Taking on Guantánamo

Assigned to defend a Guantánamo detainee, JAG lawyer Charles Swift joined up with legal scholar Neal Katyal and sued the president and secretary of defense over the new military-tribunal system. With their 2006 Supreme Court victory overridden by the Republican Congress, and Swift’s navy career at an end, they are fighting on.

By Marie Brenner

The whole purpose of setting up Guantánamo Bay is for torture. Why do this? Because you want to escape the rule of law. There is only one thing that you want to escape the rule of law to do, and that is to question people coercively—what some people call torture. Guantánamo and the military commissions are implements for breaking the law. Why build a prison here when there are plenty of prisons in Nebraska? Why is it, when we see photos of Abu Ghraib, we think that it is “exporting Guantánamo”? That it is the “Guantánamo method”?


He could not even get his client a pair of socks. That realization came to Charlie Swift, a lawyer in the navy’s Judge Advocate General’s Corps (JAG), as he landed in Guantánamo. It was December 22, 2006, a few weeks before the fifth anniversary of the arrival of the first enemy detainees at the American naval base in Cuba. Swift had been a JAG defense lawyer for 12 years and was making his 30th visit to Salim Ahmed Hamdan, a diminutive Yemeni who had been held for more than five years. The first time Swift met Hamdan, in January 2004, the prisoner was in shackles. “I am freezing,” Hamdan told him. “Can’t you get me a pair of socks?” After that, Swift brought Hamdan socks. Sometimes his client was given them, sometimes he was not.

Now, nearly three years later, Hamdan was at the center of a landmark Supreme Court case, Hamdan v. Rumsfeld, held up as a symbol of detainees’ rights and the need for the Geneva Conventions, yet he was still mired in legal limbo.

The island, once again, seemed inexpressibly strange to Swift. He always drove past a sign that read HONOR BOUND TO DEFEND FREEDOM. “This is probably not the best sign for this place,” Swift said to himself on one of his first trips. Seeing the rec hall and a McDonald’s, he made notes for a future jury summation: “This is the island of misfit toys.”

An order had been issued just before he arrived. Hamdan was to be taken to Camp Six, a no-fly zone on the base, and placed...
in solitary confinement. His days would be spent in a tiny room kept cold by air-conditioning. Mail from his family in Yemen was withheld for months. Immediately, Swift called Washington to speak to his partner, law professor Neal Katyal. This was the fourth year Katyal had spent his holidays preparing legal briefs on the subject of President Bush's military tribunals. "They've put Salim back into solitary," Swift told him. "That is outrageous," Katyal said. "But what about the notes?" Camp authorities had seized the notes Hamdan took after a recent visit with Swift. Katyal was furious at this violation of lawyer-client privilege.

Through the holidays, Katyal wrote draft after draft of possible briefs for the Supreme Court and the Court of Appeals. He made phone calls trying to learn what the Department of Defense would include in the new guidelines for Guantánamo it was issuing in January. Swift and Katyal were bogged down in procedural delay. A few months after their decisive victory the previous June, when the Supreme Court had declared the military tribunals illegal, Congress had passed an onerous new law, muting the court's ruling on the no-man's-land of Guantánamo. Now the lawyers were planning a new strategy to take before the appellate court. This time, in addition to going up against the administration, they would be challenging Congress.

From the beginning, Swift had been in an untenable situation. He had been asked, as a military lawyer, to defend enemy combatants—the government's term for the men held

Swift dialed Katyal. "I have the guy." He paused. "The only problem is that he was Osama bin Laden's driver."
ter 9/11, it was difficult for most Americans to believe that the hundreds of men swept up around the world could be innocent Mr. Beans. There was, for these men's lawyers, the ongoing struggle against the factor of guilt by association. By denying detainees customary legal rights and a normal trial process, the Bush administration has been able to play to American fears of another terrorist attack.

In the first years of the camp's operation, the outrage of legal groups and human-rights organizations ignited a flurry of books and plays detailing allegations of torture and the deprivation of rights. In constitutional-law classes and international forums, activists railed against the unchecked power of the executive branch. There have been thousands of articles in the press describing how the precedents established under the Bush administration could harm future generations. Journalists Seymour Hersh and Jonathan Mahler and legal scholars Ronald Dworkin and Joseph Margulies, among others, have made important contributions to this country's awareness by detailing hunger strikes, suicide attempts, and alleged atrocities within the camp walls. Historically, there has often been a lag in the country's concern regarding the rights of foreign nationals. It took years for the internment of Japanese-Americans during World War II to register as a national embarrassment. Today, the moral quagmire of Guantanamo is, for many Americans, at best a secondary consideration.

Swift's decision to take on the government would cost him his career in the navy and hurt his marriage. I wanted to understand what had gone on behind the scenes in his historic case. Since he was leaving the navy, I hoped that he might finally feel less constrained in what he could say about the events he had set in motion. In our first meeting, hours passed as Swift spoke nonstop, hardly moving in his chair. By the time we left Starbucks, he was late for a jazz concert. He walked ahead of me briskly, his feet spattered outward, trying to remember where he had parked his car. Had he, I asked him, at any time predicted what would happen to his life if he persisted in his legal crusade? For once, he hesitated before he answered. Looking out over the Bethesda traffic, he said, "My view was if you went down, you went down. And I would say now that, whatever happens, there was honor in that. I was upset by what I perceived as arrogance. And the implication that this was a simple fight. That maybe, by implication, we in the military were simple."

Hamdan was kept in solitary confinement for more than 10 months, lost 50 pounds, and showed signs of deterioration.

I looked at that as an advantage. I knew they were never going to see me coming."

