

**The Trial of Salim Ahmed Hamdan:
Constitutional Challenge to Executive Power and the First
War Crimes Trial of a Guantanamo Detainee**

Handout Materials

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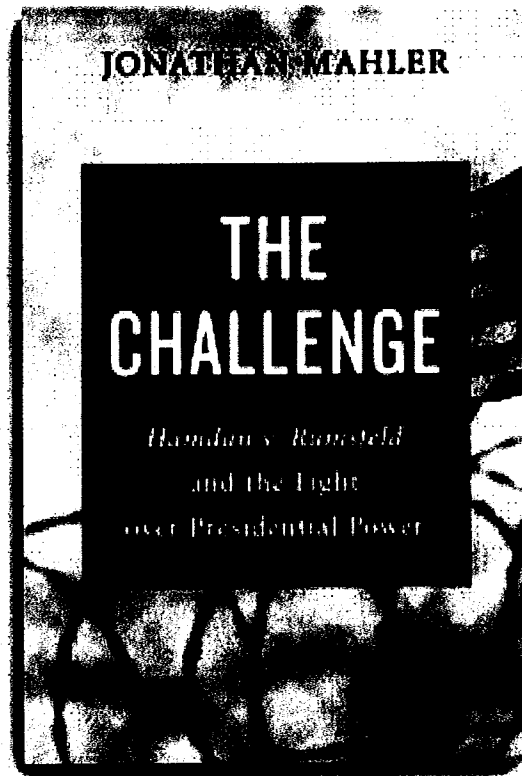
**THE TRIAL OF SALIM AHMED HAMDAN
CONSTITUTIONAL CHALLENGE TO EXECUTIVE POWER AND THE
FIRST WAR CRIMES TRIAL OF A GUANTANAMO DETAINEE**

CHRONOLOGY OF EVENTS

- 1969 (approx.) Hamdan born in a small village in the Handhramout region of Yemen
- 1996..... Hamdan recruited to support Muslims struggling against persecution by communists in Tajikistan
- 1996..... Upon returning to Yemen, Hamdan employed by Osama bin Laden as a driver responsible to transport agricultural workers to and from a farm outside Jalalabad
- August 7, 1998 U.S. Embassy bombings in East Africa, suicide truck-bomb attacks in Dar es Salaam, Tanzania, and Nairobi, Kenya
- October 12, 2000..... Bombing of the U.S. Navy destroyer USS Cole by waterborne suicide bomber while ship anchored in Port of Aden, Yemen
- September 11, 2001 Attacks of 9/11 by coordinated suicide hijackers aboard commercial jet aircraft, in New York City, northern Virginia, and western Pennsylvania
- September 18, 2001 Authorization for Use of Military Force ("AUMF"), empowering President Bush to use military to apprehend those responsible or anyone harboring them
- November 13, 2001 Military Order – Executive Order signed by President Bush establishing military commissions for Guantanamo prosecutions
- November 24, 2001 After dropping off his wife and daughter at Pakistan border, Hamdan apprehended at a roadblock while returning to Kandahar
- November 30, 2001 Hamdan taken to undisclosed location for 30 days
- December 30, 2001 Hamdan taken to Bagram Air Base, Afghanistan
- February 2001 Hamdan taken to Kandahar Detention Facility, Kandahar, Afghanistan
- February 7, 2002 President Bush decides that Geneva Conventions do not apply to conflict in Afghanistan or to detainees captured there

- April 2002 Hamdan taken to Naval Station Guantanamo Bay, Cuba
- July 3, 2004 President Bush announces he has "reason to believe" that Hamdan was member of al Qaida or engaged in terrorism, and therefore subject to trial before Military Commission
- July 14, 2004 Hamdan formally charged in ***U.S. v. Hamdan*** with conspiracy to commit terror and designated for trial before Military Commission
- December 18, 2003 Lt. Commander Charlie Swift, U.S. Navy JAG Corps, receives orders to be Hamdan's detailed military counsel for all proceedings
- January 22, 2004 Lt. Commander Swift is permitted to meet Hamdan, conditioned on negotiating a guilty plea to unstated charges
- January 30, 2004 Lt. Commander Swift meets with Hamdan
- February 12, 2004 Deadline to indicate Hamdan's "willingness to enter into a pretrial agreement"
- February 12, 2004 Pursuant to Article 10 of the Uniform Code of Military Justice ("UCMJ") , Lt. Commander Swift demands that Hamdan be informed of charges and be given trial
- February 23, 2004 Department of Defense response: "UCMJ does not apply"
- April 6, 2004 Perkins Coie files Petition for Writ of Habeas Corpus in ***Hamdan v. Rumsfeld*** before U.S. District Court for the W.D. of Washington on behalf of Lt. Commander Swift as "next friend" of the Accused
- April 23, 2004 Government responds with Motion to Hold Case in Abeyance pending U.S. Supreme Court's determination whether federal jurisdiction exists
- May 7, 2004 Hearing before U.S. District Judge Robert Lasnik
- May 11, 2004 Judge Lasnik grants stay but sets hearing for September 2004
- June 28, 2004 U.S. Supreme Court issues decisions in ***Rasul v. Bush*** and ***Hamdi v. Rumsfeld***
- August 2004 Hamdan's case transferred to U.S. District Court for the District of Columbia as a result of U.S. Supreme Court rulings
- October 25, 2004 Hearing before Judge William Robertson in District of Columbia in transferred case, ***Hamdan v. Rumsfeld***
- November 8, 2004 Judge Robertson grants Petition for Writ, stopping prosecutions before Military Commission at Guantanamo

