

2011

The Myth of Divided Loyalties: Defending Detainees and the Constitution in the Guantanamo Military Commissions

David J.R. Frakt

Follow this and additional works at: <http://scholarlycommons.law.case.edu/jil>

Recommended Citation

David J.R. Frakt, *The Myth of Divided Loyalties: Defending Detainees and the Constitution in the Guantanamo Military Commissions*, 43 Case W. Res. J. Int'l L. 545 (2011)
Available at: <http://scholarlycommons.law.case.edu/jil/vol43/iss3/2>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

**LAWFARE AND COUNTERLAWFARE: THE DEMONIZATION OF THE
GITMO BAR AND OTHER LEGAL STRATEGIES IN THE WAR ON TERROR**

*David J. R. Frakt**

If “lawfare” is “the wrongful manipulation of the law and legal systems by our enemies to achieve strategic military or political ends” against the United States and other democratic allies, then the United States needs a “counterlawfare” strategy in response. This article proposes and defines the term counterlawfare as “defensive measures to reduce vulnerabilities to the enemy’s use of lawfare and actions to contain and minimize the effectiveness of lawfare, including, but not limited to: preparing the legal battlespace; denying, disrupting, and degrading the enemy’s ability to use lawfare; and delegitimizing the enemy’s lawfare efforts” and uses the concept to analyze the Bush Administration legal strategies in the war on terror. The article analyzes several specific legal actions, including the efforts to discredit and malign attorneys who represented Guantánamo detainees, which attacks have continued to come from defenders of Bush-era policies.

In dealing with terrorists, our tax dollars should pay for weapons to stop them, not lawyers to defend them.

- Senator Scott Brown (R. Massachusetts)¹

* The author is an Associate Professor of Law at Barry University Dwayne O. Andreas School of Law. The author is also a Lieutenant Colonel in the U.S. Air Force Reserve Judge Advocate General’s Corps and previously served as a Defense Counsel with the Office of Military Commissions from April 2008 to August 2009. The views expressed herein are solely those of the author and do not reflect the views of the Air Force or the Department of Defense.

¹ Senator Scott Brown, a Judge Advocate in the Massachusetts National Guard, made the comment in his January 10, 2010 special election victory speech. Senator Scott Brown, Republican Mass., Special Election Victory Speech (January 10, 2010), *reprinted in Scott Brown’s Victory Speech*, N.Y. TIMES, Jan. 19, 2010, <http://www.nytimes.com/2010/01/20/us/politics/20text-brown.html>. Further, Senator Brown failed to mention that his fellow Republican Senator and fellow JAG officer Lindsay Graham was the principal architect of the Military Commissions Act, which mandates that taxpayer-paid JAGs be provided as defense counsel for accused detainees under 10 U.S.C. § 949(c). *Id.*

The habeas lawyers were not doing their constitutional duty to defend unpopular criminal defendants. They were using the federal courts as a tool to undermine our military's ability to keep dangerous enemy combatants off the battlefield in a time of war.

- Marc Thiessen²

I. INTRODUCTION	336
II. LAWFARE DEFINED	340
III. DEFINING "COUNTERLAWFARE"	344
IV. APPLYING A COUNTERLAWFARE PARADIGM TO THE WAR ON TERROR	346
A. <i>Preparation of the Legal Battlespace</i>	346
B. <i>Deny, Disrupt, and Degrade</i>	346
C. <i>Delegitimize</i>	352
D. <i>Attacking the Gitmo Bar: Legitimate Counterlawfare?</i>	353
V. CONCLUSION	355

I. INTRODUCTION

These quotations, one fairly mild, one rather nasty, are examples of the campaign to discredit and demonize the Guantánamo (Gitmo) Bar attorneys who represented Guantánamo detainees in habeas corpus litigation or otherwise participated in court challenges to Bush Administration detention policies. This campaign has been going on for some time, reached its apex in early March 2010 when some leading conservative commentators ratcheted up their rhetoric to unprecedentedly shameful levels.³ The March

² Marc A. Thiessen, *The "al-Qaeda Seven" and Selective McCarthyism*, WASH. POST. (Mar. 8, 2010, 11:22 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030801742.html>.

³ See Ariel Meyerstein, Note, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 307 (2007) (noting that politicians, particularly Senator Lindsay Graham, employed misleading rhetoric which contributed to the demonization of detainee defense lawyers); see also Marc D. Falkoff, *Conspiracy to Commit Poetry: Empathetic Lawyering at Guantanamo Bay*, 6 SEATTLE J. FOR SOC. JUST. 3, 13 (2007) (noting poor treatment and demonization of detainee bar in stating, "We have, in short, been accused of engaging in 'lawfare,' and of thereby waging asymmetric warfare against the United States. Any Guantánamo lawyer could forward you a number of emails in which he or she has been denounced as a 'traitor' for representing 'terrorists,' or worse."); see also Steve Vladeck, *The War on Lawyers, Continued*, BALKINIZATION BLOG (May 25, 2010, 10:25 AM), <http://balkin.blogspot.com/2010/05/war-on-lawyers-continued.html> (discussing the proposed National Authorization Act for fiscal year 2011 (for example, H.R. 5136) and how it may negatively affect lawyers representing Guantánamo Bay detainees); see generally THE GUANTANAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux and Jonathan Hafetz eds., New York University Press 2009) (discussing the struggles of Guantánamo

campaign included an infamous advertisement released by Liz Cheney, Bill Kristol, and Debra Burlingame's "Keep America Safe" organization, in which Department of Justice (DOJ) attorneys, who had formerly assisted Guantánamo detainees, were called the "Al-Qaeda 7."⁴ The ad referred to the DOJ as the "Department of Jihad" and openly questioned the loyalty of those lawyers who represented "terrorist detainees," asking "Whose values do they share?"⁵ The campaign also included opinion articles and interviews, including pieces by Ms. Burlingame, Andrew McCarthy of the National Review, and Marc Thiessen of the Washington Post, all supported by a Fox News "Investigation."⁶ A common tactic of this campaign to discredit

detainees and the lawyers who represent them); *see also* David J.R. Frakt, *The Difficulty of Defending Detainees*, 48 WASHBURN L.J. 391, 398–401 (2009) (describing a first-hand account of the Military Commission's unethical and political involvement in Guantánamo detainee trials).

⁴ *Keep America Safe: Who are the Al Qaeda Seven?*, (Mar. 1, 2010), <http://www.youtube.com/watch?v=Zlxg7LmEQg>. Ms. Burlingame, one of the video creators, is the sister of the pilot of American Airlines Flight 77 which was hijacked and crashed into the Pentagon on 9-11. Ms. Burlingame has become an outspoken critic of government policies which she considers too soft on terrorists.

