” He claimed that Vandeveld

was disappointed when I did not choose him to become a team leader, and he asked to resign shortly thereafter, never having raised an ethical concern during the nine months I supervised him. I relied on his reports to me about Jawad and other cases I entrusted to him (which included his advocacy of a 40-year sentence for Mr. Jawad the week before he departed).

Vandeveld retorted: “I wouldn’t believe a word [the prosecutor] says.”

A few days later Vandeveld published a *Washington Post* op ed.²¹ In November 2001 I was going off to avenge the attacks of Sept. 11, 2001, with a sense of pride and moral purpose. ... All of us fought because we believed that we were protecting America and its ideals. But my final tour of duty made me question everything we had done. ... Warning signs appeared early on, but I ignored them. ... But with Father John’s help, and with the unlikely support of Jawad’s relentless defense counsel—a scorned adversary whose integrity and intelligence transformed him into a trusted friend—I finally resigned.... Now that I’m home in Erie...I have regained my sense of self. ... We did not sacrifice so that an administration of partisan civilians, abetted by military officers who seemed to have lost their moral compass, could defile our Constitution and misuse the rule of law. ... I just hope no one will see that kind of abuse—and look the other way—again.

On July 8, 2009 Vandeveld testified before the Senate Armed Services Committee:²²
We do not need military commissions. They are broken and beyond repair. We do not need indefinite detention, and we do not need a new system of “national security courts.” Instead, we should try those whose guilt we can prove while observing “the judicial guarantees which are recognized as indispensable by civilized peoples”—in other words, using those long-standing rules of due process required by Article III courts and military courts-martial—and resettle or repatriate those whom we cannot. That is the only solution that is consistent with American values and American law.

U.S. District Judge Huvelle ruled in Jawad’s habeas petition on July 17 that his confessions were coerced and inadmissible, giving the government a week to produce another justification for detaining him.²³ At the end of that period the Justice Department acknowledged it had no other evidence but claimed it was thinking of prosecuting him in civilian court. Judge Huvelle gave the Justice Department

²¹ Vandeveld, “I Was Slow to Recognize the Stain of Guantánamo,” WP (1.18.09).

²² 250 Law and Security Digest (7.10.09).

²³ Glaberson, “Government Might Allow U.S. Trial for Detainee,” NYT (7.24.09).

24 hours to conduct an “expedited criminal investigation.” When it failed to produce any evidence she granted Jawad’s habeas petition. On August 24 he was returned to Afghanistan and freed.

In March 2010 Vandeveld co-authored an op ed for *Salon*.²⁴ The military commission was “untested, likely unconstitutional, and has yet to demonstrate a single, credible result.” The Defense Department “has yet to even devise rules for these proceedings.” There was a “constitutional cloud lingering over critical legal issues....”

Using our federal courts is being tough on terror. There is plenty of risk but no discernible benefit to trying the 9/11 defendants in an untested system. This trial should not be a “learning experience.” Too much is at stake for our national security, our values, and our future.

E. Stories of Resistance

Susan Sontag declared that “at the center of our moral life and our moral imagination are the great models of resistance: the great stories of those who have said ‘No.’”²⁵ But the lesser stories are equally important: dissidents like Herman Melville’s *Bartleby*, who respond to orders that violate their ethical ideals: “I would prefer not to.”²⁶ The few human rights lawyers who nobly devote their lives to defending the rule of law deserve our profound gratitude and respect. But the rule of law can survive only if ordinary lawyers do the right thing. The four described above sought to preserve the integrity of the legal process: CSRTs that purported to identify “enemy combatants,” military commissions that tried them for war crimes, and habeas corpus petitions seeking their release from Guantánamo.

Little in their past predicted that behavior. All were staunch patriots. Abraham felt a special loyalty to the country that had defeated Nazi Germany and opened its doors to his parents after they survived the Holocaust. All were career military officers, active duty or reserve, who consistently received superb performance reviews, earning repeated promotions and medals. The military had offered Diaz an extraordinary ladder for upward mobility. None was a rebel; this was the first act of disobedience in a lifetime of conformity for both Abraham and Vandeveld. All believed deeply in the military law they practiced. Vandeveld was certain that those detained and tried were dangerous terrorists. But some of the four may have been predisposed to resist. Kuebler and Vandeveld were deeply religious. Robert Diaz’s murder conviction imbued his son Matthew with a strong sense of injustice.²⁷ Abraham had been raised with memories of the Holocaust.