A Special Assignment

Charlie Swift's journey to the Supreme Court began on 9/11 in Florida. He awoke early and was rushing for coffee, knowing that once he was in court outside Jacksonville in his dress whites it would be water for the rest of the day. He was in the process of selecting a jury to hear the case of a chief petty officer accused of stealing $35,000, which he used to bid for women's underwear on eBay. Swift was preoccupied thinking about the case, and it took him a few moments to notice a cluster of people in front of a TV set in a waiting room outside the courtroom. "A plane has flown into the World Trade Center. It is an accident," one person said. Swift's wife, Debbie, was a pilot, and he remembered the last attack on the World Trade Center, in 1993, when six people died and more than a thousand were injured. "Maybe we should cancel the trial today," Swift told the judge. Seventeen minutes later, a second plane hit the other tower.

The next morning at the base, there was a line of traffic four miles long as the Mission Essential call-up started for the military. At home, Swift told Debbie, "This means we have conquered the world. People are going to come and attack us from now on. We are now "the man. We are like England in the last century." Soon an executive order from the White House authorized military commissions. Swift, immersed in his trial work, was not aware of the order, but even if he had been, he would not have had a clear idea of what a military commission was. There have been only a few times in American history when commissions—watered-down trials without possible future review—were instituted. The quality has varied, from exemplary to star-chamber.

A few weeks later, coming out of another trial, Swift was stopped by his commanding officer, who told him, "We're thinking of nominating you to be a defense lawyer in the military tribunals."

"A military tribunal, sir?" Swift was, he tells me, only half listening. The term made him think of The Hague or Spencer Tracy in Judgment at Nuremberg. "I believed that if navy JAG set up the military trials, they would be first-class." He was, however, inexperienced with the practice of what is known as the laws of war—a labyrinth of guidelines based on international agreements such as the Geneva and Hague conventions.

Months passed. As the supervising JAG lawyer in Jacksonville, Swift had a full calendar of cases to monitor or try. The staff would gather and talk about Afghanistan and the threat of war in Iraq, but largely they were absorbed with their personal caseloads—shoplifters, coke users, sailors caught in lewd behavior in public parks.

The navy, army, air force, and Coast Guard each have a JAG Corps. Started during the Civil War with the appointment of a civilian lawyer for a court-martial, the
THE MILITARY

Navy JAG Corps did not become a separate division until 1967. There are now more than 730 Navy JAG officers on active duty.

One day, Navy Captain Dan McCarthy, the JAG chief prosecutor, approached Swift with a sheaf of papers in his hand. "What do you know about the case Ex parte Quirin?" he asked.

"Quirin? I never heard of it, sir."

"I suggest you read it," McCarthy said. "It is going to be the basis of the military tribunals."

That night, Swift stayed up until dawn reading the history of the case that would lay the groundwork for the next phase of his life. In 1942 a small band of Nazi saboteurs landed at Amagansett, Long Island, and at Ponte Vedra Beach, Florida. All of the men had previously lived in America, and two were American citizens. What marked the case was the seeming ambivalence of some of the saboteurs regarding their assignment. Had they arrived to blow up American targets, or were they attempting to gain asylum? One turned himself in to the F.B.I. but was initially dismissed as a hoaxter. The F.B.I. found a briefcase stuffed with $82,000 in cash (a million dollars today) in one saboteur's hotel room. The story captivated the nation.

In charge of the case was Colonel Kenneth Royall, a graduate of Harvard Law School, who understood that his best hope of saving his clients from swift execution was to draw on Ex parte Milligan, a military-tribunal case that dated back to the Civil War, when Abraham Lincoln suspended habeas corpus in order to be able to prosecute Copperheads, those northerners strongly in sympathy with the Confederacy. The Supreme Court ultimately ruled against the president, finding in part that "the Constitution of the United States is a law for rulers and people... under all circumstances." The court's decision remained unchallenged for three-quarters of a century.

Royall litigated ferociously on behalf of the eight saboteurs' right to a fair trial, even trying to appeal personally to several justices for a temporary writ of habeas corpus. Since the Supreme Court was in summer recess, he was able to reach only Justice Hugo Black, who wanted nothing to do with "these German American legal policy in Guantánamo?" McCarthy and Swift were adversaries in court but friends outside of it. They often jogged together on the base. For Swift, McCarthy was a prosecutor's prosecutor, trained at Duke Law School and dedicated to justice. He wrote him, "This is kind of like saying that the Dred Scott case was a great decision. Do we really want to go back to a time when slaves cannot seek redress in the court system? It appears to make no sense for the President of the United States to decide whether or not someone is guilty in advance of a trial."

McCarthy e-mailed him back. "I am sure the Department of Defense will do the right thing."

Soon after, Swift received a call from JAG headquarters. "We are planning to nominate you to work on these tribunals," an officer told him. "Do you have any problem with that? The assignment should not take longer than six weeks."

"Six weeks," Swift responded. "I guess I can do anything for six weeks."

In 1999, Lieutenant Charles Swift caught the attention of Attorney General Janet Reno after a bomb killed a civilian security guard at a naval training facility on Vieques, Puerto Rico. Since Swift was the supervising JAG lawyer in Puerto Rico, Vieques and Guantánamo were in his district, and suddenly he found himself in meetings with Pentagon admirals and generals and members of Reno's staff. He learned, he says, a powerful lesson about the Department of Defense: "There was the legal case and there was politics. Politics drove every decision." For him, the mess on Vieques was a portent of Guantánamo. "No one understood what was happening. No one could make a decision."