⁵ *Id.*

⁶ *See* Debra Burlingame & Thomas Joscelyn, *Gitmo's Indefensible Lawyers*, WALL ST. J., (Mar. 15, 2010), http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704131404575117611125872740.html (referring to "Department of Justice political appointees who previously represented or advocated on behalf of terrorists."). The Left is embarrassed. It senses that the public is no longer buying its bogus narrative about the Gitmo Bar: that they are noble attorneys answering the Constitution's call in order to protect 'our values.' For all the Obama campaign's talk about how attorneys who voluntarily rushed to al-Qaeda's aid were defending our 'values,' the Obama administration now senses the need to hide those lawyers. It doesn't want to name all of them, it won't discuss their role in counterterrorism policy, and it certainly doesn't want to talk about which terrorists they were helping. Andrew C. McCarthy, *Why the al-Qaeda Seven Matter*, NAT'L REV. ONLINE (Mar. 9, 2010, 4:00 AM), <http://www.nationalreview.com/articles/229281/why-al-qaeda-seven-matter/andrew-c-mccarthy>. *See also* Thiessen, *supra* note 3 (stating that lawyers defending Guantánamo detainees used federal courts to undermine military authority). Despite unassailable evidence that the majority of detainees were not terrorists and lacking any evidence that any of the lawyers involved represented an actual terrorist, Thiessen refers to Justice Department officials "who represented terrorists" and "represented or advocated for terrorist detainees." *Id.* His article grossly distorted the views of one DOJ official, Jennifer Daskal, calling her "a lawyer who advocates setting terrorists free" and castigating her for her "radical and dangerous views" for the quite mainstream suggestion she made when working for a human rights group prior to joining the DOJ (for example, that when there was insufficient evidence to charge a detainee with any crime the detainee should be released) *Id.*; *see also Exclusive: Marc Thiessen Extended Interview*, THE DAILY SHOW.COM, <http://www.thedailyshow.com/watch/tue-march-9-2010/exclusive---marc-thiessen-extended-interview-pt-1> (discussing with Marc Thiessen the treatment of lawyers who represented Guantánamo detainees); *see also* Marc Thiessen, *Where are the Gitmo Goatherds?*, WASH. POST., May 31, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/05/31/AR2010053101702.html> ("Liz Cheney was right—the folks she dubbed as al-Qaeda lawyers really are al-Qaeda lawyers."); *see, e.g.,* Mike Levine, *Exclusive: Unknown DOJ Lawyers Identified*,

the lawyers representing detainees is to call the lawyers “Al Qaeda lawyers” or “terrorist lawyers,” in much the same way that lawyers who represent known mafia figures are sometimes called “mob lawyers.” The critics conveniently ignore the fact that the overwhelming majority of detainees represented by counsel were never even accused of terrorist acts, much less proven to have committed them.

Here is a typical example of such an attack in the conservative press, railing against “Michael Ratner and the lawyers in the Gitmo Bar”:⁷

Lawyers can literally get us killed . . . We may never know how many of the hundreds of repatriated detainees are back in action, fighting the U.S. or our allies thanks to the efforts of the Guantánamo Bay Bar . . . Allowing lawyers to subvert the truth and transform the Constitution into a lethal weapon in the hands of our enemies—while casting themselves as patriots—makes a mockery of the sacrifices made by true patriots . . . If Sens. Patrick Leahy and Arlen Specter, chairman and ranking members, respectively, of the Senate Judiciary Committee succeed in their plan to turn enemy combatant cases over to the federal courts, we will sorely rue the day that we eliminated “lawyer-free zones.”⁸

The shameful smear tactics employed by Liz Cheney and her counterparts were quickly denounced by mainstream legal organizations and were the subject of media analysis for several news cycles.⁹ Many lawyers, including prominent conservatives, were quick to come to the defense of the Gitmo Bar.¹⁰ Those who criticized the attack ads and defended the work of the

LIVESHOTSBLOG (Mar. 3, 2010, 2:07 PM), <http://liveshots.blogs.foxnews.com/2010/03/03/exclusive-unknown-doj-lawyers-identified/> (discussing the recent identity revelation of lawyers assisting Guantánamo detainees).

⁷ Michael Ratner is the President of the Center for Constitutional Rights, which spearheaded the habeas corpus litigation on behalf of detainees.

⁸ Daniel Halper, *Lawfare Warnings*, WEEKLYSTANDARD.COM (Mar. 5, 2010, 2:39 PM), <http://www.weeklystandard.com/blogs/lawfare-warnings>.

⁹ See Statement of Carolyn B. Lamm, President, Am. Bar Ass’n Re: Justice Dep’t Lawyers’ Representation of Detainees (Mar. 5, 2010) (“Individuals and organizations conducting a witch hunt in order to name names of Department of Justice lawyers who earlier represented Guantánamo detainees are showing a profound disregard for a fundamental tenet of our justice system and our Constitution: that anyone who faces loss of liberty has a right to legal counsel.”); see also Press Release, NACDL, Don’t let Politics Weaken the Rule of Law Statement of NACDL President Cynthia Hujar Orr (Mar. 16, 2010) (discussing the “McCarthy-style attack campaign” waged against the Justice Department lawyers who represented Guantánamo detainees); see also Ari Shapiro, “*Al-Qaeda 7*” Controversy: Destinies and Politics, NPR.COM (Mar. 11, 2010), <http://www.npr.org/templates/story/story.php?storyId=124546087> (stating that attacks on the lawyers who represented Guantánamo detainees undermine the justice system).

¹⁰ This author is one of those who defended the detainee bar. See David Frakt, *In Praise of the Gitmo Bar*, TRUTH-OUT.ORG (Mar. 11, 2010), <http://www.truth-out.org/in-praise-gitmo->

detainee bar included many of the key architects of Bush Administration legal policies in the detention and interrogation arena, “a virtual ‘who’s who’ of officials who worked on counterterrorism policies under President Bush,” according to one article.¹¹ For example, former Attorney General Michael B. Mukasey noted in a Wall Street Journal op-ed that “lawyers now employed at the Justice Department who, while in private practice, volunteered to represent suspected terrorist detainees, or argued legal positions supporting various rights of such detainees, have been portrayed as in-house counsel to al Qaeda.”¹² He called such attacks “shoddy and dangerous.”¹³ The Brookings Institution released an open letter signed by several leading conservative lawyers.¹⁴ The letter decried the “shameful series of attacks on attorneys in the Department of Justice who, in previous legal practice, either represented Guantánamo detainees or advocated for changes to detention policy” calling efforts to “delegitimize the role detainee counsel play” “unjust” and “destructive.”¹⁵

What many of the lawyers critical of Cheney and her ilk failed to realize, or at least failed to acknowledge, is that such extreme attacks on the character and values of the detainee bar were the logical extension of the very policies, positions, and strategies that conservative lawyers had created, developed, and supported over the preceding eight years, a strategy that I propose to call “counterlawfare.”

bar57583; see also David Frakt, *Confessions of a Terrorist Sympathizer*, SALON.COM (Mar. 9, 2010, 12:10 AM), http://www.salon.com/news/guantanamo/index.html?story=/news/feature/2010/03/09/confessions_terrorist_sympathizer (a satirical article inspired by a segment on the Rachel Maddow Show in which the author briefly appeared).

¹¹ Michael Isikoff, “*I was Disgusted,*” Says Former Bush Official About Liz Cheney Ad, NEWSWEEK.COM (Mar. 8, 2010), <http://www.newsweek.com/blogs/declassified/2010/03/08/i-was-disgusted-says-former-bush-official-about-liz-cheney-ad.html>.

¹² Michael B. Mukasey, *Why You Shouldn’t Judge a Lawyer by His Clients*, WALL ST. J., Mar. 10, 2010, at A23.

