

**Remarks of Brigadier General Mark Martins
Chief Prosecutor, Military Commissions
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“Legitimacy and Constraint in Reformed Military Commissions”

Good evening, and thank you, Harvey, for that gracious introduction. And I join a large chorus in also thanking you for your distinguished career of service as professor of law and security studies at the National Defense University and in other capacities. My thanks also to Ms. Holly McMahan and General Charlie Dunlap and to other members of the American Bar Association's Standing Committee on Law and National Security. Thanks as well to ABA Executive Director Jack Rives and to the leaders and participating members of the co-hosting Centers on National Security Law of the Virginia, Duke and Georgetown Law Schools.

Kate and I are so enjoying this chance for a date tonight out on the town, at the Ritz no less, and with all of you longtime friends and new colleagues in attendance. Among other pleasures of this evening is having been given an opportunity by the ABA to catch up on a bit of lost time over the past decade with my wonderful partner and the captain of our family ship. Anyone in the military knows how a beloved spouse makes service even possible.

Seeing so many familiar faces with whom I have grown up in the military and the law takes me back to a time when we were all much younger, and in fact to my own earliest days in the Army. I was a brand new lieutenant out at my first field exercise with my platoon, at Fort Irwin, California. We'd had a long day, and we didn't crawl into our sleeping bags until shortly before midnight. I'd only been asleep for an hour or so when my platoon sergeant, a wise old parachute infantry veteran, elbowed me and woke me up.

"Sir," he said, "look up and tell me what you see." So I looked up at a beautiful night sky and replied, "I see a million stars, platoon sergeant." "And what does that tell you Sir?," my wise old platoon sergeant asked. Not exactly sure where he was going with this question, I thought for a few moments and, wanting to impress him, gave an answer sure to convince him that I possessed a profound and keen intellect. "Well platoon sergeant," I said, "astronomically it tells me that there are millions of galaxies and potentially billions of planets. Theologically it tells me that God is great and that we are but small and insignificant. Meteorologically it tells me that we're going to enjoy an ideal day for training tomorrow." There was a long pause as my platoon sergeant considered this weighty answer.

Thinking that he might be speechless after such an impressive response, I waited a moment and finally asked him, "what does it tell you platoon sergeant?" "Well Sir," he replied, "it tells me that somebody stole our tent."

You may recognize the dialogue between me and my platoon sergeant as a parable sometimes told of detective Sherlock Holmes and his assistant Dr. Watson out on a camping expedition. My first field problem did not quite happen that way. Still, the parable captures well

the types of practical lessons Vietnam veteran John Smiley taught green Lieutenant Martins on the desert floor of Fort Irwin, California, and elsewhere. Many years have now passed, and I've had a little seasoning. Rest assured that I lost with my youth, perhaps as you did, any self-conscious desire to be profound. I certainly do not set out to be so this evening, even while the subject matter of this excellent 21st annual review from the field indeed demands its share of deep thinking if we are going to have wise national security laws.

What I will set out to do is pragmatically outline—two months into this new duty assignment but decades into a career-long consideration of such matters —how I see the military commissions prosecution function in the context of our larger national security structure and strategy. I hope to be able to cover that substantial amount of ground by building upon rather than merely repeating what has been said in two recent speeches on law and national security. The first was by Assistant to the President for Homeland Security and Counterterrorism John Brennan at Harvard Law School on September 16th. The second was by Defense Department General Counsel Jeh Johnson at the Heritage Foundation on October 18th. I commend them to you if you've not already heard or read them. In addition to being strong and thoughtful statements of United States policy, these two speeches provide the framework within which my observations here can be better understood.

This, then, is the keynote I wish to sound tonight: that the proper exercise of decision-making discretion with regard to a military commissions forum newly reformed by all three branches of our government requires conscious adherence to principles that guide and constrain such discretion. I recognize that despite their long historical vintage, military commissions are controversial in many American legal circles. Systems of military commissions attempted in both the November 2001 executive order and the 2006 Military Commissions Act were flawed, and we have worked hard on reforms. We think that these reformed military commissions are fair and have an important role to play in the armed conflict against Al Qaeda and associated forces. Moreover, far from limiting the potential utility of reformed military commissions, norms of constraint actually maximize the legitimacy and effectiveness of the forum with respect to a narrow but critically important set of national security cases. Although there are many individuals and components of the government that play important roles in various aspects of the military commissions process, I will focus here tonight on the role of the prosecution.