Growing up as an adopted child in a family with three other siblings, Charlie Swift always felt like an outsider. His father was an environmental-research scientist in Franklin, North Carolina. Charlie went to a small public school with the children of farmers, and in the summers he shoveled gravel in the local ruby mine. Swift now sees this period as formative for his later career in law. Unable to settle down, he was sent to boarding school and to Outward Bound. When Charlie applied to Amherst, his family worried that he might not have the discipline for an officer.

At the naval academy, Swift put a sign above his bed: YOU ARE BEING PAID $54 A MONTH TO GET OUT OF BED. He was often on detention, and once he was almost kicked out for drinking. This was the era when women were first admitted to Amherst, and Swift was often appalled by how they were treated. According to Gina DiNico, then a plebe, "Charlie was one of the few men who did not ignore us. Once, after a dance, a group of midshipmen cornered him in the dorm and demanded that he tell them every single detail about me. He refused."

At another dance, Charlie met a town girl, Debbie Breden, who would become his wife.

After graduation, he found his way into defense work as a junior officer on a frigate. During a stopover in Malaysia, he managed to negotiate the release of three sailors arrested for possession of pot. Next he went to law school and learned to channel his embroidery into the flair for telling stories that he would use to great effect in jury summations.

One of his first cases was in Kodiak, Alaska, working under the renowned JAG lawyer...
Brent Pope. The case, involving allegations of sexual molestation, seemed to be going nowhere, but Pope told him, "Just wait." As Swift watched Pope investigate the town, looking for a way to prove the innocence of his client, he became hooked. When the trial stretched on longer than expected, Swift's commanding officer tried to call him back, but Pope barked into the telephone, "We are JAG lawyers defending clients! No one is taking my second seat off the case!" Swift learned from Pope how to avoid politics, crusade for clients, and maintain the independence of the JAG Corps. All of this, Swift tells me, he drew upon when he was assigned to the new team of military-commission lawyers. "I learned you fight the judge, you fight the town. You are Atticus Finch — that is your job."

A large poster for the 2004 play Guantánamo, which dramatized the alleged brutalities of the camp, has pride of place in the office of Marine colonel reservist Dwight Sullivan, the chief defense counsel for the Office of Military Commissions, in Washington. Sullivan is known for his work on appellate death-penalty cases. Wiry and muscular, he speaks with military precision, but his legal bona fides suggest a lefty activist. For years he worked at the American Civil Liberties Union in Maryland, and a number of the JAG lawyers under him reflect his point of view: there are quotes from H. L. Mencken in one office, a boycott Guantánamo sign in Arabic in another, and a denounce torture sign from Amnesty International in another. Whenever a supervisor from the Department of Defense pays a visit, Sullivan suggests that his staff take down the agitprop.

The first time I visit the offices, there is no sign of Swift. "Who knows where he is," Sullivan says. "These guys are all independent. They're working with their clients. They're giving interviews." Sullivan's phone rings often. "Colonel Sullivan!" he snaps when he answers, and he signs off with more of an abrupt "Roger that!" He tells me, "Rule 54: If you have a military lawyer, he is completely independent, even though he is subject to his military senior. I would not go to Charlie and say, 'Don't do X,' because Charlie is so independent he would do it anyway."

On vacation with his family when the Military Commissions Act was proposed, Sullivan was outraged. "Now you have the Congress declaring law over the courts! It is not often in the career of a lawyer that you get to rely on the case of Marbury v. Madison," he says. That case, which goes back to the Jefferson era, declares that the courts can strike down laws they find unconstitutional. Sullivan sat down that day and fired off 40 e-mails to lawyers working on military-commission cases. The essence of all of them was "This is wrong."

A common belief is that the Department of Defense invariably finds a way to weed troublemakers out of the corps, most often relying on a failure-to-promote policy. JAG lawyers who are not promoted at scheduled intervals are subject to the regulation known as "Up or Out." In fact, according to Sullivan, this is a misconception. "The JAG Corps prefers their career lawyers to be generalists, not criminal-defense specialists." Sullivan also says, "There has always been a psychic and moral division within JAG. Soldier first or lawyer first? Do I fight this case as a career officer, a colonel in the Marines? Or do I fight it as what I am, a defendant's lawyer?"

Sullivan's office has 11 military lawyers, including army-reserve major Robert Cohen, from Maryland; army-reserve major Tom Fleener, a former federal public defender from Wyoming; and navy lieutenant commander Bill Kuebler, one of the few Republicans, who recently wrote an excoriating op-ed piece for Roll Call on the unfairness of the Military Commissions Act. There is no question in Sullivan's mind which side the JAG office is on. "It is profound, but every one of us in this office is on the same side of the divide. If Saint Peter was asking us, 'Who are you?' we would say, 'Lawyers. We go to war for our clients.'" Enraged by Congress's action, Fleener threatened to quit. "I'll go back to Wyoming and work as a public defender rather than putting up with this," he told Sullivan.

The Washington Team

March 1, 2003. Charlie Swift was given two days to pack and report for duty on the new military commissions. When he arrived at the Pentagon, he met air-force colonel Will Gunn; two air-force litigators; and navy lieutenant commander Philip Sundel, who had worked on the International Criminal Tribunal for Rwanda. Sundel was famous for his encyclopedic knowledge of the Uniform Code of Military Justice and was known to quote arcane rules that could turn a case on a technicality. There were no army JAG lawyers. Good deal, Swift remembered thinking, the army has been shut out.

The lawyers were all handed an early draft of what would become the operating rules for tribunals, and as Swift read through it, he could not stop himself from saying out loud, "This is not good. What do they think they are doing?" Colonel Gunn was in charge and immediately put a question to the group: "What do you think is necessary to put on a good defense?" Everyone knew what was at stake, so there was an atmosphere of urgency in the room.