¹³ *Id.*

¹⁴ Statement on Justice Department Attorney Representation of Guantánamo Detainees, Brookings Institution (Mar. 8, 2010), available at http://www.brookings.edu/opinions/2010/0307_guantanamo_statement.aspx (select “download statement to PDF”) (signatories include: Benjamin Wittes, Robert Chesney, Matthew Waxman, David Rivkin, Lee Casey, Philip Bobbitt, Peter Keisler, Bradford Berenson, Kenneth Anderson, John Bellinger III, Philip Zelikow, Kenneth W. Starr, Larry Thompson, Charles “Cully” D. Stimson, Chuck Rosenberg, Harvey Rishikof, Orin Kerr, Daniel Dell’Orto, Suzanne E. Spaulding, Frank Jimenez and William H. Taft IV); see also Charlie Savage, *Bush Official Defends Lawyers Under Attack for Detainee Work*, THECAUCUS.BLOGS.NYTIMES.COM, (Mar. 4, 2010, 4:26 PM), <http://www.thecaucus.blogs.nytimes.com/2010/03/04/bush-official-defends-lawyers-under-attack-for-detainee-work/> (discussing Peter Keisler’s defense of attorneys who represented Guantánamo detainees before joining the Justice Department).

¹⁵ Statement on Justice Department Attorney Representation of Guantánamo Detainees, *supra* note 14.

In this Article, I hope to define the term “counterlawfare” and explain how the concept can help us to understand much of the legal strategy employed by the Bush Administration during the “Global War on Terror.” I will begin, in Section II, by explaining the concept of lawfare and its predominant usage today, as well as exploring several, in my view, misapplications of the term. In Section III, I explain my proposed concept of counterlawfare. In Section IV, I apply the counterlawfare paradigm to the actions of the Bush Administration to see if it can provide a coherent explanation for the legal strategy in the war on terror, up to, and including, attacks on the character and motives of the Gitmo Bar. In Section V, I conclude that while there may be other compelling explanations, counterlawfare does help to explain many, if not all, of the legal strategies deployed by the Bush Administration.

II. LAWFARE DEFINED

In order to define “counterlawfare,” it is important first to have an understanding of the term “lawfare,” a descriptive noun popularized, if not actually coined, by now Retired U.S. Air Force Major General Charles Dunlap. According to General Dunlap, “lawfare is the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”¹⁶ “Lawfare” is typically described as a form of asymmetric warfare by adversaries of unequal power. According to General Dunlap, “It can be positive or negative.”¹⁷ In other words, in General Dunlap’s view, both the proper use of the law and the misuse of the law to achieve operational objectives constitutes lawfare. However, a survey of the legal and popular literature reveals that the term is used almost exclusively in this second, negative sense. For example, according to an article by David B. Rivkin, Jr. and Lee A. Casey in the *Wall Street Journal*, “The term ‘lawfare’ describes the growing use of international law claims, usually factually or legally meritless, as a tool of war.”¹⁸

In a Spring 2010 speech by Brooke Goldstein, she proposed what I consider to be a useful working definition of “lawfare”:

When I say lawfare I denote the *wrongful* manipulation of the law and legal systems to achieve strategic military or political ends. I emphasize *wrongful* because lawfare is an inherently negative undertaking, it consists

¹⁶ Brigadier Gen. Charlie Dunlap, Remarks at the Keystone Leadership Summit, *in* *The Reporter* Keystone Edition, at 95 (Oct. 3, 2005).

¹⁷ *Id.*

¹⁸ David B. Rivkin Jr. & Lee A. Casey, *Lawfare*, *WALL ST. J.*, Feb. 23, 2007, at A11.

of the *negative* exploitation of the law to achieve a purpose other than or contrary to that for which the law was originally enacted.¹⁹

So, what exactly are the military or political ends pursued by lawfare? What is it that a military enemy is theoretically trying to accomplish through manipulative legal actions? Presumably, if the legal claims are weak or meritless, the enemy would not expect to prevail in a court of law, so there must be some other objective. General Dunlap describes the purpose of lawfare this way:

Rather than seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of the law of armed conflict.²⁰

Rivkin and Casey echo this view, asserting that “Al Qaeda and the Iraqi insurgents . . . routinely claim that American forces systematically violate the laws of war” with the goal of “undermining America’s political will to win.”²¹

Another commentator has described the lawfare concept a bit more skeptically:

The idea seems to be that weak states or non-state actors could be expected to flood our courts with frivolous lawsuits, using the rights traditionally afforded by the American legal system to further their hostile ends. As the concept has been fleshed out by conservative commentators and some academics, the theory goes that “lawfare” would divert commanders’ attention from military operations, encourage our soldiers to second-guess themselves on the battlefield and (perhaps most importantly, though its adherents would dispute it) embarrass the United States by providing terrorists with a public relations boon.²²

Although “lawfare” was originally intended strictly as a military term of art, in recent years the term has been increasingly used outside of the military context to refer to what is perceived as vexatious or frivolous

¹⁹ Brook Goldstein, Director of The Lawfare Project, Speech on Lawfare and Combating the Goldstone Report, Int’l and Domestic Legal Recourses: Responding to Lawfare and the Goldstone Report (April 27, 2010).

²⁰ Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

²¹ Rivkin & Casey, “*Lawfare*” Over *Haditha*, WALL ST. J., June 7, 2006, at A14.

²² Marc D. Falkoff, *Conspiracy to Commit Poetry: Empathetic Lawyering at Guantanamo Bay*, 6 SEATTLE J. FOR SOC. JUST. 3, 13 (2007).

litigation. For example, Alan Dershowitz and Elizabeth Samson have stretched the term to describe libel lawsuits by Islamic charities against private entities, particularly news organizations, under the theory that such lawsuits are “brought to silence critics of controversial Islamic organisations.”²³ Although these authors acknowledge that lawfare is a weapon of war, they fail to persuasively link such lawsuits to a specific armed conflict.

Brooke Goldstein has also strained her own useful definition to include, under the rubric of lawfare, a wide variety of lawsuits with dubious connections to armed conflict:

[L]awfare techniques include frivolous and predatory libel and “hate speech” lawsuits brought against authors, politicians, members of the media, and even cartoonists who are brave enough to speak publicly about, or satirically on, issues of national security and public concern. The techniques also include “workplace harassment” lawsuits against counterterrorism experts that brief our military and police officers about radical Islam.²⁴

The term has also been used inaccurately to describe the work of neutral non-governmental organizations (NGO) dedicated to peace and human rights.²⁵ Perhaps the most bizarre invocation of lawfare I have seen was in an article about the court-martial of U.S. Navy SEALs for abusing a prisoner and lying about it.²⁶ The author claimed that this instance of the American military holding its own personnel accountable for violations of the laws of war was an example of terrorist lawfare.²⁷

Conservative critics have essentially accused American lawyers working on behalf of detainees as engaging in lawfare. For example, when lawyers for Ali al Marri successfully challenged the government’s right to detain a lawful resident alien as an enemy combatant, Andrew McCarthy was strongly critical of the Fourth Circuit ruling (later reversed *en banc*),

²³ Alan Dershowitz & Elizabeth Samson, *The Chilling Effect of ‘Lawfare’ Litigation*, GUARDIAN.CO.UK, (Feb. 9, 2010, 1:30 PM), <http://www.guardian.co.uk/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups>.