Two Traditions: Public Prosecution and Wartime Accountability

The post of Chief Prosecutor of military commissions grows out of two established historical traditions: first, the American tradition of public prosecution of crimes; and second, the tradition of military commissions rendering military criminal justice. These traditions reflect not just history, but important normative values: that criminal prosecution authority rests with the state, and that military commissions can play an important role in promoting accountability in armed conflict that cannot be achieved by other means.

Throughout the 19th century, legal historians teach us, the early American practice by which the state and even victims themselves regularly retained private attorneys to prosecute criminal offenses was being displaced by the appointment of public prosecutors. Today, public prosecution is a well-established tradition of our civilian criminal justice system, and one source of its legitimacy. Included within this tradition is not only the notion that criminal prosecution

authority rests with the state, but also that those who wield such authority are public officials who seek not to win at all costs but rather to enforce the law and to do justice.

A prosecutor has awesome power. Prosecutors must make decisions about whether to investigate a crime and whom to investigate, whether to charge an offense and what to charge, whether to entertain a guilty plea and under what terms, whether to offer certain evidence and how, whether to call particular witnesses and what to ask them or even impeach them with so as to elicit truthful testimony, whether to seek appeal of certain court rulings and what issues to raise and how to argue them—these and many other decisions involve a level of independent discretionary power that is tolerated only if it is exercised so as to achieve justice.

Experience has shown that court-made doctrines such as those of vindictive prosecution or of restricting official immunity are not by themselves sufficient to achieve justice. At least some part of the constraining of discretion must be internal, through the self-restraint inherent in the public prosecution tradition.

John Brennan spoke compellingly at Harvard Law School of how in order to face modern threats we must be pragmatic, making decisions based not on preconceived notions but rather upon what will actually enhance the security of this country and the safety of the American people. But he speaks equally compellingly of how we must not cut corners by setting aside our values and flouting our laws. We cannot treat them like luxuries we cannot afford. And he cites examples of how pragmatism—in being constrained and guided by our core values, including the rule of law—actually far more effectively and sustainably can serve the public interest. In the context of my own current assignment and function, this same insight is part of the public prosecution tradition and the discretion-guiding principle within that tradition. As Judge Murray Gurfein stated, “the security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions.”

Over the past controversial decade for another tradition, that of military commissions, roots for the practice dating back to George Washington and the Revolutionary War have often been cited, but with little further elaboration. Washington, as you may recall, was confronted with a situation in which a British officer had been arrested while carrying papers concerning a plot to turn the key fort of West Point over to the British. The commission convened to examine case of the officer, Major André, performed capably. It determined that André was a spy, given that he had removed his officer’s uniform and traveled under an assumed name.

In other contemporary incidents, General Washington was also using courts of military officers to investigate and as necessary punish their own soldiers’ offenses against civilians as well as prisoners. And in most of the major armed conflicts since that time, military tribunals—courts-martial and military commissions—have been used to impose discipline, prevent lawlessness, and seek accountability.

Reformed military commissions thus revive a tradition of providing accountability during armed conflict where there otherwise would be no adequate means to do so. This tradition offers a constraining principle to what Jeh Johnson called in his speech at the Heritage Foundation “the powerful reach of the military,” which by our conscious discretionary decisions must be prevented from displacing or making less effective civilian law enforcement in this country. The

constraining principle of accountability by military commission—the necessity for which the Supreme Court in the *Hamdan* case said is for the Congress to determine—relies upon the idea that the military is intended to fight our nations wars, not police our streets. Neither our citizens, nor members of our military, nor indeed the international community, want the U.S. military prosecuting criminal cases except when and where necessary. It could of course also be said that none wants the military to be prosecuting wars, for that matter, except when and where necessary, but at least with regard to necessary wars, the military's prominent role is understood, accepted, and even demanded.