From the first, inside navy JAG, Guantánamo was considered a disaster. In his book Guantánamo and the Abuse of Presidential Power, Joseph Margulies details the protests that came from Europe in response to President Bush's order of

Neal Katyal felt that the lawyers for the detainees "were all behaving as if it was September 10, 2001."

November 13, 2001, authorizing trials by military commissions rather than civilian courts. Ten days later, Spain refused to extradite eight terrorism suspects to the U.S. In January 2002, Donald Rumsfeld told reporters that the prisoners were "unlawful combatants" who "do not have any rights under the Geneva Convention." All the JAG lawyers in the room had seen the shocking photographs of shackled prisoners in hoods and orange jumpsuits, wearing blackened goggles and surgical masks. In England, according to Margulies, the Daily Mail ran the photographs under the headline TORTURED and editorialized, "Even the SS Were Treated Better Than This." There had been hunger strikes and serious mental problems in the camp as prisoners realized that they were being held without being charged, detained by an executive fiat that Charlie Swift would later compare to that imposed by King George III on the American colonists. One prisoner, a Saudi named Nashafi, hanged himself in his cell and suffered irreversible brain damage.

Suddenly, all the lawyers were talking at once as Gunn scribbled on the whiteboard at the front of the room. "We need to get out of the barrage of the media," one lawyer said. "P.R. is essential! We need to get the reporters on our side!" Another said, "More important is to get our future clients to a federal trial." All agreed that what was happening at Guantánamo was something straight out of the gulags of the Stalin era. "We have to build support from the N.G.O. [non-governmental organization] community and from the defendants' families," Swift said. "There was so much we did not understand," he tells me. "How do we get them to court? What about Arab culture was it necessary to understand? How could we learn enough about Islam to be credible to our clients? Who could translate?" "We were going against the resources of
the entire U.S. government," Swift continues. "We were going to have to get the people on our side. The order had been signed by the president. I knew what that meant. If the president is involved, the first, most important rule is: Don't embarrass him. When the president says you are guilty, you better damn well be guilty. I knew that this was going to be awkward. The job of a military officer is not normally to make the commander in chief look bad."

Later that morning, Gunn scribbled four large letters on the whiteboard: V, U, C, and A. "Gentlemen," he said, "this situation is a VUCA." Then he spelled out the words the letters stood for: Volatile, Uncertain, Complex, Ambiguous. Gunn's last words to the lawyers before he adjourned the morning session were "Remember this: VUCA is where history happens."

After lunch, Sundel and Swift went back to the conference room. Gunn was already there, very upset. "They're putting a stop to our meetings," he said. "They think that a JAG presence is premature." He then told Swift, "Stay in the Washington area. I will call you." Swift and Sundel got on the Metro and went to Sundel's house. "Well, so much for that," Sundel said. "This will be the most interesting defense case that never happens. You can hold these guys under internationa law forever."

A week later they were called back to the office, and Sundel and Swift began planning strategy. "Neither of us believed in the legal machinery of the war on terror," Swift says. Swift burried himself in the history of military commissions—Quirin, Nuremberg, the Geneva Conventions. He combed the Internet for any material that could add to what he already knew. The International Committee of the Red Cross, he learned in May, had scheduled a seminar on humanitaire law. Swift sent the planners an e-mail: "I have been assigned to work on the military commissions as a defense counselor for certain non-citizens for the War on Terror at Guantánamo. Since you are going to be talking about me and the job I'm doing, maybe I should be there."

The Law Professor

In May 2003, Neal Katyal, a constitutional-law scholar, learned that Donald Rumsfeld had chosen the lead prosecutor and defense counsel for the military-commissions trials. Several days later Katyal sent Will Law School, and had clerked for Supreme Court justice Stephen Breyer. Before he was 30, he had been hired to work on the national-security staff inside the Clinton Justice Department, where he focused on issues including executive power and counterterrorism. He had earned a reputation within the intelligence community and the White House when he prepared a possible military and legal response to Osama bin Laden's 1998 embassy bombings in Kenya and Tanzania.

As a young man, he had watched his father, an engineer, be forced out of a job. That made him determined to pursue a legal career. Katyal learned to hide his anger under highly reasoned arguments. He virtually lived on his BlackBerry, and he produced lengthy articles for the Harvard Law Review almost as quickly as he could think them up. He was able to work productively for 16 hours a stretch, in his office or at the computer in his kitchen, with a new baby at home and his wife, Joanna, a doctor at Washington's V.A. Medical Center, on duty. When Katyal told his family that he had to weir in on Guantánamo, his brother-in-law Jeffrey Rosen, the legal reporter for The New Republic, felt that the task was so daunting that Neal would never be able to push a case to the Supreme Court. In the spring of 2002, Katyal and the Harvard scholar Laurence Tribe co-authored a lengthy dissection of the Guantánamo situation for The Yale Law Journal. However much Katyal read about the allegations of torture, he remained adamant that proof was required, and he tended to dismiss rumors coming from the far left.

By March 2003, all had gone quiet in the Justice Department and the Department of Defense. There were no new directives, and the meeting of Gunn and his staff at the Pentagon was classified. I was convinced that in the Justice Department they had come to their senses, and that these military tribunals were being reconsidered," Katyal says. "I thought that nothing would come of it."

F rom the start, Katyal had mixed feelings about the JAG lawyers. He thought of them as rule-book guys, impediments to everything he was dealing with in his investigations concerning counterterrorism and Osama bin Laden. In his first meeting with Swift, Katyal recoiled at his swmooshy courtroom dramatics. He thought he was all bluster. It was difficult for Katyal to understand what Swift could bring to the table. For a month, Katyal managed to refrain from telling him to shut up. He simply tuned him out while focusing on Sundel.