²⁴ Brooke Goldstein, *The Disproportionate Use of Lawfare*, HUDSON NEW YORK, (April 5, 2010, 5:00 AM), <http://www.hudson-ny.org/1132/the-disproportionate-use-of-lawfare>.

²⁵ See Anne Herzberg, *Lawfare Against Israel*, WALL ST. J., Nov. 5, 2008, (Europe), http://online.wsj.com/article/NA_WSJ_PUB:SB122583394143998285.html (asserting that a Palestinian NGO engaged in lawfare by filing a lawsuit to obtain arrest warrants in Spain for former Israeli army officers).

²⁶ See Clare M. Lopez, *SEALs Case Shows How Terrorists Use “Lawfare” to Undermine U.S.*, HUMAN EVENTS (Mar. 8, 2010), <http://www.humanevents.com/article.php?id=35934>.

²⁷ See *Id.*

writing: “Strike another blow for lawfare: The use of the American people’s courts as a weapon against the American people.”²⁸

Although lawfare is normally considered a tactic of asymmetric warfare for use by weak nations or parties against powerful states like the United States, the United States has also been accused of waging lawfare. For example, Scott Horton, a leading critic of Bush Administration’s legal policies in the war on terror, has described the U.S. legal strategy towards detainees and their lawyers as lawfare:

[U]nder the current administration, those designated as enemies have no rights, neither under the laws of war nor under any notion of criminal justice. A radical rupture has occurred; American legal tradition has been swept aside and, with it, long-established precedents for dealing with adversaries in wartime—even those accused of heinous crimes. Nowhere is that more clear than in the treatment of the so-called habeas lawyers (so named because of their repeated attempts to enforce the rights of their clients through the writ of habeas corpus—the legal procedure that allows an imprisoned person to test the legality of his detention) who counsel the detainees at Guantánamo Bay, Cuba.

The habeas lawyers have been tarred with ethnic slurs and accusations of homosexuality, accused of undermining national security, subjected to continual petty harassment. They have also had their livelihoods threatened through appeals to their paying clients. These events have been reported as separate incidents in the press, but this conduct results from a carefully orchestrated Bush Administration policy that goes under the rubric of “lawfare.”²⁹

David Luban has also used the term “lawfare” to describe the view under which “lawyers opposing the U.S. government are . . . the equivalent of enemy combatants” because they are “really waging lawfare against the

²⁸ See *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *rev’d en banc sub nom*; *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008); see also Andrew C. McCarthy, *Lawfare Strikes Again*, NATIONAL REVIEW ONLINE (June 12, 2007 10:10 AM), <http://article.nationalreview.com/318385/lawfare-strikes-again/andrew-c-mccarthy> (condemning the 2007 decision as relying on “faulty reasoning”).

²⁹ See Scott Horton, *State of Exception: Bush’s War on the Rule of Law*, HARPER’S MAG., July 2007, <http://harpers.org/archive/2007/07/0081595>; see also Scott Horton, *Lawfare Redux*, HARPER’S MAG., Mar. 2010, <http://www.harpers.org/archive/2010/03/hbc-90006694> (“The notion of ‘lawfare’ was previously used to attack lawyers in the United States who filed habeas petitions on behalf of alleged terrorists in Guantánamo. These lawyers were and continue to be subjected to McCarthyite character assassination as terrorist sympathizers, even though about 80% of their clients have turned out not to be terrorists after all.”).

United States.³⁰ He suggests that this view may have contributed to “the persistent harassment of Guantánamo lawyers.”³¹

Although I do not dispute Professor Horton’s and Professor Luban’s observations about the harassment of the Gitmo Bar, I do not believe “lawfare” is the most precise term to describe it.³² Rather, I would suggest that, in military terms, the campaign against the Gitmo Bar is part of a broader “counterlawfare” strategy adopted by the Bush Administration and still being carried out by some of the true believers in the strategy, even though they are not necessarily in official positions of authority.

III. DEFINING “COUNTERLAWFARE”

There can be no question that leading architects of the Bush Administration legal policy strongly believed in the threat posed by lawfare, the idea that our enemies would use our legal institutions and our reverence for the rule of law as a weapon of war against us. Jack Goldsmith explains in his book *The Terror Presidency* how fear of “lawfare mischief,” especially politically motivated international prosecutions under the doctrine of universal jurisdiction, deeply influenced the thinking of Secretary of Defense Donald Rumsfeld and other civilian leaders in the Department of Defense (DOD).³³ John Yoo, a leading proponent of Bush-era detention policies, referred to the use of lawfare in a 2008 column for the *Philadelphia Inquirer*:

[T]errorists are using our own legal system as a weapon against us. They use cases such as [José] Padilla’s to harass the men and women in our government, force the revelation of valuable intelligence and press novel theories that have failed at the ballot box and before the president and Congress. “Lawfare” has become another dimension of warfare.³⁴

Indeed, as several scholars have noted, the idea of lawfare was explicitly incorporated into national defense strategy.³⁵ Most obviously was in

³⁰ David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2021 (2008).

³¹ *Id.* at 2025.

³² See generally David J. R. Frakt, *The Difficulty of Defending Detainees*, 48 WASHBURN L. J. 381 (2009) (describing the author’s experience with the challenges facing those attorneys who represent detainees).

³³ See Jack Goldsmith, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 53–64 (2007).

³⁴ John Yoo, *Terror Watch: Terror Suspects are Waging ‘Lawfare’ on U.S.*, PHILA. INQUIRER, Jan. 18, 2008, at A15.

³⁵ See, e.g., Mark D. Falkoff, *Conspiracy to Commit Poetry: Empathetic Lawyering at Guantanamo Bay*, 6 SEATTLE J. SOC JUST. 3 (2007); Phillip Carter, *Legal Combat: Are Enemies Waging War in our Courts?*, SLATE (Apr. 4, 2005), <http://www.slate.com/id/2116169>.

the March 2005 National Defense Strategy for the United States, which stated that “our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”³⁶ The reference to the use of international forums and judicial processes clearly indicates concern over the use of lawfare as an asymmetric tool of war. The equation of lawfare with terrorism indicates how seriously the Pentagon viewed the lawfare threat. However, to the extent that lawfare is viewed as a negative concept—as misuse of the law and legal institutions—then it would not be appropriate for the United States to practice lawfare and incorporate it into our own defense strategy. Rather, we would develop a *counterlawfare* strategy—just as we do not fight terrorists with terrorism, but with counterterrorism. Furthermore, if lawfare is a form of asymmetric warfare used by the weak against the strong, then the United States, as the world’s lone superpower, would hardly need to engage in it.

William Eckhardt described the development of the use of lawfare and the appropriate response to it in a 2003 law review article:

[T]he increasing use of the law of war as a weapon against the United States by our enemies [has] produced a new method of communicating and a healthy democratic public accountability. Although the United States is not likely to lose militarily on the battlefield, the United States is far more vulnerable in the world court of public opinion. Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our “center of gravity.” To counter these attacks our government—and the military in particular have developed a mechanism to justify, explain, and account for its actions. This change began with a presidential address by President Ronald Reagan when he directed the bombing of Libya in 1983, comparable to carefully created governmental policy statements in Britain known as “White Papers.” The government subsequently has had the discipline to articulate the legal and moral justification for our military actions. For the military, this means that the warfighters (commanders and operations officers) must fight the war by day and explain their actions on CNN at night. The Secretary of Defense and the Chairman of the Joint Chief of Staff have become as much public spokesmen as war managers.³⁷

In essence, what Professor Eckhardt is describing is a counterlawfare strategy, a plan to combat misleading accusations of illegal behavior. Although

³⁶ U.S. DEP’T OF DEF., NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005), available at <http://www.defense.gov/news/Mar2005/d20050318nds1.pdf>.