Using All Instruments of National Power and Authority to Counter Modern Threats

I regard these two discretion-constraining principles—deriving from the traditions of public prosecution and wartime accountability—as critical to how reformed military commissions prosecutions will acquire legitimacy and viability. For we need all of the legitimate and viable instruments of national power we can muster. In the current conflict with al Qaeda and its associated forces, we face unconventional non-state actors who: repudiate all rules and operate in the shadows; conceal themselves among and purposefully endanger civilian populations; respect no national boundaries while cynically using such boundaries to establish sanctuary and shake pursuers; leverage information technology ingeniously to coordinate, plan, and recruit, and to intimidate governments and their citizens; adapt and morph and metastasize continuously; and join efforts with likeminded entrepreneurs of terrorism to deploy the latest asymmetric weapons against the United States homeland and our interests overseas.

Within the space defined by the law and by our values, as further defined by principles such as those I have described, we must be relentlessly empirical and pragmatic in how we counter these threats. Federal courts have proven on many occasions that they can successfully meet the challenges of international terrorism prosecutions, and when a defendant is convicted by a federal court, the legitimacy of that verdict is unquestioned. Although the cases can sometimes be complex and challenging, federal prosecutors, including the exceptional ones who work for me in military commissions alongside terrific judge advocates of all services, have successfully convicted many terrorists in federal courts, including in cases involving extraterritorial crimes. A broad range of terrorism offenses is available in the federal criminal code, and procedures exist to protect classified information in federal court trials where necessary. The evidentiary rules at trial are well-established, and experienced prosecutors can often find ways to overcome any challenge those rules may pose to introduction of critical evidence in specific cases. There are currently many individuals in our federal prisons who were tried and convicted for terrorism-related offenses in our federal courts.

That said, the unlawful activities of our adversaries can in many cases be fairly characterized both as terrorism offenses under our federal criminal code and violations of the law of war. This reflects the nature of the conflict in which we are engaged. In the case of violations of the law of war, federal courts have not traditionally been the primary forum for trying such crimes and are not always best suited to the task. In some cases, prosecutions of such crimes in reformed military commissions will offer a more appropriate forum, and in those instances, cases should be prosecuted there.

As with federal courts, reformed military commissions incorporate all of those fundamental guarantees of a fair and just trial that are demanded by our values. This is saying a lot, because those values themselves were clarified and redefined to include far greater guarantees in federal and state courts during the half century that preceded 9/11. The accused is presumed innocent. The prosecution must prove his guilt beyond a reasonable doubt. The accused has: the right to notice of the charges; the right to counsel and choice of counsel; the right to be present during the proceedings; the right against self-incrimination; protection against use of statements obtained through torture or cruel, inhuman, or degrading treatment; the right to present evidence, cross-examine witnesses, and compel attendance of witnesses in his defense; the right to exculpatory evidence that the prosecution may have as to guilt, sentencing, and the credibility of adverse witnesses; the right to an impartial decision-maker; the right to suppression of evidence that is not reliable or probative or that will result in unfair prejudice; the right to qualified self-representation; protection against double jeopardy and against ex post facto laws; the right to appeal to a federal civilian court consisting of lifetime-tenured and independent judges, and so on.

Many in this audience know that the accused in a reformed military commission receives stronger protections than did an accused tried under the London Charter at Nuremberg following World War II. He also receives stronger protections than an accused in many respected criminal justice systems around the world. That is as it should be.

Well, you may ask: with such capable federal courts, and such overlapping jurisdiction on offenses that can be characterized as both federal civilian crimes and violations of the law of war, and such minor differences in protections afforded the accused, why should we ever use reformed military commissions, much less invest great energy in reviving them?

As I have suggested, the answer is that there is a narrow but critically important category of cases in which the pragmatic choice among the lawful tools available to protect our people and serve the interests of justice is a reformed military commission. Forum selection as between article III courts and military commissions must turn in part on the same sorts of strength-of-interest and efficiency factors that help guide forum selections made by prosecutors every day when two federal jurisdictions could both try an accused or when both federal and state courts could do so.