- July 15, 2005 D.C. Circuit reverses Judge Robertson, reinstating prosecutions before Military Commission at Guantanamo
- November 7, 2005 U.S. Supreme Court issues writ of certiorari and grants review in ***Hamdan v. Rumsfeld***
- January 12, 2006 Motion to Dismiss filed in Supreme Court based on Detainee Treatment Act's strip of federal jurisdiction
- March 28, 2006 Argument before the United States Supreme Court in ***Hamdan v. Rumsfeld***
- June 29, 2006 Supreme Court issues its decision in ***Hamdan v. Rumsfeld***, reversing D.C. Circuit Court of Appeals, stopping prosecutions before Military Commission at Guantanamo
- October 2006 Congress passes Military Commissions Act of 2006 ("MCA"), reinstating prosecutions before Military Commission at Guantanamo
- April 2007 Hamdan recharged under MCA with conspiracy to commit terror and material support for terrorism
- June 2007–May 2008 Pretrial hearings
- June 12, 2008 ***Boumedienne v. Bush*** decided by U.S. Supreme Court
- July 14–18, 2008 Military Judge Keith C. Allred holds hearings on motions re-filed in light of ***Boumedienne*** decision
- July 17, 2008 U.S. District Judge Robertson holds hearing on Hamdan's reinstated Petition for Writ of Habeas Corpus in ***Hamdan v. Rumsfeld II***, in light of ***Boumedienne***, and denies relief
- July 21, 2008 Trial begins at Guantanamo before Military Commission in ***U.S. v. Hamdan***
- August 4, 2008 Closing arguments at trial
- August 6, 2008 Verdict on guilt
- August 7, 2008 Sentencing verdict
- November 25, 2008 Hamdan transported to Sana, Yemen, to serve last month of sentence in Yemeni Political Security Prison
- January 8, 2009 Hamdan released



Excerpts from Jonathan Mahler's [The Challenge](#)
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For more information on the case, including
legal briefs and trial transcripts, go to
hamdanvrumfeld.com

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EVEN AFTER CONGRESS passed the Military Commissions Act, controversy continued to swirl around the commissions. In the fall of 2007, the chief prosecutor, Air Force colonel Morris Davis, resigned in protest, publicly accusing the Pentagon of interfering with his ability to do his job by pressuring him to pursue “sexy” cases in advance of the 2008 presidential election.

Not long after, Davis elaborated on his criticism of the Pentagon’s handling of the military commissions in an op-ed for the *New York Times*. Davis wrote that he had argued, unsuccessfully, against using evidence obtained through waterboarding at the war-crimes trials: “To do otherwise is not only an affront to American justice, it will potentially put prosecutors at risk for using illegally obtained evidence.”

Days after the op-ed was published, Davis publicly recounted a conversation with William Haynes, the Pentagon’s general counsel, which cast further doubt on the fairness of the commissions. “We can’t have acquittals, we have to have convictions,” Davis recalled Haynes telling him. “If we’ve been holding these people for so long, how can we explain letting them get off?”

For its part, the Bush administration was pressing ahead with its plans to try Hamdan.

McMillan and Schneider were now serving as lead counsel. With Swift out of the Navy, Hamdan had been assigned a new military lawyer, Lieutenant Commander Brian Mizer, the thirty-one-year-old

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son of an Air Force master sergeant who joined the Navy's JAG Corps after graduating from law school in 2000. Mizer visited Hamdan regularly and quickly became a full partner in the legal strategizing for the case.