³⁷ William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT’L L. 431, 441 (2003).

the term “counterlawfare” does not exist in the defense lexicon, I believe it is a potentially useful term.³⁸ Accordingly, I propose the following definition:

COUNTERLAWFARE: defensive measures to reduce vulnerabilities to the enemy’s use of lawfare and actions to contain and minimize the effectiveness of lawfare, including, but not limited to: preparing the legal battlespace; denying, disrupting, and degrading the enemy’s ability to use lawfare; and delegitimizing the enemy’s lawfare efforts.

IV. APPLYING A COUNTERLAWFARE PARADIGM TO THE WAR ON TERROR

Utilizing the above definition of “counterlawfare,” it is possible to see how many actions and decisions of the Bush Administration during the war on terror, especially those related to detainees, were consistent with a counterlawfare strategy.

A. *Preparation of the Legal Battlespace*

This phase of counterlawfare involves efforts to procure legal authority for military action, such as a U.N. Security Council Resolution, publicizing the moral and legal basis for the armed conflict itself, and justifying actions within the conflict. In the case of the invasion of Afghanistan, the preparation of the legal battlefield included an invocation of the right to collective self-defense under the NATO Charter and obtaining a Joint Resolution of Congress providing Authorization for the Use of Military Force.³⁹ It also included the Bush Administration’s public efforts to explain its basis for denying prisoner of war (POW) and Geneva Convention Common Article 3 rights to both Taliban and al-Qaeda fighters.⁴⁰

B. *Deny, Disrupt, and Degrade*

The Bush Administration took their counterlawfare efforts to the extreme by denying detainees all access to lawyers or to courts, and by asserting that no laws or treaties, including Article 3, protected detainees,⁴¹

³⁸ See, e.g., U.S. DEP’T OF THE ARMY & U.S. DEP’T OF THE NAVY, JP-102, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, (Apr. 2010), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

³⁹ See Authorization for the Use of Military Force, S.J. Res. 23, 107 Cong., 115 Stat. 224 (2001); *Collective Defence*, N. ATL. TREATY ORG., http://www.nato.int/cps/en/SID-85648058-8934EDC9/natolive/topics_59378.htm, (last updated Jul. 30, 2010) (“NATO invoked Article 5 of the Washington Treaty for the first time in its history following the 9/11 terrorist attacks against the United States.”).

⁴⁰ See Ari Fleischer, White House Press Sec’y, Announcement of President Bush’s Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), available at <http://www.state.gov/s/1/38727.htm>.

⁴¹ See *id.*

President Bush unilaterally declared all Taliban and al-Qaeda to be unlawful enemy combatants, denying that they were entitled to any presumption of POW status, and asserting that there was no possibility of doubt about their status as combatants who were outside of the protection of the Geneva Convention and therefore not entitled to a hearing before a competent tribunal.⁴²

The choice of detention facility can also be seen as part of the counterlawfare strategy. If the Bush Administration was concerned about the enemy's ability to hamper the war effort through appeals to legal institutions, Guantánamo was the perfect solution. Indeed, Guantánamo was selected as the site for the military's principal interrogation and detention center precisely because it was considered to be beyond the reach of any court. Equally suitable (and arguably superior) sites, such as Andersen Air Force Base in Guam, were rejected specifically because of the possibility of detainee's gaining access to courts.⁴³ While this strategy did open the United States to severe criticism, it did assure that Guantánamo was able to operate with minimal oversight or legal constraints for the first few years of its existence, until the Supreme Court intervened in the summer of 2004 and ordered that detainees be afforded some opportunity to challenge the basis for their detention.⁴⁴ However, even when forced to provide a hearing for detainees, the counterlawfare strategy continued. The rules the Pentagon developed for these hearings (known as Combatant Status Review Tribunals (CSRT)) ensured that such hearings were held under strict secrecy and without benefit of the assistance of defense counsel.⁴⁵

Similarly, when the Bush Administration was forced by a Supreme Court decision to provide military commissions providing minimal due

⁴² See Memorandum from President George W. Bush to Vice President Richard Cheney et al., Regarding Humane Treatment of al-Qaeda and Taliban Detainees (Feb. 7, 2002), available at http://www.dod.mil/pubs/foi/detainees/dia_previous_releases/fourth_release/DIAfourth_release.pdf.

⁴³ I was serving as Deputy Chief of International and Operations Law for Pacific Air Forces in the Fall of 2001 when the Department of Defense was looking for appropriate sites to house detainees. Pacific Air Forces proposed Andersen Air Force Base in Guam. It was relatively close to the theater of war, it had a huge airfield, it had extensive infrastructure which could be readily converted to a detention camp, and it was considered highly secure and easy to defend by virtue of Guam's extremely isolated location. The Guam site was rejected in favor of Guantánamo primarily because Guam was a U.S. territory with a federal courthouse. See Goldsmith, *supra* note 33, at 108 ("The Pentagon considered other facilities besides GTMO, including military bases inside the U.S. and on the Island of Guam. . . . detentions there were more likely to be subject to legal challenges since they were on U.S. soil.").

⁴⁴ *Rasul v. Bush*, 542 U.S. 466, 466 (2004) (holding that "the District Court has jurisdiction to hear petitioners' habeas challenges under 28 U.S.C. § 2241").

⁴⁵ Memorandum from Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing CSRT 7 July 4, 2004, para. C3 available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

process guarantees, it still sought to limit the involvement of potentially meddlesome lawyers in the legislation requested from Congress.⁴⁶ Although Congress had no choice but to provide defense counsel to accused detainees, the Military Commissions Act mandated that military attorneys would fulfill that role.⁴⁷ Foreign attorneys were limited to an advisory non-speaking role in military commissions.⁴⁸ Non-U.S. Citizens, even those from allied countries admitted to practice in a U.S. jurisdiction, were not authorized to appear on behalf of a detainee.⁴⁹

With regard to the writ of habeas corpus, the DOJ vehemently denied that detainees had the right to maintain such petitions, appealing every ruling to the contrary. When the Supreme Court ruled against the DOJ in 2004, the Bush Administration sought to undermine, if not completely nullify, the ruling through creative legislation.⁵⁰ At the Administration's behest, Congress assisted in the counterlawfare efforts by passing legislation limiting detainees' access to courts and declaring that detainees could not cite the Geneva Conventions as a source of rights.⁵¹ This counterlawfare maneuvering bought the Administration several more years in which the detainees were denied access to the courts. It was not until the summer of 2008, over six and a half years after Guantánamo opened, that the Administration was finally forced unequivocally by the Supreme Court to allow habeas corpus petitions.⁵² Even then, the DOJ continued to use every procedure, gimmick, and excuse, legitimate or otherwise, to delay reaching decisions

⁴⁶ Hamdan v. Rumsfeld, 548 U.S. 557, 564 (2006) (“... it must be understood to incorporate at least the barest of the trial protections recognized by customary international law. The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need . . .”).