For his part, Swift was immediately drawn to Katyal's rigor. He was relieved that Katyal did not present himself as some Yale Law School snot, and he was intimidated at first by the fact that Katyal had been able to testify in front of the Senate on military tribunals without having practiced as a military lawyer. Both Swift and Sundel knew the law cold and appreciated the importance of the Geneva Conventions for the military in the field. Katyal brought expertise in constitutional law.

One day Swift stood up in Katyal's Georgetown office and came to full attention. In his most booming voice, he announced, "Neal, we are the Geneva Conventions! This is what the military is about! If we do not uphold them, we have anarchy..."
on the battlefield. We will have chaos and a complete breakdown of moral codes."

"That's great," Katyal said. "How do you win that in court?"

All through the summer of 2003, the three lawyers tried out theories and strategies on one another in a steady stream of e-mails: Is terrorism a war? Can Guantánamo detainees challenge military commissions in federal court? Does the Uniform Code of Military Justice apply?

Meanwhile, a flurry of cases from detainees—the "ask to be heards"—came before the courts, but they were steadily turned down. The lower courts said that the men in Guantánamo were outside the U.S. legal system. Then, in November 2003, the Supreme Court agreed to hear Rasul v. Bush, in armed conflict... I was conscious of the need to explain a strategy that would not get the JAGs into so much political hot water that they could not keep their jobs.

He told the JAG lawyers that they would not file a brief against the president, but rather would warn the Supreme Court of a larger issue: the Guantánamo tribunals were unconstitutional, and the justices were in danger of depriving themselves of the power to hear cases of detainees wrongly imprisoned.

"There has always been a psychic and moral division within JAG. Soldier first or lawyer first?" says Dwight Sullivan.

Swift was convinced otherwise. Without even meeting Hamdan, he had a feeling that he could be just a timid schmuck rounded up with hundreds of other foreigners in a C.I.A. bounty-hunting mission. He knew, however, that he would have to persuade Katyal to let Hamdan be their test case. "He had never been involved in any shootings or real violence," Swift says. "O.K., so he was a driver to one of the worst men on earth. All that really links him is that he worked for a motor pool. He wasn't necessarily a henchman. I thought, I can work with this."

He dialed Katyal. "I have the guy. There are no other attorneys assigned to him; he never shot anybody; as far as I can tell, he was never part of any plot." He paused. "The only problem is that he was Osama bin Laden's driver."

"Bin Laden's driver!" Katyal replied. "That's the client? You've got to be kidding."

The Test Case

The first time Swift saw his future client, Hamdan was shackled hand and foot and chained to a bolt on a slab next to a cell inside a wooden hut. It was "Hannibal Lecter time," says Swift. "The guards were on us like Vekro."

Driving into Camp Echo, Swift and his translator, Charles Schmitt, an expert on Yemeni culture, had passed rows of the huts, each not much larger than a king-size bed. Swift argued with the guard who told him he had to take his nametag off. "Call the general," Swift told him, adding, "Let me get this straight. I am supposed to represent this guy and not tell him my name?" Swift put a piece of tape on his badge, but he took it off once he was inside Hamdan's cell.

The guards insisted that there be two
the start, Swift sensed that something was wrong. When he and Sundel met with William "Jim" Haynes, the Pentagon general counsel, he greeted them with an odd remark: "If you never try a case, you will have served your country." Haynes then mentioned Lloyd Cutler, the legal strategist who had counseled the Clintons during the Whitewater imbroglio. Cutler, who had been nominated to work on the military commissions, had died in May 2005, at the age of 87. As a young man he had worked on the Quirin case, and Haynes repeated what Cutler had said about it: "You know, Quirin is the only case I have ever "inside there was extraordinary reluctance about what they wanted to do... There are times when you are doing something against your better judgment. If this is so historic and wonderful, why does Mr. Haynes not want these pictures floating out there?"

All that summer, Swift, Sundel, and Katty brainstormed in ways in which the law of armed conflict, the Constitution, and the Geneva Conventions were interrelated. The three men soon realized that their only workable legal strategy would be to focus on narrow applications of the Geneva Conventions and the Uniform Code of Military Justice. As early as 2002, in the Justice Department's Office of Legal Counsel, John Yoo—a professor at U.C. Berkeley School of Law who once clerked for Supreme Court justice Clarence Thomas—and special counsel Robert Delahunty produced a lengthy memorandum which concluded that the Geneva Conventions could be ignored in the case of al-Qaeda suspects. Shortly after 9/11, Yoo had been assigned to design the legal machinery for military commissions. Now notorious for the work he did at the Office of Legal Counsel with David Addington, later chief of staff to Vice President Cheney, Yoo is considered the main author of the "torture memo," which was sent to the attorney general in August 2002 and justified interrogations that inflicted pain up to the level of organ failure or even death.

When Swift examined Yoo's arguments, he grew anxious. "The only person who could view if the executive powers were necessary was the executive. It made no sense." When Yoo's torture memo came out one year later, Swift surmised it was intended to make statements coerced from detainees under torture admissible in court and to provide immunity for the interrogators. Swift got more and more irritated: "It keeps striking me, all the phrases they are using—"The trials will be full and fair"... it was, like, "huk? They will be 'full and fair'," but different. It was, like, if you use this line, maybe we can convince ourselves."

"Do you think there is anything, really, to these reports of brutalities during the interrogations?" Swift asked Will Gunn. Swift would often wander down the hall and discuss strategy with his boss. Increasingly troubled by the allegations coming from prosecutors and human-rights organizations, Gunn was equally concerned. "May 2004 was one of the oddest months I have ever had," he says. "Every day there was a new headline about what was happening at Guantánamo. When I would sit

"This situation is a VUCA,"] said Gunn. Then he spelled out the words:
Volatile, Uncertain, Complex, Ambiguous.