In December 2007, Hamdan's new team flew down to Guantánamo for a hearing on whether their client was an unlawful enemy combatant, a prerequisite for trial by military commission. Swift, too, was on hand, only now in civilian clothes and with two students from his national security law seminar at Emory.

Hamdan's lawyers made a two-pronged argument. First, they contended that their client wasn't a combatant at all, but rather a civilian employee of bin Laden's. If Hamdan was found to be a combatant, their argument continued, he certainly wasn't an unlawful one; he was allegedly transporting weapons for the Taliban, which was operating as the *de facto* government of Afghanistan.

Judge Allred rejected both arguments, ruling that Hamdan was not part of a legitimate army and had been actively engaged in hostilities against the United States. Hamdan's military commission was scheduled for May 28, 2008.

McMILLAN, SCHNEIDER, AND MIZER spent the winter drafting motions to stop the trial. Among other things, they argued that the new charges filed against Hamdan under the Military Commissions Act—conspiracy and material support for terrorism—were invalid because they had not been on the books when Hamdan was captured. As such, the charges violated the *ex post facto* clause of the Constitution, which protects individuals from being tried for acts that are made criminal retroactively. Inspired in part by Morris Davis's allegations, Mizer conceived and drafted a motion accusing political appointees inside the Pentagon of "unlawful command influence"—essentially, using their status to interfere with the impartiality of the military commissions process.

None of their arguments found any traction with Allred.

Meanwhile, Hamdan's mental and emotional deterioration continued. In late 2007, he was transferred from Camp 6 into Camp 5, an-

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other maximum-security facility with minimal contact among the prisoners. According to Emily Keram, who had by now spent more than seventy hours with Hamdan, he was suffering from post-traumatic stress syndrome and major depression. He heard voices inside his head, talked to himself, and was at risk of becoming suicidal.

Hamdan's lawyers could see that their client was falling apart. With the trial now approaching, there were critical legal issues to discuss during their visits to Guantánamo; yet even in his more lucid moments, Hamdan refused to talk about his case. Instead, he remained fixated on getting transferred back to Camp 4. The lawyers asked Judge Allred to compel the government to move their client back into the general prison population so that he might be able to meaningfully participate in his own defense. Allred declined to rule on their motion.

McMillan felt at least partly to blame for his client's worsening condition. He and Swift took very different approaches to managing Hamdan. Swift's first priority had always been to buoy his client's spirits. He was constantly assuring Hamdan that good news was on the horizon, he just needed to hang in there a little longer.

Now that they had been to the highest court in America and won—and yet Hamdan was still facing the very real possibility of a life sentence—it was much harder for McMillan to project optimism. He was wary of filling his client with false hopes. McMillan also wanted to counteract what he considered to be Swift's often undue optimism, to give Hamdan a clear, unvarnished sense of exactly what they were up against if they went to trial. McMillan went so far as to write an extensive analysis of the case for Hamdan, detailing the government's evidence against him and the range of possible sentences that loomed were he convicted. His conclusion was that Hamdan should think seriously about trying to cut a deal—that a guilty plea was probably his best shot at seeing his family again. Going to trial, McMillan wrote, meant running the very real risk of dying in prison.

Hamdan's long stretch in solitary coupled with McMillan's bleak outlook finally pushed him over the edge during his pretrial hearings in April 2008. Hamdan interrupted the ongoing proceedings and, using the halting English that he had learned in Guantánamo, announced his intention to boycott his own trial.

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"I refuse to participating in this and I refused all the lawyers that is presiding on my behalf," he said. "There is no thing as justice here."

"Mr. Hamdan," Judge Allred replied, "I think you should have great faith in American law. You have already been to the Supreme Court. The Supreme Court of the United States said to the president, 'You can't do that to Mr. Hamdan.' You were the winner. Your name is printed in our law books."

Unmoved, Hamdan asked to be escorted out of the courtroom and was taken into a nearby holding cell. His lawyers sent word through a military guard that they wanted to see him. The guard returned with Hamdan's response: "He said that if you try to talk to him he will create a disturbance."

The following morning, Hamdan refused to leave his cell in Camp Delta for the final day of hearings. The proceedings continued without him. His attorneys sat mute at the defense table, in deference to their client's wishes.

On the plane back to Andrews Air Force Base that afternoon, Hamdan's lawyers debated how to proceed. They couldn't ignore his wishes to no longer speak on his behalf, yet they could hardly sit silently at counsel's table during the military commission itself—which was now just one month away—as the prosecution leveled a barrage of un rebutted allegations against him.