⁴⁷ 10 U.S.C. § 949c(b)(4) (2009).

⁴⁸ OFFICE OF THE MILITARY COMMISSIONS, OFFICE OF THE SECRETARY OF DEFENSE, REGULATION FOR TRIAL BY MILITARY COMMISSION, Ch. 9 § 9.6(a) (2007).

⁴⁹ 10 U.S.C. § 949c(b)(3)(A) (2009).

⁵⁰ Rasul v. Bush, 542 U.S. 466 (2004). After Rasul, Congress attempted to suspend the writ of habeas corpus by substituting appeals under the Detainee Treatment Act for habeas petitions. In Boumediene v. Bush, the Supreme Court held that the Military Commissions Act was an unconstitutional suspension of the writ and that the DTA was an inadequate substitute. 553 U.S. 723 (2008). Thus, even though Rasul seemingly granted the right of habeas corpus to detainees in 2004, no detainee received a review, on the merits, of their habeas petition until late 2008, a few months after the Boumediene decision.

⁵¹ 28 U.S.C. § 2241(e) (2006) (this legislation also consolidated all detainee claims in the D.C. Circuit where it was widely believed the judges would be less sympathetic to detainees and more eager to embrace Administration views); 10 U.S.C. § 948b(e) (2009) (“No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for private right of action.”).

⁵² Boumediene v. Bush, 553 U.S. 723 (2008) (holding that “aliens detained as enemy combatants at Naval Station at Guantánamo Bay were entitled to privilege of habeas corpus to challenge legality of their detention.”).

on the merits. For example, in June 2009, after taking many months to compile a database about the detainees, the DOJ lawyers in my client Mohammed Jawad's habeas corpus case, indicated that it would take months to search the database for relevant discovery because it was so large and unwieldy.⁵³ Another technique that was both popular and effective was to overclassify discovery, declaring almost every scrap of information related to detainees to be classified or otherwise protected, forcing habeas counsel to utilize time-consuming and cumbersome procedures to review documents and submit court filings.⁵⁴ These tactics ensured that the public was kept in the dark to the maximum extent possible, denying a public relations coup to the "terrorists." For example, in Mohammed Jawad's habeas corpus case, the government sought to protect information that was already clearly in the public domain, and, indeed, freely available in unclassified court filings on the DOD military commissions' website related to his criminal case.⁵⁵ The Judge assigned to the case even commented that much of the information the government was seeking to protect could be found on the internet.⁵⁶

Another prong of the counterlawfare strategy was to invoke the state secrets privilege in order to degrade or deny the ability of the enemy (or at least those opposed to Administration policies) to pursue lawsuits with the alleged potential to harm our national security interests. The Bush Administration used this privilege extensively and more aggressively than prior administrations by seeking to use it, often successfully, to get lawsuits dismissed completely, rather than to selectively deny discovery.⁵⁷

⁵³ Resps.' Mot. For an Extension of Time to Comply with the Court's April 27, 2009 Order, *Al Halmandy v. Obama*, 612 F. Supp. 2d 45 (D.D.C. 2009) (No. 05-2385), available at http://www.aclu.org/files/images/asset_upload_file851_39693.pdf.

⁵⁴ I was granted a TS-SCI clearance by the Pentagon in 2008 and had the opportunity to review thousands of pages of classified documents in my role as defense counsel in the Office of Military Commissions from April 2008 to August 2009. Frequently, the basis for classifying a particular document was not clear. I gradually came to the conclusion that many items were classified solely because of their potential to embarrass the United States, rather than on the basis of any real national security concern.

⁵⁵ *Al Halmandy v. Obama*, 612 F.Supp.2d 45 (D.C. Cir. 2009); See Mohammed Jawad - Habeas Corpus, ACLU, <http://www.aclu.org/national-security/mohammed-jawad-habeas-corpus>. I was Mohammed Jawad's defense counsel before the military commissions and co-counsel on his writ of habeas corpus. See Mohammed Jawad, <http://www.defense.gov/news/commissionsJawad.html> (demonstrating that the Department of Defense was posting on its website unclassified court filings relating to Jawad's case beginning in January 2008) (last visited Oct. 10, 2010).

⁵⁶ *Al Halmandy v. Obama*, Civil Case 05-2385 (ESH) Transcript of Hearing, July 26, 2009, 21-22, available at http://www.aclu.org/files/pdfs/safefree/jawad_transcriptofhearing.pdf ("Have you read the blogs on this case? It's just --- everything is public. Everybody knows about it.")

⁵⁷ For example, the state secrets privilege was used to defend against lawsuits involving extraordinary rendition. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 951 (9th Cir. 2009) ("The United States government intervened, asserting the state secrets privilege and,

Yet another example of counterlawfare was the Administration's frequent references to the Manchester Manual, an al-Qaeda handbook found in Manchester, England, in 2000, which the Administration claimed instructed al-Qaeda members, if captured, to make false assertions of torture.⁵⁸ If a weak non-state actor were to make false accusations of torture against its more powerful democratic nation enemy, it would be a classic example of lawfare. The DOD frequently cited the existence of the Manual (and the fact that it was found in different translations in various parts of the world) in support of their claims that reports of detainee abuse were manufactured or exaggerated, and not to be trusted.⁵⁹ DOD officials also used the Manual to convince the American public of the need to use enhanced interrogation techniques: "There's a document called the Manchester Manual that was picked up in a search in Manchester and has surfaced in Afghanistan and elsewhere. It's the al-Qaeda manual, basically. There is a very lengthy chapter on counter-interrogation techniques. These are sophisticated terrorists who know how to avoid interrogation."⁶⁰

on that basis, moved for dismissal."), *rehearing en banc granted*, 586 F.3d 1108 (9th Cir. 2009); *El-Masri v. United States*, 479 F.3d 296, 301 (4th Cir. 2007) ("The United States moved to dismiss the Complaint, contending that its interposition of the state secrets privilege precluded the litigation of El-Masri's causes of action.") *cert denied*, *El-Masri v. United States*, 552 U.S. 947 (2007). The state secrets privilege has also been used to defend against warrantless domestic wiretapping. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) ("The government countered that the suit is foreclosed by the state secrets privilege an evidentiary privilege that protects national security and military information in appropriate circumstances."); See Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778 (2010); Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201 (2009).

⁵⁸ Jane Mayer, *The Experiment: The military trains people to withstand interrogation. Are those methods being misused at Guantánamo?*, THE NEW YORKER, July 11, 2005, at 60, available at http://www.newyorker.com/archive/2005/07/11/050711fa_fact4 ("The military officials who run the Guantánamo prison maintain that almost all of the detainees' charges are untrue. A training manual written by Al Qaeda leaders, which is known as the Manchester Manual, because a copy of it was confiscated during a 2000 raid in England, counsels Islamists to 'complain of mistreatment while in prison' and say that 'torture was inflicted on them.' Bumgarner said, 'They are trained to make false accusations. It's part of their P.R.'").

⁵⁹ See, e.g., Donna Miles, *Al Qaeda Manual Drives Detainee Behavior at Guantánamo Bay*, AMERICAN FORCES PRESS SERVICE, June 29, 2005, available at <http://www.defense.gov/news/newsarticle.aspx?id=16270>; Dep't of Defense, Briefing on Detainee Operations at Guantánamo Bay (Feb. 13, 2004), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2071> ("Some of you may be familiar with a document called the Manchester Manual. This was a document that was picked up in a search in Manchester, England and has surfaced in various other venues, including in Afghanistan. It's really the al-Qaeda manual, and in it is a large section which teaches al-Qaeda operatives counterinterrogation techniques: how to lie, how to minimize your role.").