To evaluate strength of interest, one looks to the nature of the offenses to be charged and to whether one jurisdiction already has charges pending; to the nature and gravity of the conduct underlying the offenses; to the identity of victims of the offenses; to the location in which the offenses occurred; to the location and context in which the individual was apprehended or captured; and to the manner in which the case was investigated and evidence gathered, including which entity conducted the investigation.

To evaluate relative efficiency, one looks to the protections that will be afforded specific intelligence sources and methods; to the venue in which the case would be tried; to any issues that may be presented by multiple-defendant trials; to foreign policy concerns; to legal or evidentiary problems that might attend prosecution in one of the jurisdictions; and to resource concerns.

Although in most cases, federal courts will be the more feasible and better choice based on strength-of-interest and efficiency factors, reformed military commissions will sometimes prevail in this analysis. Moreover, forum selection as between article III courts and military commissions will sometimes turn in part also on compelling factors not encountered every day. Thus, when charging under the law of war better permits a full presentation of the wrongful conduct allegedly committed by the accused, or makes legally available a sentence more proportionate or reflective of the alleged offense, a reformed military commission may be the better choice on this basis, even if conventional strength-of-interest and efficiency analysis is indeterminate. It is not difficult to understand that even if numerically few, such instances could implicate hugely important national security and justice interests, fully justifying the energy and expense invested.

With the remainder of my time, I would like to suggest how the two guiding principles—what I have called public prosecution and wartime accountability—can and will operate across a range of decisions prosecutors will face. Some see the military commissions prosecutor as a kind of loose cannon, subject to no rules, and therefore capable of wreaking havoc through unreviewable and discretionary decisions. I obviously hope to persuade you that this is not the case at all and that we are acutely attentive to the constraints on our actions. We are also keenly aware that principled exercise of discretion strengthens legitimacy and helps to define the comparative advantage that military commissions will sometimes have in achieving accountability for crimes committed in the course of armed conflicts. Other executive branch officials who play important roles in various aspects of the military commissions process may also take guidance from the principles set forth here.

Example of Guiding Principles: Whether and What to Charge

Let's take that most basic of prosecutorial decisions: whether to charge an individual. This decision is expressly constrained by law, as codified in the Military Commissions Act. For instance, the Act's jurisdictional provisions limit those who can be charged to non-U.S. citizens who fight in no military uniform and without obeying the rules of warfare—so-called “unprivileged belligerents.”

But in addition to being constrained by this and other provisions of law, the decision is also constrained by the public prosecution and wartime accountability principles that I have outlined. For I have to be satisfied that the official acts of swearing the charges, endorsing them, and recommending them for trial by military commission—given the evidence available against each element of each charge—are the best way to enforce the law, achieve accountability, and do justice.

Let's look at the decision of what offense or offenses should be charged. Again, law expressly constrains this decision, including by specifying in statute thirty-two offenses triable by military commission. But the public prosecution and wartime accountability norms also serve as constraints, enjoining me in a case-specific analysis to swear out and endorse offenses that describe clear violations of the law of war, that complement rather than displace the broad range of terrorism offenses with extraterritorial reach available in the federal criminal code and triable in Article III courts, and that will result in legally sustainable convictions and detentions.

Example of Guiding Principles: Presenting Evidence & Navigating Procedures

How about discretionary decisions that sometimes exist regarding what evidence to present? Yet again, the law and legal precedents are the main sources of direction and constraint in such decisions. They tell me and all of the prosecutors from the Defense and Justice Departments whom I am privileged to supervise, what sorts of evidence are admissible, often with great granularity and predictability.

Evidentiary and other rules for reformed military commissions protect and facilitate sensitive sources and methods of intelligence-gathering; allow for the safety and security of participants; leverage the national security expertise of the military officers who form the panel that fulfills the jury function; and take into account the particular challenges of gathering evidence during military operations overseas, while also providing due process to the accused. For example, some customary rules of criminal procedure, such as the *Miranda* rule, are aimed at regulating the way police gather evidence for domestic criminal prosecutions and at deterring police misconduct.