Back in Seattle, the Perkins lawyers quickly drafted a request to Judge Allred asking him to delay the start of Hamdan's commission so they could research the ethics of what to do and order a psychiatric evaluation of their client to determine if he was mentally competent to make such a potentially self-destructive decision. As they awaited word from Allred on their request, McMillan and Schneider received seven letters from Hamdan in which he repeatedly reaffirmed his desire that they no longer speak on his behalf.

Allred agreed to delay the trial for six weeks. The final pretrial hearings were rescheduled for Monday, July 14, with opening arguments starting the following week.

McMillan and Schneider now turned their attention to their client, visiting him unannounced during the first week in June. Inside

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a trailer in Camp 5, the lawyers told Hamdan that they couldn't make any promises, but that one thing was certain: If he didn't at least try to mount a real defense, a life sentence was inevitable.

Hamdan was angry and skeptical. He listened to the Perkins lawyers, but refused to talk about the case. He seemed genuinely torn. He was convinced that resistance was pointless, that his fate had already been sealed; yet at the same time, he didn't want to give up all hope.

McMillan left after two days. His father had died suddenly of respiratory failure in late May and he had to get to Iowa for the funeral. Schneider stayed on to continue to press Hamdan and finally managed to bring him around. Hamdan wasn't willing to state explicitly that his boycott was over—he liked having something he could hold over his lawyers, a little bit of leverage in his otherwise powerless life—but he did agree to allow Schneider, McMillan, Mizer, and Swift to continue representing him.

JUST AS HAMDAN'S LAWYERS were making their final preparations for trial, the possibility emerged for a last-minute reprieve. The Supreme Court again rebuffed the president on Guantánamo Bay, ruling in a case called *Boumediene v. Bush* that the Military Commissions Act—the new law under which Hamdan was to be tried—represented an unconstitutional suspension of the right to habeas corpus.

As far as Hamdan's lawyers were concerned, if their client was entitled to the constitutional right of habeas corpus, he was also entitled to other constitutional rights being denied him by his military commission. Working closely with Katyal, they filed papers with Judge Robertson urging him to again stop the commission.

McMillan and Katyal argued the case before Robertson in federal court in Washington, D.C., while Hamdan's final pretrial hearings were taking place in the courtroom on Guantánamo Bay. Given the urgency of the matter, Robertson said he would deliver his verdict from the bench immediately following the oral arguments.

Robertson refused to block the trial. He acknowledged that seri-

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ous constitutional questions remained about the commissions, but ruled that they should be settled on appeal after Hamdan's trial. "Hamdan is to face a military commission designed by Congress under guidelines laid down by the Supreme Court," Robertson said.

But the judge who had handed Hamdan's team their first victory more than three and a half years earlier, setting *Hamdan v. Rumsfeld* on its path to the Supreme Court, had one other point to make before clearing the way for Hamdan's imminent trial. "The eyes of the world are on Guantánamo Bay," he said. "Justice must be done there, and must be seen to be done there, fairly and impartially."

NEARLY SEVEN YEARS after Salim Hamdan had been taken into custody by the United States, he was finally being brought to trial in America's first military commission since World War II.

Hamdan's lawyers were not optimistic. The government had two charges to prove. The lesser of the two, material support for terrorism, was a slam dunk: Hamdan had admitted to serving as a driver for Osama bin Laden, which in and of itself appeared to be enough to assure a conviction.

The more serious charge, conspiracy to commit murder or terrorism in violation of the laws of war, required that the government go a step further and demonstrate that Hamdan had actively and knowingly joined al Qaeda's plot to engage in acts of terrorism against the United States. Hamdan's team was by no means convinced the prosecution had the evidence to support this charge. But they had little confidence that the jurors would be willing to make this distinction--and, more to the point, grant an acquittal to a man who had worked for bin Laden, in whatever capacity.

Indeed, not long before Schneider left for Guantánamo, his wife, Gail, had told him to forget about trying to win: "Your job is to preserve issues for appeal. Don't have any illusions about an acquittal on any charge."

To make matters worse, the final week of pretrial hearings had not gone well for the defense. They had tried to persuade Allred to suppress all of Hamdan's incriminating statements to interrogators, argu-

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ing that they were obtained either by torture or in an atmosphere deliberately designed to disorient him. Hamdan had even taken the stand during the hearings to testify that he had been beaten and threatened by guards in Afghanistan, and subjected to sleep deprivation and sexual humiliation on Guantánamo.

Allred was not entirely unsympathetic to their arguments, and had even agreed to throw out the reports from Hamdan's interrogations at Bagram, where he had been kept in isolation for twenty-four hours a day with his hands and feet tied. But almost everything else—including a videotaped confession from Hamdan that there were two surface-to-air missiles in the trunk of the car he was driving—would be in.