⁶⁰ Paul Butler, Principal Deputy Assistant Secretary of Defense, *The Detainees*, PBS NEWSHOUR (Feb. 13, 2004), http://www.pbs.org/newshour/bb/terrorism/jan-june04/detainees_2-13.html.

This counterlawfare campaign extended beyond a public awareness campaign and included responses to international legal institutions. For example, the Manchester Manual was invoked in response to questions from the Committee Against Torture, the U.N. body responsible for ensuring compliance with the Convention Against Torture, about allegations of abuse and torture in U.S. detention facilities. According to Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs at the DOD,:

Question 8 concerns the Committee's interest in measures to remedy command and operational issues at DoD detention facilities in light of what the Committee describes as "numerous allegations of torture and ill-treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison." The United States would like first of all to address an underlying misconception that is the basis for the Committee's question. While the United States is aware of allegations of torture and ill-treatment, and takes them very seriously, it disagrees strongly with the assertion that such are widespread or systemic. As Mr. Bellinger stated in his opening remarks, these allegations must be placed in context: they relate to a minute percentage of the overall number of persons who have been detained. Moreover, not everything that is alleged is in fact truth. For example, it is well-known that al Qaeda are trained to lie. The "Manchester Manual" instructs all al Qaeda members, when captured, to allege torture, even if they are not subjected to abuse.⁶¹

But were the Bush Administration officials accurately characterizing the Manchester Manual? According to one commentator's analysis, they were not:

Where the Manchester Document instructs its reader to "ask that evidence of his torture be entered in subsequent legal proceedings," it is not directing him to fabricate abuse claims. Written in the expectation that its recruits would be detained by... enemy Arab regimes, the manual anticipates torture as an inevitable fact, and simply urges captives to report the treatment they receive. Through the years, senior Bush administration officials repeatedly distorted these instructions to cast doubt on abuse claims.⁶²

If this analysis is correct, then the repeated references to the Manchester Manual are more appropriately described as propaganda, rather than counterlawfare.

An additional action that could be characterized as an example of counterlawfare was President Bush's unsigned of the Rome Statute of the International Criminal Court in May 2002, followed by an aggressive dip-

⁶¹ *United States' Response to the Questions Asked by the Committee Against Torture*, U.S. DEPT OF STATE, (May 5, 2006), <http://www.state.gov/g/drl/rls/68561.htm>.

⁶² Larry Siems, *The Battle Lab*, THE TORTURE REPORT, Chapter 5, Part 2, (Sept. 03, 2010 15:54), <http://www.thetorturereport.org/report/chapter-5-part-2-new-battle-lab>.

lomatic arm-twisting campaign which resulted in over one hundred countries signing so-called Article 98 bilateral immunity agreements with the United States.⁶³ Under the terms of these agreements, these countries, even those who were signatories to the Rome Statute, agreed not to cooperate with the ICC with regard to U.S. citizens. These actions have largely blocked the ability of the ICC to hold American citizens accountable (or at least force them to respond) for alleged war crimes and crimes against humanity. The Bush Administration cited concern over meritless “politically motivated criminal accusations, investigations, and prosecutions,” in other words, citing lawfare, as a primary reason for withdrawing from the treaty and seeking Article 98 agreements.⁶⁴

C. *Delegitimize*

When efforts to deny access to the courts fail, a final prong of the counterlawfare strategy could be to delegitimize enemy-sponsored efforts to use the law and legal institutions by directly attacking those responsible for filing such lawsuits. Legal expertise is required to exploit and manipulate the law to commit lawfare, and a lawfare strategy is only as effective as the lawyers who frame the legal arguments and litigate the legal claims. If the legitimacy of those lawyers can be effectively undermined, the force of their arguments can be blunted. The delegitimization of the messengers is especially important when their message is logical and forceful.

The messages of the Gitmo bar—emphasizing themes of human rights, fairness, due process, the rule of law, and open and transparent government—were especially dangerous messages to the Bush Administration because such themes resonate so profoundly with much of the American public and many of our allies, and also because the Bush Administration itself was attempting to use many of the same themes to describe its own policies in Afghanistan, Iraq, and elsewhere. In order to blunt these messages, the messengers—the lawyers—had to be portrayed as extremist ideologues, glib silver-tongued subversives who speak the language of American values but secretly sympathize with the terrorists they represent. Put in military terms, when lawyers represent legitimate military targets (detainees alleged or determined to be enemy combatants), then the lawyers themselves become legitimate military targets, or, at the very least, acceptable collateral damage. Of course, American lawyers cannot just be killed or locked up, but they can be labeled, and maligned. Thus, detainee counsel

⁶³ Letter from John R. Bolton, Under Sec’y of State for Arms Control and Int’l Sec., to Kofi Annan, Sec’y Gen. of the U.N., (May 6, 2002), *available at* <http://amicc.org/docs/bolton.pdf>.

⁶⁴ John R. Bolton, *American Justice and the International Criminal Court*, 26-2 DISAM J. OF INT’L SEC. MGMT. 28, 29 (2003/2004) (presenting excerpts from the remarks presented to the American Enterprise Institute in Washington D.C., November 3, 2003).

should not be referred to as civil rights lawyers, human rights lawyers, Constitutional lawyers, or *pro bono* lawyers, but as “al Qaeda lawyers” or “terrorist lawyers.” And when you can’t defeat them in court on the merits, then you can at least delegitimize them by challenging their motives, values, and loyalties.

Thus, the campaign to discredit and demonize the Gitmo bar can be understood as a logical continuation of the broader counterlawfare strategy. But does that make it right?

D. Attacking the Gitmo Bar: Legitimate Counterlawfare?

When one examines the nature and purposes of the detainee litigation, it is clearly inappropriate to label any of it as lawfare, and therefore inappropriate to fight it with counterlawfare. As I wrote in an opinion piece in the online journal *Truthout*:

Even accepting that there may be a few actual al-Qaeda terrorists represented by American lawyers, if one were to review the hundreds of thousands of pages of legal documents filed on behalf of all the Guantánamo detainees by American lawyers over the last eight plus years, one would be hard pressed to find a single sentence that could be construed as pro al-Qaeda or pro-terrorism, in the sense of endorsing the al-Qaeda ideology or endorsing terrorist methods.

So, what exactly have the “pro-terrorist,” “pro al-Qaeda” lawyers been fighting for?

In essence, the Gitmo Bar, as we detainee lawyers proudly refer to ourselves, fought for the restoration of the rule of law in the treatment of detainees . . . The bulk of the litigation on behalf of detainees has focused on three core principles:

First, the Gitmo Bar fought for humane treatment for all detainees and against torture, cruelty and abuse. Humane treatment is the baseline guaranteed by Common Article 3 of the Geneva Conventions for all persons detained in war, and is a basic human right. The Bush administration said Common Article 3 didn’t apply. The Supreme Court said otherwise.