Our soldiers should not be required to give *Miranda* warnings to enemy forces they have captured; requiring warnings in such a context would be impractical and dangerous. Even precluding warnings in situations resembling the case of *New York v. Quarles*, which gave rise to the public safety exception that makes so much sense in domestic criminal law enforcement and has parallels on the battlefield, would not be sufficient relief. The best rule for the battlefield is voluntariness, under a totality of the circumstances test, with a small carveout for point-of-capture situations resembling *New York v. Quarles*, and this is what reformed military commissions have.

Similarly, strict hearsay rules—which were no part of the trial of war criminals at Nuremberg and are unknown to many respected justice systems—may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from genuine zones of armed conflict. Military commissions generally prohibit hearsay, but with tailored exceptions that make sense given the unique circumstances of military and intelligence operations during hostilities and the adverse impacts on such operations that would likely result from the production of the witness. Under law, the party offering the hearsay statement has the burden of convincing the military judge that the evidence is reliable, probative, and lawfully obtained, that direct testimony from the witness is not available as a practical matter, and that the interests of justice will best be served by admission of the statement.

The public prosecution and wartime accountability principles further guide prosecutorial actions. One important example is that none of us representing the United States will ever seek to come close to the line of introducing statements that we conclude have resulted from torture or cruel, inhuman, or degrading treatment or that are involuntary within the analysis in section 948r of the Military Commissions Act. This is not merely a standard for the military judge to enforce. This is a standard that I also am bound by as a public official wielding the authority of the state and as an accountable officer of a law of war commission.

Example of Guiding Principles: Conducting Discovery and Compelling Evidence

What of decisions relating to discovery by accused and counsel and to affording witnesses and other evidence in preparation of the defense? This was an area of particular interest to the Congress in passing the Military Commissions Act of 2009. The law now expressly requires that such disclosures and opportunities be comparable to those available to a criminal defendant in an article III court of the United States. But the public prosecution and wartime accountability principles will often further guide us, for instance, to turn over discovery in advance of the time required by law or to not oppose defense requests for things such as mitigation experts or other witnesses because that is in the interests of a fuller, fairer trial.

Accused persons in military commissions are zealously represented at government expense, something that has been noted again and again even by critics. The 2009 Act added the additional appointment at government expense of defense counsel learned in capital litigation for all accused whose charges are referred to military commissions empowered to adjudge a death penalty, and reinforcing this reform has been the approval by the convening authority of government funded mitigation experts for the defense. But even highly competent defense lawyers need access to evidence, to their clients, and to witnesses in order to prepare. I am committed to ensuring they get such access. This commitment extends to all cases where national security requires heavy use of classified information procedures, which in military commissions are very similar to those used in federal court.

Example of Guiding Principles: Transparency

Prosecutorial discretion is also guided in matters of transparency, such as decisions regarding public access to trials. Military commissions prosecutors will continue, as we did last month, to submit formal motions urging judges to permit closed circuit video transmission of live proceedings to locations in the continental United States for viewing by victim family members, by the media, and by the public.

The Supreme Court has said that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” The best traditions of public prosecution and wartime accountability call for us to allow the American people and world to witness these criminal trials. I want to take this opportunity, by the way, to recognize the leadership and hard work of Doug Wilson, Jeh Johnson, Bruce Macdonald, Mike Chapman, and Wendy Kelly in making possible the stateside closed circuit viewing of military commissions. I also recognize convening authority Bruce Macdonald for his vision in designing and fielding the new military commissions website, where the morning after a proceeding is now posted an unofficial and unauthenticated transcript specifically to increase transparency.

Ample Law and Precedent

How do these discretion-guiding principles work together within reformed military commissions? Let me take the now familiar hypothetical often suggested by those who fear military commissions: that the prosecutor will overreach and criminally charge a little old lady in Switzerland for making a charitable donation to a mosque where some of the money might

eventually make its way to Al Qaeda. That hypothetical is just that: a hypothetical law school exam scenario that won't happen because prosecutors are constrained, taking care about whether to charge an individual and what to charge her with, because the evidence could not support such a charge, because defense counsel would challenge the evidence offered, and because the transparency of the entire matter would make it embarrassing for a prosecutor ever to bring such a case. In short, the principles I describe here are the antidote for exactly the kind of overreaching that some fear, and they reinforce the black letter rules that govern reformed military commissions, helping assure their fairness.