JUDGE ALLRED CALLED Hamdan's military commission to order at a few minutes after nine on the morning of Monday, July 21, 2008, a steamy, cloudless day on Guantánamo. The courtroom was full, though most of the seats were occupied by reporters and human-rights observers. There were surprisingly few representatives from the government, given how much energy the Bush administration had devoted to bringing Hamdan to trial.

Lieutenant Commander Timothy Stone delivered the opening argument for the government in his Navy whites. He began with a quote Hamdan had overheard bin Laden utter on September 11, 2001—"If they hadn't shot down the fourth plane, it would have hit the dome"—and proceeded to paint a portrait of a dedicated jihadi, a man whose job was "protecting and assisting Osama bin Laden elude detection, capture, and, ultimately, justice."

Schneider spoke first for the defense, addressing the jury of three colonels and three lieutenant colonels. "It has been said that no soldier sheds a tear for the enemy," he began. "The evidence in this case will show that this man, Salim Ahmed Hamdan, is not a war criminal who committed war crimes against the United States of America."

It was a much different sort of opening statement than Schneider was accustomed to delivering. Ordinarily, he focused on raising doubts about the prosecution's version of the events. Here, there weren't any meaningful factual disputes: Hamdan *had* worked for bin Laden. But

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that alone didn't make him a war criminal, Schneider explained, urging the jury not to treat the defendant as a stand-in for the true perpetrators of 9/11.

"You are going to hear evidence over the next several weeks that those folks' crimes were horrific, and that the people who were responsible for committing them are treacherous and unrepentant," Schneider said. "The evidence will be, no doubt, that what they accomplished was devastation and destruction of the kind and nature we hope and pray never to see again; the evidence will be that the death and destruction was of the type that would cause any reasonable American to be stunned, to be flabbergasted, to be saddened, to be angry. . . . And the evidence will be such that it will cause any reasonable American to be upset and perhaps to want to exact some measure of revenge and see to it that those people, those responsible, are brought to justice. . . . But all the evidence in this case . . . is going to show that Salim Hamdan was never a member of that conspiracy and that he never perpetrated those acts."

Schneider closed by echoing Robertson's sentiments of a few days earlier, highlighting for the jurors the stakes of the case they were about to consider: "You sit at an important point in time, at a location that will have a profound place in our nation's history, while the world watches."

He had spoken for close to an hour. Settling back in at the defense counsel's table, he was struck by the fact that the jury's attention had never seemed to falter.

OVER THE COURSE OF the next several days, the prosecution sent a parade of witnesses to the stand.

Two members of U.S. Special Forces who had been present in Afghanistan when Hamdan was taken into custody told the story of his capture and the discovery of the two surface-to-air missiles in the trunk of his car. Soufan and several other FBI agents told the narrative of Hamdan's years of service to bin Laden.

The government presented evidence as well, including footage of a 1998 press conference for the Pakistani media in Afghanistan in

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which Hamdan could be seen smiling at bin Laden. There was also a Powerpoint presentation mapping out Hamdan's driving itinerary with bin Laden after both the 1998 embassy attacks and 9/11, and the grainy, black-and-white video of Hamdan's first two interrogations in November 2001. In the video, Hamdan sits cross-legged on the cement floor of a dark cell, his hands bound in front of him, a masked, armed guard behind him. Under questioning, he denies having any connection to bin Laden or al Qaeda, explaining that he was in Afghanistan working for a charity. He acknowledges that there were missiles in the trunk of the car he was driving, but says that it wasn't his car.

Over strenuous objections from the defense, the government also showed a ninety-minute documentary film, a primer on al Qaeda commissioned by the Pentagon called *The al Qaeda Plan*. Assembled by a twenty-nine-year-old self-styled terrorism expert named Evan Kohlmann, *The al Qaeda Plan*—the title was deliberately chosen to echo *The Nazi Plan*, which was shown at Nuremberg—traced the origins and ambitions of the terrorist organization, covering its various attacks in graphic detail.

As the trial unfolded, Hamdan's lawyers quickly settled into something of a routine. They shared adjoining trailers in Camp Justice, at the bottom of the hill where the courthouse was perched. They rose early—Swift had forgotten his alarm clock, so it fell to his roommate, Schneider, to wake him up—and gathered on the small wooden deck connecting their trailers to drink coffee and discuss the day ahead. In the afternoon, following the proceedings, they would go over everything that had taken place with Hamdan. They would work in their office through the evening, take a short break for a swim and dinner, and then finish prepping for the day ahead in their trailers.