"I told him the government has unlimited resources, and there is no limitation to what they can throw at this case," Hamdan recalls, studied him quietly and then said, "You are a military lawyer. I didn't fight; I am a civilian. Why are you here?"

Schmitz walked into the computer room in the camp and heard several of the interrogators' interpreters, mostly middle-aged men, arguing in Arabic. "They were threatening to walk off their jobs," Schmitz says. "None of them had gotten paid." Swift was astonished at how young the interrogators themselves were. They were in Guantánamo as part of a plan hastily set up by the administration. "If in fact you had the 430 most dangerous people in the world, I would have expected them to be interrogated by the best—not kids," says Swift.

According to several people connected to the case, one day in 1996, Salim Hamdan was telling jokes in front of the Martyrs' Mosque in Sana, Yemen's capital, when he caught the attention of Nasser al-Bahri, who would later become a bin Laden bodyguard. Al-Bahri and Hamdan ended up in Afghanistan, where al-Bahri introduced Hamdan to Osama bin Laden, who offered him a job as a driver. Soon after the American invasion of Afghanistan, bounty hunters poured into the country, and Hamdan was seized. He was chained on the ground and eventually shipped off to Guantánamo, where he did not see daylight for 90 days. He was kept in solitary confinement for more than 10 months, lost 50 pounds, and showed signs of deterioration. After being assigned to the Pentagon, Swift says, "it took me about a month to understand: why a military commission? Because if you torture someone, it is the only way you can get their statements in and not have to admit it in public."

donc in the law that I am not proud of."

"We were sitting there looking at him, thinking, Why is he telling us this?" says Swift. As Sundel and Swift walked out of the room, Sundel said he thought the commissions would never go forward, because smart people would explain that they were dumb. Swift countered by saying, "They have to, because of politics."

A photo session of Haynes signing the instructions for the commissions was held in a conference room at the Department of Defense. One hour later, an e-mail circulated ordering that all copies of the photographs be returned. That told Swift, he says, that
in meetings with Mr. Haynes, I was told, 'You cannot be part of the privileged-information distribution.'

Several of the prosecutors, frustrated that during discovery they had been denied evidence by the C.I.A., began to confide in Swift. They told him, 'The C.I.A. has taken this over.' Swift recalls, 'The prosecutors would say, 'We have given you everything we have been given for. It is difficult to get evidence out of the bureaus. We are trying.' We knew by then there had been thousands of interrogations. If we knew there had been video equipment, we were going, like, 'O.K., what are we going to get? From the very beginning, there was a struggle. How were we going to get it? In a federal or military court, the prosecutor must provide the defense with every scrap of paper. ... And they must go through and determine whether any of the attack has potential. ... And if they fail to produce it, a judge can overturn a conviction. And if a videotape shows your client being held up all night barely able to speak?'

For Swift, life became "all Hamdan, all the time." He and Katyal soon joined the legion of lawyers petitioning the courts.

Swift's marriage suffered. "Charlie is very one-dimensional when he is on a case," Debbie Swift says. "We bought a house, and instead of helping Debbie move in, I left for Yemen," says Swift. "I was unreachable for weeks. There was no time for home or anything else. Debbie began to ask me, 'When is this going to be over?'" She knew my obsessions. She said, 'When am I going to get you back?'"

About nine months passed. "There was nothing but loss, and the courts were closed," Swift says. But then a series of decisions went in their favor. "If I had to sum it up in a sentence, I would say, 'The detainees got into the door of the courts by our arguing that Guantanamo was under the American legal system.'"

"The Torture Memo"

I kind of feel like I have been hung out to dry," says John Yoo. "People say that I am responsible for everything, as if I had the full point plan for what we are going to do. In fact, I was fairly low down on the organizational chart. [Those above me] have basically decided they are not going to talk about this anymore. It is as if, if all the flak falls on this guy, well, fine. I don't like it, but unlike them I think it is my responsibility to explain what we did and why."

Yoo and I met in Philadelphia, in the lobby of his hotel, near Independence Hall, where he was preparing to be interviewed about his book War by Other Means. Round-faced and amiable, he seemed younger than his 39 years. His conversation is larded with euphemisms—"factor," "cost," "a negative"—which he uses to explain his analysis of torture. It was a "factor" for Yoo that "coercive methods" might make evidence inadmissible in a trial. Did he ever consider the moral implications of locking away in shackles potentially innocent men who had little ability to petition a court? "I said that I had no doubt it would be extremely controversial. I talked to people about it," he told me. And his conclusion? "The one negative was international opinion," he said, giving the phrase all the weight of a potato chip.

In the fall of 2002, Major General Michael Dunlavney, then in charge of interrogations at Guantánamo, sent a memo about "Gitmo interrogation" and submitted a chain of proposals, some of which went beyond what was permitted in the field manual. The memo, Yoo said, "did not cross my desk, but I heard about it." Eventually, he said, "the Defense people came and said, 'What is applicable law?'"

"Waterboarding?" I asked, referring to the most egregious known torture connected to Guantánamo. "Not that specific," he said.

In January 2005 the Associated Press reported allegations concerning the smearings of a prisoner with what was purported to be menstrual blood, inappropria-"waterboarding?" I asked, referring to the most egregious known torture connected to Guantánamo. "Not that specific," he said.

In January 2005 the Associated Press reported allegations concerning the smearings of a prisoner with what was purported to be menstrual blood, inappropriate sexual conduct of female interrogators. Human-rights organizations also began reporting possible abuse of the Koran. "I believed that the Defense Department should not be running the interrogations," Yoo said. "This would have been much better handled by the C.I.A. ... They know what to do." Soon, he recalled, Haynes came to see him. "I remember saying, 'This is not a very good idea, to have the military think about doing this.'" Yoo went to his bosses, he said, and "got nowhere. I was overruled." I asked if he had thought about going "of course not," Yoo said. "I would not have considered that an option."