Second, the Gitmo Bar fought for the right of detainees to be informed of the basis for their detention and to have an opportunity to prove their innocence in a court of law. The Supreme Court has repeatedly affirmed that detainees had this right.

Third, the Gitmo Bar fought for the right of the few detainees facing criminal charges to be tried “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” as guaranteed by the Geneva Conventions. The Supreme Court agreed that detainees are entitled to nothing less, invalidating the

original kangaroo court, military commissions devised by the Bush administration.⁶⁵

Another point that must be made is that lawfare, by definition, is a weapon of war utilized by our enemies. The habeas corpus litigation was aimed at determining if the detainees at Guantánamo were even properly considered to be the enemy. The vast majority of detainees have been voluntarily released by the United States after determining they were not (or no longer) enemy combatants. Among those asserted by the United States to be enemy combatants, the error rate has been appallingly high. As of September 2, 2010, the current habeas scorecard is 37-15 in favor of the detainees.⁶⁶ That is, 70% of the detainees to have their day in court have been determined not to be lawfully detained enemy combatants by federal judges, whose loyalty to the United States presumably is not subject to question. It strains credulity to label counsel for wrongfully detained men “terrorist lawyers” or to describe their efforts to free innocent persons as “lawfare.”⁶⁷

As Brooke Goldstein has stated,

Lawfare is not something that persons engage in the pursuit of justice and must be defined as such to have any real meaning, otherwise, we risk diluting the phenomenon and feeding the inability to distinguish between what is the correct application of the law on the one hand and what is lawfare on the other.⁶⁸

The father of “lawfare,” General Dunlap similarly rejected the demonization of the defense bar as an appropriate counterlawfare tactic in a 2007 speech: “To be clear, I condemn any interpretation of lawfare which would cast as terrorists those legitimately using the courts to challenge any governmental action.”⁶⁹ In a 2008 law review article, he further criticized attacks on the loyalties of detainee counsel: “[T]here is no need to separate the duty of a patriot from that of an advocate. We believe defense counsel in virtually

⁶⁵ David Frakt, *In Praise of the Gitmo Bar*, TRUTHOUT (March 11, 2010), <http://www.truth-out.org/in-praise-gitmo-bar57583>.

⁶⁶ *Guantanamo Bay Habeas Decision Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS (Sept. 7, 2010), <http://ccrjustice.org/learn-more/faqs/guantanamo-bay-habeas-decision-scorecard>.

⁶⁷ That has not stopped the most ardent critics of the Gitmo bar. See Marc Thiessen, *Where Are the Gitmo Goatherds?*, WASHINGTON POST (May 31, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/05/31/AR2010053101702.html> (“Liz Cheney was right—the folks she dubbed as al-Qaeda lawyers really are al-Qaeda lawyers.”).*Id.*

⁶⁸ Goldstein, *supra* note 19.

⁶⁹ Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, Speech to ABA 17th Annual Review of the field of National Security Law Conference (Nov. 16, 2001).

every instance—military and civilian—are patriots, carrying out a vital function in a democracy built upon the rule of law.”⁷⁰

Professor Luban nicely sums up the counterlawfare efforts directed at the Gitmo Bar: “The lawfare idea is, fundamentally, a paranoid overreaction to perfectly legitimate legal challenges to Guantánamo detentions.”⁷¹

V. CONCLUSION

While the counterlawfare concept could help to explain many of the Bush Administration’s actions, the question remains whether the actions described above are legitimate uses of counterlawfare. One problem with the counterlawfare paradigm is that counterlawfare strategies and tactics are only appropriately applied to actual lawfare tactics by the enemy—to abusive, meritless legal actions. Just as the invasion of Iraq was premised on the theory of preemptive self-defense, the Bush Administration’s counterlawfare strategy was a preemptive one, seeking to bar all legal actions of any kind by the enemy before they were made or even contemplated. The counterlawfare weapon, as wielded by the Bush Administration, was a very blunt instrument, sweeping away all litigation, legitimate or illegitimate, without regard to its merit or source. One scholar has described the overreaching of the counterlawfare strategy this way:

These critics [like David Rivkin, Casey, and Yoo] seem to posit that while the administration can and must assert the law in defense of its practices, others who do so thereby give aid and comfort to the enemy. They also assume that any legal challenge to practices that the administration considers to be in the context of the war on terror is lawfare, regardless of whether or not the specific case arises in a situation of armed conflict.⁷²

In several instances, the counterlawfare strategy clearly backfired on the Administration, as it was dealt one defeat after another by the courts, leading to persuasive arguments by critics, such as Scott Horton, that it was the U.S. Government, not the detainees, who were engaged in lawfare, and helping to erode popular support for the war. It is simply not convincing to label legal efforts as “lawfare” when the alleged enemy litigants are repeatedly victorious in the home team’s courts, up to and including the highest court in the land. Indeed, one scholar argues that the Supreme Court itself rejected the idea of detainee litigation as lawfare.⁷³

⁷⁰ See Charles J. Dunlap, Jr. and Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 438.

⁷¹ Luban, *supra* note 30, at 2021.

⁷² Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, n.59 (2008).

⁷³ Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 892 (2009) (“The Court

There is, of course, an alternative explanation for the actions of the Bush Administration described above. It could be argued that these actions were not part of a coherent counterlawfare effort—a legitimate response to concerns of *lawfare*—but rather were a response to what might be called “*lawfear*.” Under the *lawfear* theory, the Bush Administration’s efforts to avoid the legal review and scrutiny of their actions that detainee and other war-related litigation would engender was not based on a belief that such lawsuits would be frivolous, abusive, distracting, and a waste of time, but rather the opposite. They feared discovery by zealous defense counsel and review by independent judges because they knew that their actions would not survive a searching and unbiased legal review. They did not want to expose the flimsy legal justifications and paltry intelligence that supported their actions. They feared that if lawyers (other than trusted ideologically-compatible insiders) and courts became involved in reviewing the Administration’s actions in the War on Terror, they might be precluded from carrying out programs which the administration considered essential as part of their national security strategy, for they knew that such programs were legally dubious at best. They feared that domestic support for the war would wane if the American public knew what was really going on. They even feared criminal prosecution for extralegal acts that they were authorizing.

Certainly, many senior Bush Administration officials had legitimate reason to be concerned about all of these things. Nevertheless, I do not believe that the *lawfear* hypothesis alone can account for everything. For one thing, the true believers in the Bush Administration have never acknowledged and do not appear to believe that they did anything wrong. More to the point, there was definitely a concerted effort by senior lawyers within the Administration, especially the self-styled “war council,” to develop a comprehensive and coherent legal strategy in the war on terror. While reasonable people can and do disagree with many aspects of the legal strategy, it is hard to dispute that there was one.⁷⁴ While the propriety of the Administration’s overall legal strategy and whether specific actions (other than the inappropriate demonization of the Gitmo bar) constituted appropriate counterlawfare is beyond the scope of this short Article, I believe the concept of counterlawfare fairly captures much of what the Administration was trying to do. I am hopeful that the concept of counterlawfare can be further developed in subsequent articles and that it will provide a useful analytical framework for developing appropriate legal strategies in future conflicts.

decisively rejected the idea that detainee litigation itself was lawfare, as well as the notion that lawyers were too dangerous to be allowed to represent detainees.”)

⁷⁴ See David J. R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammed Jawad*, 22 HARV. HUM. RTS. J. 1 (2009).