McMillan was still trying to persuade Hamdan to offer the government a plea deal, but he and the rest of the defense team were not unhappy with how the trial was progressing. The government hadn't sprung any surprises on them, and they had scored some points of their own. When one FBI agent showed an organizational chart of al Qaeda identifying Hamdan as a courier and bodyguard, Schneider pointed out to the jury that he was *below* another Yemeni man, Abu Assam Maghrebi, who had already been released from prison.

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The prosecution had made some miscalculations, too. *The al Qaeda Plan* appeared to have backfired. The film had come off as irrelevant and inflammatory. What's more, Hamdan, who had never before seen footage from 9/11, wept audibly at the sight of a man scooping up a young girl on the carnage-strewn streets of lower Manhattan.

The government's various witnesses had spoken in detail about all of the valuable information Hamdan had provided, taking FBI agents and military intelligence officers to bin Laden's residences and guest houses, drawing maps of al Qaeda compounds and training camps, identifying photographs of various al Qaeda figures. The goal in eliciting this testimony had been to demonstrate that the defendant was an al Qaeda insider, but it had also had the unintended effect of raising questions about Hamdan's level of commitment to jihad.

But the government's star witness, Robert McFadden, an officer for the Naval Criminal Investigative Service who had flown down to Guantánamo with Soufan in the spring of 2003 to interrogate Hamdan in Arabic, had not yet testified. The defense had been fighting furiously to keep him off the stand, arguing that Hamdan had been tortured to soften him up for this particular series of interrogations. The night before the trial began, they had received 1,200 pages worth of discovery—documents they had been requesting for months—from the government bolstering their case: detention records confirming that Hamdan had participated in a systematic sleep-deprivation program known as Operation Sandman during the same period of time as McFadden's interrogations.

At the opening of the trial, Judge Allred announced that he was barring McFadden for the time being, but that he was deferring his final decision until the proceedings were underway. On Tuesday, July 29, with the prosecution's case almost complete, Allred recessed the court at noon to write his ruling on the matter.

That afternoon, the defense team took a couple hours off and went to the beach with a six-pack of beer. The conversation quickly turned to Allred. They had lost almost all of their motions, but they had come to respect the judge all the same. They saw him as a principled man struggling to implement the rules of a novel legal system devised by the president and Congress, while at the same time

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trying to preserve the integrity of the laws of war and ensure the defendant a fair trial. Schneider was certain Allred would suppress McFadden's testimony. Still, he spent the evening preparing for a cross-examination that he hoped would never take place.

The following day, Allred announced from the bench that he was going to allow McFadden to testify. He would be the last of the prosecution's fourteen witnesses.

McFadden offered the government's most damaging testimony, portraying Hamdan not just as a driver and bodyguard but as a devoted acolyte of bin Laden committed to jihad's goal of "killing Jews and Christians, expelling them from the Arabian Peninsula." Relating a day-long interrogation that he and Soufan had conducted with the defendant, McFadden said Hamdan had acknowledged swearing a *bayat*, or oath of loyalty, to bin Laden, and had admitted to feeling "uncontrollable passion or zeal" after hearing about al Qaeda's attacks on the U.S. embassies in East Africa and the USS *Cole*, as well as 9/11.

The defense's goal was to undermine McFadden's credibility. Their first opportunity arose unexpectedly before the government's prosecutor had even finished examining their witness. There was a letter on the overhead projector in Arabic, which McFadden was having trouble reading. Schmitz nudged Schneider, whispering in his ear that the page was upside down.

Schneider promptly interrupted the proceedings. "Perhaps, I can help," he said, addressing McFadden. "Do you speak Arabic?"

"Yes," McFadden answered.

"Isn't that upside down rather than right side up?"

Schneider continued to hammer away at McFadden during his formal cross-examination of the witness. The government had provided the defense with fifty pages worth of handwritten notes from Soufan and McFadden's interrogations. Schneider pointed out that nearly all of those notes had been taken by Soufan in Arabic, and that McFadden's notes, which were in English, addressed nothing but logistical details such as what they had served Hamdan for his afternoon snack.

With Schmitz's help, Schneider also identified a discrepancy between Soufan's notes and McFadden's testimony. McFadden had said

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that Hamdan had personally felt “uncontrollable passion or zeal” after the various al Qaeda attacks. But according to Soufan’s notes, Hamdan’s statements were more general: He said the attacks inspired uncontrollable zeal or passion “among the people.”