Note that I say “reinforce.” In every example I cited, there is a considerable body of law and precedent to serve as the primary source of guidance. The principles merely reinforce, in situations where discretion requires additional constraint. And they are not optional. That is what a constraint is. I regard these constraints to be every bit as binding as the Supreme Court’s decision in *Hamdan v. Rumsfeld*, in which the Court ruled against the government. We follow such rulings. As my former boss has said, “we are not self-employed.”

Military commissions are compelled by law to incorporate procedures from two principal sources: rules for courts-martial of service-members and rules for trials in article III courts. Just as in the federal system, it will be necessary from time to time to update specific regulations for things such as how witnesses can be paid for travel expenses or how civilian defense counsel can apply for security clearances to receive access to classified information. That such new administrative regulations happen to post-date alleged criminal offenses in no way prejudices an accused, a suggestion innocently but erroneously made by some in response to the recent release of the updated regulation for trial by military commission. If an accused believes some such administrative change disadvantages him, he can seek appropriate relief. And remember that military commissions are subject to oversight by the Article III courts.

There is also a broader precedent available, and we aim to follow it. It is the precedent by which our forebears, sometimes facing long odds, earned public and Congressional and eventually judicial support for major undertakings because it was the only way to really achieve them. We seek public support with transparency and a clear definition of our unique role. We have Congressional support with the new Military Commissions law. But there are larger constraints, and we cannot play or make decisions to please the public or the Congress. Like our forebears, we are compelled to step back from “victor's justice.” This is what the rule of law is about. Sometimes various people or interests will not be happy. But in the end we can only do the right as we see the right, and seek the best obtainable justice, and trust that our efforts will stand the test of time.

Conclusion

I close by once again sounding the keynote, while also explaining how it is in harmony with the broader endeavors of this distinguished association and with the lifetime contributions of one of its leaders. For the idea that constraints founded in law and principle enhance rather than curb the effectiveness of an institution because they strengthen its legitimacy is at the core of the American Bar Association. The ABA’s Division for Public Services is dedicated to applying the knowledge and experience of the legal profession to promotion of the public good.

Its Standing Committee on Law and National Security seeks to achieve this noble goal in disciplines I have had the honor to practice for most of my professional career.

Some of the most memorable lessons I have learned about constraint and legitimacy in that career have been taught to me by none other than the Standing Committee's Chair, Harvey Rishikof. Harvey, much to his own chagrin at times, was faculty advisor for my national war college thesis on terror trials. Among many other tremendous experiences we've enjoyed together was attending the oral argument before the Supreme Court in *Hamdan v. Rumsfeld*. In my assignments following war college, Harvey's model of commitment to and faith in the power of civil society organizations has profoundly influenced me. This influence was there with me and the troops whether we were helping provide security and logistical support for a small nongovernmental organization that trained Afghan criminal defense counsel or creating avenues by which interested private and professional groups could provide input on detention operations.

I can never repay my debts to you, old friend, but I did want to deliver a small gift I have been holding for you since returning from my most recent deployment. It is the cup of the NATO Rule of Law Field Support Mission, my last command in Afghanistan, where such cups have been used by resourceful Afghan and international supporters of legitimacy-through-constraint in every contested province of that embattled country. We drew our motto, Harvey, from the ancient Pashtun proverb, "Yow mumlakat, bey law qanoon tsacka, de zdangal haysiat laree—A Country Without Law is a Jungle."

It seems only fitting that we should drink from the same cup. We are both committed to seeking national security consistent with the rule of law. You are trying to achieve it by your work with the Standing Committee and through your teaching at the War College. I am trying to achieve it as a prosecutor mindful that legitimacy flows from respecting the legal and normative constraints on my authority.

Thank you, Harvey, and thank you all.