Yoo left the government in 2003 to return to teaching law at Berkeley. His arrival was met with protests and a petition signed by hundreds of students pressuring him to resign.

"Why have there been no trials in five years?" I asked. He startled me by laughing and saying, "Yes, that is something, isn't it? It is the lawyers fighting for the defendants. They stopped the process."

"Are you blaming the lawyers for the fact that their defendants have remained uncharged in Guantánamo?" I asked. Yoo did not answer.

By the time Katyal left court at noon, he had been told, "The president is vowing to overturn the decision."

During the weeks Katyal prepared to argue Hamdan's case in front of the Supreme Court, he slept little. He traveled to law schools and law firms around the country, mooting his case 15 times, and each time he came away with more critiques and more suggestions. He assembled a team of law students and worked with Joe McMillan, an expert on international law and a senior partner at the law firm Perkins Coie. Eventually, three lawyers at the firm were helping pro bono. In his first practice session at Harvard, Lawrence Tribe told him, "Neal, you feel a little small at the podium." Katyal understood that this meant he was overly deferential.

The essence of their case was that the Geneva Conventions and the Uniform Code of Military Justice had to be maintained. That argument, Swift knew, was clear-cut and a winner.

About a decade earlier, Swift had met Joshua Karton in a JAG training session. A former actor and director, Karton had appeared in Beverly Hills 90210. In his mid-50s, he was a specialist on voice inflection and how to sell a jury. He was known to be able to unlock lawyers who might freeze in front of a jury. Karton wore flip-up sunglasses, a sweater-vest, and a bow tie, and he pulled his long gray hair back in a ponytail. When he met Swift, he told him, "All this talent, but you have no tools." Swift recalls, "He hammered me for years with how to do it: 'Don't sell hard, sell soft.'"

By August 2004, Swift had been with Hamdan on a monthly basis and had traveled to Yemen to interview the prisoner's family—his wife was a potential corroborating witness. That month Karton called him, having read a New York Times piece on the Hamdan case. "Do you need help?" he asked. "I sure do!" Swift replied. A week and a half later, Karton met him in Washington.

"Neal is not into touchy-feely," Swift told him. "He is going to tune you out."

They arrived at Katyal's office an hour later than they had said they would. "Neal is really, really pissed at me this time," Swift recalls. "He is in his office at Georgetown, and he just shuts down. Joshua sat there and waited him out. At the right moment he said, 'Let me hear the first three minutes of your argument for the District Court.' When Neal was finished, there was
a silence in the room, and Joshua said, 'Why don’t you try this?' And Neal began to take notes.”

Their Day in Court

March 28, 2006. At three A.M. the night before they were to argue in front of the Supreme Court, Swift was on the courthouse steps in jeans. For days, protesters had been massing in the capital, and students had lined up on the steps for the night, hoping to be let into the trial the next day. A group of high-school students from Wisconsin began to talk with Swift. “Did Mr. Hamdan do it?” one of them asked him.

Swift recalls, “I told them, ‘The question tomorrow is not: Did Mr. Hamdan do it? It is: Who are we? What kind of people are we? That is why it is so important that you are here today, because someday you will be able to tell your children who we are as a nation. And something else: only in this country can a military officer take a disagreement with presidential power to court as a way of settling. Everywhere else they call that a coup.’”

That night Katyal, keyed up in a way his family had never seen him, took a six-mile run and then went to see the movie V for Vendetta. “I turned my cell phone off for the first time in many months,” he says. “When I came out of the movie, there were 70 phone calls.” The first was from a CNN reporter: “Do you have a comment about the effort to oust Justice Scalia from the case?” While Katyal had had his phone off, a group of retired generals and admirals had written a letter demanding that Justice Scalia recuse himself because of a remark he had made concerning detainees in a speech he gave in Switzerland.

Katyal called Swift. “This is outrageous! What do those generals think they are doing?” he said. “I was furious that they were so irresponsible,” Katyal tells me. “I deeply admire and trust Justice Scalia. We disagree on many things, but it would have been the height of arrogance for me, a litigant, to tell him what to do. The justices are far better judges of recusal than the litigants in a given case, all of whom are self-interested.” He immediately released a statement to scotusblog, the Supreme Court blog run by his close friend and adviser Tom Goldstein.

The next morning Katyal was still angry. He tried to sing “It’s a beautiful day in the neighborhood” in the shower. Walking up the steps of the court, he experienced the same exhilaration he had felt when he went to clerk for Justice Breyer. There were protesters wearing the orange hoods and jumpsuits of the Guantánamo prisoners, and news vans were parked by the courthouse steps. Katyal was wearing a Gucci tie his mother had bought for him. “She left the price tag on it: $150!” he said. “Mom, I paid that much for my Prada suit at an outlet in Italy. What do you think you are doing?” Staring up at the courthouse columns, he later recalled thinking how astonishing it was that “a little guy from Yemen” could be heard against “the biggest guys in America—the president and the secretary of defense.”

For months Katyal had honed his argument. He would first talk about the jurisdiction and then about the merits of the case. Sundel had found a paragraph buried in the Uniform Code of Military Justice that left scarcely a doubt that the treaty giving the U.S. control of Guantánamo meant that the base was subject to American laws and could not—as the Bush administration was arguing—be a legal black hole. Concerning the merits of the case, he would deal with the government’s outrageous attempt to flout the Uniform Code of Military Justice. “The experts were against this,” he says. “I was convinced it was the right way to go. I did not want to get sidetracked into jurisdiction issues, and I knew that if the merits came first they would push me back to jurisdiction.”