As for McFadden’s testimony about the *bayat*, Schneider pointed out that not one of Hamdan’s many other interrogators had heard him acknowledge having sworn an oath of loyalty to bin Laden. “For almost two years,” Schneider said, “Mr. Hamdan, cooperative, forthcoming, helpful, information right on the money, he had said ‘no *bayat*.’ Right? You knew that.”

“I didn’t,” McFadden answered.

IT TOOK THE DEFENSE just a couple of days to present their case.

Their most compelling piece of evidence came from an unlikely source: two senior al Qaeda figures on Guantánamo who knew Hamdan from Afghanistan. Both men, one of whom was Khalid Sheikh Mohammed, or KSM, the principal architect of the 9/11 attacks, had agreed to submit written responses to questions from the defense. Their answers were telling. Most notably, KSM scoffed at the notion that Hamdan could have played a meaningful role in any terrorist attack, explaining that Hamdan was a driver, not a soldier: “His nature was more primitive . . . like a Bedouin . . . He was not fit to plan or execute. But he is fit to change trucks’ tires, change oil filters, wash and clean cars, and fasten cargo in pickup trucks.”

The defense’s most significant witnesses—a pair of Special Forces officers who were at Bagram when Hamdan was brought there in December 2001—testified in secret at the government’s request. Their testimony remains classified, but it centered on establishing the extent of the cooperation Hamdan provided to American forces in Afghanistan. (There is even speculation that the officers said Hamdan had offered to help the United States find bin Laden.)

Hamdan’s lawyers decided against calling their client as a witness. It’s always risky to put a defendant on the stand; it means shouldering the burden of making him seem credible. Hamdan’s answers would be coming through a translator, which complicated things even fur-

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ther. The lawyers were worried, as well, that Hamdan would face aggressive questioning about the missiles that had been recovered in the car he was driving. They had repeatedly pressed him to tell them how the missiles had gotten there and where they were going to be used; he had always refused to discuss the issue. (A typical exchange on the subject: Hamdan's lawyers: "Salim we need to talk about those missiles." Hamdan: "Where's my cheesecake?")

Hamdan's team had formulated their own answer to the matter. They were surface-to-air missiles, designed for shooting down helicopters. The logical assumption was that Hamdan was bringing them back to the battle for Kandahar—not for an act of terrorism. As far as Hamdan's lawyers were concerned, this was not a war crime. They called an expert on the law of war to testify to this—in short, to make it clear that even if the missiles were intended to be used against U.S. forces in the battle for Kandahar, this battle was part of a legitimate military conflict between the *de facto* government of Afghanistan, the Taliban, and the U.S.-backed Northern Alliance forces.

ON MONDAY, AUGUST 4, two weeks after the trial began, the two sides delivered their closing arguments. John Murphy, a prosecutor on loan from the Justice Department, spoke for about an hour for the government, laying out the prosecution's case against Hamdan one final time. "Al Qaeda had huge aims, an aim to literally take down the West, to kill thousands, and they have. To create economic havoc, and they have. And they needed enthusiastic, uncontrollably enthusiastic warriors like the accused right there, Salim Hamdan," Murphy said, pointing his finger at Hamdan.

McMillan and Mizer split the closing. Mizer reminded the jury that not a single witness had alleged that Hamdan had played a role in any terrorist attack. Alluding to the secret testimony of the two Special Forces officers—"You know what Mr. Hamdan agreed to do and you know how we squandered that opportunity"—Mizer said it was impossible to infer from Hamdan's conduct that he was a militant jihadi.

McMillan used his remarks to restate and amplify their argument that Hamdan's ties to bin Laden alone did not make him guilty of

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war crimes. If you follow the government's theory to its logical conclusion, McMillan said, "every teacher, every cook, every farmer, every goatherder associated with bin Laden" was a war criminal. "The general is a war criminal, and therefore the driver is, too?" McMillan continued. "No, it didn't work that way in World War II and it doesn't work that way today. Hitler's driver was never charged as a war criminal."

ON WEDNESDAY MORNING, after a little more than a day of deliberations, the jury returned to the courtroom. The bailiff handed Judge Allred a worksheet containing their findings. Allred spent several minutes silently looking them over, before asking the head juror, an African-American Navy captain, to read the verdict out loud. Hamdan was convicted on the charge of material support—but acquitted on the charge of conspiracy.

The defense team was ecstatic. Hamdan was crushed. The moment he heard the word "guilty," he bowed his head and cried softly, using his head scarf to wipe his eyes. Schmitz tried unsuccessfully to console him. Later, when Schneider went to see Hamdan in the courthouse holding cell to tell him that he should be thrilled—he had beaten the most serious charge against him—he found him stretched out on the floor weeping, his head scarf draped over his face.