What seems to have moved them to resist was the contrast between the due process they had come to take for granted in their civilian and military legal practices and the egregious violations they confronted at Guantánamo: failure to disclose exculpatory evidence, pressure to try cases prematurely, selection of cases for political reasons (e.g., to stoke outrage at those charged with killing or wounding American soldiers), unnecessary secrecy, abuse of detainees (especially vulnerable juveniles), coercive interrogation sometimes crossing the line into torture, contempt for international law, and disregard for the Constitution. Some government policies were difficult or impossible to justify: concealing the

²⁴ Vandeveld & Dratel, “Military Commissions: A Bad Idea,” *Salon* (3.10.10).

²⁵ Epigraph to E. Press, *Beautiful Souls* (Farrar, Straus & Giroux 2012). In the Gospel of St. Matthew, Peter assures Jesus in the Garden of Olives that he will never renounce him: “Etiam si omnes--ego non,” “Even if all others do--I will not.” Of course he does deny Jesus, three times.

²⁶ H. Melville, *Bartleby, the Scrivener: A Story of Wall Street* (1853).

²⁷ Edmond N. Cahn, *The Sense of Injustice* (Indiana University Press, 1975).

identities of detainees so lawyers could not petition for habeas on their behalf; spying on detainee communications with their lawyers. Some political interference was brazen: assuring prosecutors there would be no acquittals, packing CSRTs with compliant members and redoing the few that found detainees not to be enemy combatants, replacing military commission judges midtrial for requiring prosecutors to disclose exculpatory evidence or being too deliberative. Abraham was troubled by his office's sloppiness and casual disregard for evidence and procedure. The lawyers' outrage intensified when the military lied—insisting that these detainees were the worst of the worst, all were committed jihadists, the U.S. did not torture—or when it sought to cover up its actions. As professionals, lawyers live a unique dilemma: as hired guns they must assert the truths of empirical and moral claims they do not believe.²⁸ These lawyers eventually balked, declaring (with Galileo) “*eppur si muove*.” Some developed sympathy for particular detainees (especially the juveniles Khadr and Jawad, who exhibited the psychotic symptoms of torture victims) as well as respect for opposing counsel. Vandeveld wondered how he would feel were his son treated like Jawad; Abraham was moved by the fact that al-Ghizzawi had a daughter the same age as his own.

All found resistance difficult. Most needed a long time to form the necessary resolve and act on it. They had to reject firmly-held beliefs and relinquish long, rewarding military careers. Vandeveld switched from a “true believer” to “truly deceived.” Although some reported up the chain of command, all ultimately concluded that would be fruitless. Vandeveld feared the consequences for his family. Even though he must have anticipated Father Dear's advice he delayed following it. He persisted in arguing that Jawad's abuse should affect only punishment, not conviction. In retrospect, Diaz felt his action had been stupid. Only Abraham seems to have had few regrets about returning to civilian life.

Like Chelsea Manning, Edward Snowden, and other whistleblowers, these had reason to be apprehensive. No good deed goes unpunished. Instead of honoring their courage and fidelity to the rule of law, the military first sought to discourage their resistance and, when that failed, cynically impugned their motives. The military insisted Vandeveld's reasons were personal, even subjecting him to a psychiatric examination. The military never admitted error: it continued to maintain that the prosecution disclosed all evidence when this was patently false; Eric Holder contemplated a criminal prosecution of Jawad after his military commission trial collapsed (but wisely backed off). When these lawyers persisted in exposing misconduct by the military it retaliated. Diaz saw his military career end, served time in the brig, and lost his license to practice law. Vandeveld was temporarily muzzled.

Once these lawyers defied their superiors the rupture tended to be complete—partly because of government retaliation. Vandeveld submitted declarations for other detainees, testified before Congress, and wrote in the media. Kuebler followed Mori's advocacy for Hicks in Australia by campaigning in Canada for Khadr's repatriation.

Like ripples from a rock thrown into a pool, whistleblowing had further ramifications, some quite surprising. Earlier prosecutors who objected to procedural irregularities were quietly transferred. But these more public challenges led a judge to suspend a case and direct the Convening Authority to remove the legal adviser from it. In the subsequent trial the accused was acquitted of some charges and sent home after serving a short additional sentence. Lawyers for five high-value detainees then made similar arguments against the legal adviser, who was reassigned to other tasks. Vandeveld's complaints convinced both judges that the prosecution was withholding exculpatory evidence. Judge Parrish reinstated Kuebler when the chief defense counsel fired him. Vandeveld succeeded in excluding both of

²⁸ Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues,” 5 Human Rights 1 (1975).

Jawad's confessions, not just in the military commissions but also in the District Court, which therefore granted the habeas petition, leading to his transfer home and release. And Vandeveld's resignation forced the prosecution temporarily to withdraw charges against all the cases in which he had been involved. Khadr's plea deal allowed him to be transferred to Canada, where he would soon be eligible for release.

These four men demonstrate the enormous power of "just saying no." I hope their stories will inspire other lawyers to fidelity to the rule of law, not just at moments of heroic resistance but in their daily practice.