He gambled correctly. During Katyal’s argument, Justice Breyer, his former boss, asked Solicitor General Paul Clement a lengthy question, the essence of which was: How much do you want to shake the president, and how much do you want to give the president a blank check? Katyal was expecting it, and he focused his subsequent argument on the merits of the case. He kept his gaze on Justice Stevens, who asked a lot of questions, and on Justice Kennedy, the expert on military law. Paraphrasing Justice Breyer, Swift recalls the scene: “As I understand it the petitioner says that the guy is not a combatant because he is not engaged in classic combatant acts... The war in which you say he was fighting is not actually a war.” I was suddenly quivering in the courtroom, thinking: He’s got it! We have won! I am singing Hallelujah!”

On the day the decision came down, June 29, the telephones began to ring in the JAG offices. Katyal and Swift were at the court, waiting to hear the decision read. Within moments, the JAG lawyers, reading scotusblog.com, were shouting...
“We won! We won! We won everything!”

At court, moments after the decision had been read, two senators, Kayyali had consulted came over to congratulate him. “Soon we are going to have real trials that the nation can be proud of,” one said. By the time Kayyali left court at noon, he had been told, “The president is vowing to overturn the decision.”

“I was shocked,” Kayyali tells me in an e-mail. “I would have hoped, just for a moment, the president would have thought about the constitutional ramifications of what he did, instead of churning it through the Karl Rove spin machine.”

All that day, the JAG offices were besieged by photographers. Swift went from one TV studio to another. Kayyali fielded 300 interview requests, but did only two before going home to a sick child.

The next day, Dwight Sullivan announced, “Jim Haynes is coming to have a conference.” When their boss arrived from the Defense Department, his mood was somber. The JAG lawyers gathered in a small conference room. When Haynes entered, Sullivan called his men to attention. Swift waited for Haynes to say, “At ease,” but he said nothing. Uh-oh, Swift remembers thinking. Finally, Haynes said, “We want to congratulate you on your hard work. Especially you, Commander Swift.” Then he delivered a shock: “The decision does not change anything in this office. All of you continue to work on your cases.”

Tom Fleener, the former public defender, was disgusted. “My first impression was that these guys were never going to learn. There was never the slightest chance that they were going to do the right thing and try these people.”

“As I read it, Haynes did not give a crap if the detainees were represented,” says Swift. “They were stunned inside the Defense Department and trying to get the old system back.”

Within days, the Military Commissions Act, which would strip Guantánamo detainees of habeas corpus rights, was working its way through Congress. (Haynes did not respond to numerous requests for comment.)

The Aftermath

In the JAG offices, lawyers now use the term “Alice in Wonderland” to describe the ever-changing rules coming at them from the Department of Defense. On his way to work on January 11, Dwight Sullivan was listening to Federal News Radio when he heard Charles Stimson, the deputy assistant secretary of defense for detainee affairs, be more patriotic than that?” (Stimson later apologized.)

In Georgetown, Kayyali was also listening to the radio. For weeks he had been waiting for a decision from the Court of Appeals on Rand v. Bush in order to decide whether to mount his next challenge in the D.C. Circuit Court of Appeals or go directly to the Supreme Court. Swift, alone at home, was spending unhappy hours with reporters on the telephone, mooting about what had become of the Hamdan case. He had begun interviewing with law firms around the country, but so far there were no takers for a soon-to-be-retired JAG lawyer who had gone up against the president. He was writing an article arguing that Guantánamo had been chosen by the military for one reason only: torture. “It was as if I were doing a closing for a jury,” he tells me, adding, “It is time to close Guantánamo.”

Swift also had new concerns. Earlier in the week, Dwight Sullivan had forwarded him a memo from the Joint Task Force in Guantánamo making almost anything he said about the base and his client classified. It was clear to him that the Department of Defense was coming down harder on the defense bar than he had ever imagined. If he were prosecuted, he didn’t know how he would afford an attorney. According to the memo, some of what Swift told me for this article was now classified—for example, where Salim Hamdan was in Guantánamo and his condition.

According to Dwight Sullivan, the restrictions included “all sorts of new stuff—the names and identities of the accused and the camps in which they are held! Pictures of the accused! Sitting here in Washington, D.C., I am not sure that I can say over the phone the name of a certain Yemeni detainee whose case went to the Supreme Court. Pictures that we have had in our files for years may be classified today. Every single submission in a commission proceeding may be classified because they have the names of the detainees.” The memo itself was classified, Sullivan said. “The new rules are so ambiguous and so broad that they just have a chilling effect on speech by the attorneys.”

In the end, will Salim Hamdan or any of the other detainees ever be brought to trial? “Absolutely,” said Colonel Morris Davis, the chief prosecutor of the military commissions. “I would anticipate that Hamdan will be in the initial group charged.” Like Kayyali and Swift, Morris was waiting for the new Department of Defense guidelines that would control the military commissions. “We are taking a hard look at charging material support to terrorism,” he said. “This is the typical charge you see in federal courts in the United States.”

When Charlie Swift read the guidelines, his first thought was: The new rules are like putting perfume on a pig. “They were written in such a way that it is very clear it is to let you in evidence that is based on coercion,” he says. What is the difference between coercion and torture, I ask. “Who the hell knows?” he says. He pauses a moment and adds, “There are two reasons not to use coercion—because of public policy, and because it is not reliable. Clearly, Congress and the administration disagree.”

Hamdan v. Rumsfeld

is a case scholars have compared to Brown v. Board of Education in its ramifications.