THE FOLLOWING MORNING, both parties returned to the courtroom for the trial's sentencing phase.

Hamdan's lawyers had already persuaded Allred to give their client credit for time served, a total of sixty months and two weeks, the period of time that had elapsed since he was first designated for trial by military commission. The question for the jury was how much additional time should the defendant spend in prison.

The prosecution wanted him to serve a total of thirty years to life. Their argument, as Murphy put it to the jury, was that the sentence should "reflect the victims' outrage at what he did" and "absolutely keep our society safe from him."

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Swift spoke for the defense. He was meandering, rhetorical, overly emotional, and yet ultimately effective. He finally had the opportunity to deliver the counternarrative he had been working on for years, portraying Hamdan as a poor, uneducated orphan who was drawn to bin Laden not out of ideological fervor but out of financial imperative. "In the Arab world, if you don't have the money to pay for a wife, then you cannot have a wife. You don't have a family," Swift said. "Yes, he looked the other way because they were giving him something he wanted so very badly. Not to attack America, not to attack the world, but to have a family." He answered the government's plea to the jury to consider the outrage of the victims by saying that this trial was not about revenge; it was about justice.

Swift closed with a parable. A young boy with a bird cupped in his hands approaches a wise old man. The boy asks the man if the bird is alive or dead. If the wise old man says the bird is alive, the boy intends to crush it in his hands and say, "No old man, he's dead." If the man says the bird is dead, Swift continued, the boy intends to open his hands and let the bird fly free. But the wise old man says neither. Instead, he says: "The bird is not in my hands. He's in yours, my son."

"For five years, I've carried Mr. Hamdan, I've done everything I could for him. I've done everything to see that justice was done in this case," Swift told the jury. "The fate of Mr. Hamdan is no longer in my hands. It's in yours, and I trust in yours."

THE JURY NEEDED just a little over an hour to determine Hamdan's fate. They returned to the courtroom and sentenced him to sixty-six months. Factoring in time served, that meant just five and a half months. He would be eligible for release before the end of 2008.

Swift let out a yelp and then embraced Hamdan. The rest of the lawyers followed in turn, each one of them in tears.

"I wish you Godspeed, Mr. Hamdan," Judge Allred said. "I hope the day comes when you return to your wife, your daughters, and your country."

"Inshallah," Hamdan replied. "God willing."

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AFTER THE COURTROOM had cleared out, Schneider sat alone in the back row of the gallery reflecting on what had happened—“marveling at how the jury had done something reasonable in a place designed to be unreasonable,” as he would later put it.

How had the jury reached such a surprising result?

The administration wasted no time citing the verdict and sentence as proof that their much-maligned military commissions system was fair. It could just as easily be argued that the verdict and sentence had come not because of but in spite of the system. For starters, Hamdan had been prosecuted for crimes that were not recognized as criminal offenses under international law when they were committed, which is strictly prohibited in any legal system that aspires to dispense justice.

Yet on at least one score, the commissions' detractors were wrong, too. One popular criticism of the commissions was that the juries comprised military men and women who would be less objective than civilians when it came to judging accused terrorists. As it turned out, the opposite was true. As military officers—and in more than one case, combat veterans—Hamdan's jury was comfortable carrying out their duty without emotional static. They listened to the facts of the case, applied the law, and concluded that there was a clear limit to the degree of the defendant's guilt. As one member of the jury panel put it to a reporter, “the evidence . . . simply didn't support the prosecutors' depiction of a hardcore al Qaeda terrorist who hates America and its way of life.”

BUT THE GOVERNMENT WASN'T DONE YET. A few weeks after the trial had ended, the Bush administration asked Allred to reconsider his motion granting Hamdan credit for time served, which would have extended Hamdan's sentence by more than five years. Allred refused.

Even now, though, Hamdan's fate wasn't entirely clear. The United States still considered him an enemy combatant, and the administration had reserved the right to detain all enemy combatants until the

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end of hostilities. Because the hostilities in the war on terror were ongoing—and might very well continue for decades—the government could theoretically try to keep Hamdan in prison indefinitely.

As the months passed without word from the administration about their intentions with respect to Hamdan, his lawyers started making plans to compel their client's release.

This proved unnecessary. Early on the morning of November 26, 2008, a military plane left the airstrip at Guantánamo Bay bound for Sana. On board was prisoner number 149, Salim Hamdan. He served the final month of his sentence in a Yemeni prison and was set free.