

2014

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Recommended Citation

Mark Martins Brigadier General, *A Conversation with the Chief Prosecutor of United States Military Commissions*, 46 Case W. Res. J. Int'l L. 483 (2014)

Available at: <http://scholarlycommons.law.case.edu/jil/vol46/iss3/5>

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A CONVERSATION WITH THE CHIEF PROSECUTOR OF UNITED STATES MILITARY COMMISSIONS

*Brigadier General Mark Martins**

Thank you, Dean Mitchell for that warm and gracious welcome and introduction.

It is so tremendous to be here in this distinguished institute and law school and in the tradition of international legal studies. Michael, Avi, great to see you again—Avi, in your former work in Human Rights First and our work together on the Counterinsurgency Manual, the Army, and Marine Corps Manual for Counterinsurgency; and, of course, Michael, who I hadn't seen for twenty years.

* In September of 2011, Brigadier General Mark Martins became Chief Prosecutor of Military Commissions. Over the previous year, in Afghanistan, Martins was commander of the Rule of Law Field Force-Afghanistan and of the dual-hat NATO Rule of Law Field Support Mission. The prior year, also in Afghanistan, he had served as the first and Interim Commander of Joint Task Force 435 and then as its first Deputy Commander upon Senate Confirmation of Vice Admiral Robert Harward. Immediately prior to his deployment to Afghanistan, Brigadier General Martins co-led the interagency Detention Policy Task Force created by President Obama in January 2009. Commissioned in the infantry after graduating first in order of merit from the United States Military Academy in 1983, Brigadier General Martins served as a platoon leader and staff officer in the 82d Airborne Division. He then became a judge advocate and has since served in a variety of legal and non-legal positions. He has been deployed to zones of armed conflict for more than five years, including service as Chief of Staff of the U.S. Kosovo Force, Staff Judge Advocate for First Armored Division and then Multi-National Force—Iraq, and his recent duties with Rule of Law Field Support Teams across eight provinces and twenty-three key districts in Afghanistan. Brigadier General Martins is a Rhodes Scholar (Balliol College, P.P.E., 1st Class Honours, 1985) and a graduate of Harvard Law School (magna cum laude, 1990). He holds an L.L.M. in Military Law and a Masters Degree in National Security Strategy, having attended the Infantry and Judge Advocate Officer Basic courses, the Judge Advocate Graduate course, the Combined Arms and Services Staff School, the Command and General Staff College, and the National War College. He has published widely in professional journals. His awards include the Defense Superior Service Medal, the NATO Meritorious Service Medal, the Department of State Meritorious Honor Award, the Legion of Merit, the Bronze Star (two awards), and the Army Meritorious Service Medal (multiple awards). He has also earned the Ranger Tab, Pathfinder Badge, Expert Infantryman Badge, Senior Parachutist Badge, and Air Assault Badge. In April of 2011, Brigadier General Martins was awarded the Harvard Law School Medal of Freedom.

It is hard to believe that twenty years ago we were trying to think through how an International Criminal Court might deal with shadow groups of various levels of allegiance in connection to a government, might be tried for violations of international law, and your scholarship has meant so much to us in the field and in court rooms around the world. So it is just tremendous to see you again and to be here.

You know, coming to this distinguished institute of higher learning, having spent most of the last decade in rural parts of Iraq and Afghanistan, I am kind of reminded of maybe the most famous occasion in which a backwoodsman came to the academy.

You will remember it too, from our history. It was Abraham Lincoln in 1858, and he is debating Steven A. Douglas in the senatorial campaign in Illinois, and one of the Lincoln-Douglas debates occurs at Knox College in Western Illinois. Then, as now, it is a preeminent private liberal arts college.

Lincoln, of course, who is a self-schooled person, no higher education of any sort, comes to Knox. Historians say it was a pivotal moment in the lead-up of the Civil War, the whole course of peace and then war might have been different had Lincoln not denounced slavery on moral terms that day.

So Knox, as the legend of the debate goes, Knox had set up scaffolding. If you had been out to Knox, there is an old main building, and they wanted everyone who was coming—it is a railroad junction town, so people were coming from all over the Midwest to Knox—they gathered out in front of the old main building, and they had set up scaffolding on the second floor so the candidates could be heard and seen.

So Steven A. Douglas, a compact man, gets through the window out onto this scaffolding, no problem. Lincoln, of course, a tall, gangly man who was to become our sixteenth President in just a couple of years, kind of gets through the window with difficulty out onto this makeshift stage and is said to have quipped, “at least now I will be able to say that I have been through college.”

I won't be able to say I have been through the great Case Western Reserve University School of Law after this, but I am indebted to you for allowing me to share it with you this afternoon. It is also great to be in Ohio.

My first platoon sergeant was from Ohio, a very grounded, wonderful non-commissioned officer, repetitive tours in Vietnam. I was a green infantry lieutenant, and we were out on our first field problem in Fort Irwin, California, in the high desert, and we had trained hard all day with my platoon, and went to bed out near our foxhole.

The Sergeant elbows me at about two o'clock in the morning and he says, “Sir, look up, and tell me what you see.” And I looked up, and I said, “Well, I see a heaven full of stars Platoon Sergeant.”

He says, “Sir, what does that tell you?” And I didn’t really know where he was going with this question. But I wanted to impress him with my profound keen intellect. So I said, “Well, astronomically, that tells me there are billions of stars, perhaps trillions of planets. Theologically, it tells me that God is great, and we are but small and insignificant. Meteorologically, it tells me it is a clear night; should be a clear day tomorrow, great day for training.”

I said, “Well, what does that tell you, Platoon Sergeant?” And you know, I thought I really impressed him with this. He was pausing. He says, “Sir, it tells me that somebody stole our tent.”

That was the last time I was consciously trying to be profound.

And I won’t try to be profound today, even though we are dealing with some profound issues, some serious and profound issues. I want to talk to you for the next twenty to twenty-five minutes about the reformed military commission system under the Military Commissions Act of 2009.¹

This is a system that the Dean’s introduction indicates in almost every phrase and word the connection of this system in people’s minds, to images formed of Guantanamo a decade ago. And yet, the world’s view of this system and of Guantanamo is not merely a function of just images. There were serious legal errors in the framework with which we started out a decade ago.

In 2004, the Supreme Court held that detainees held under the law of armed conflict must have a meaningful opportunity to confront the basis under which they are detained.²

In 2006, the Court held that if we are to try somebody under the law of armed conflict, we must comply with common Article 3 of the Geneva Conventions,³ and then in 2008, the Court granted the great writ, the writ of habeas corpus, access to our federal courts, to detainees,⁴ those cases of *Hamdi v. Rumsfeld* in 2004, *Hamdan v. Rumsfeld* in 2006, and then the *Boumediene v. Bush* case in 2008.

Where we are now, I will submit to you and I am grateful to have the opportunity to answer whatever questions you have, tough questions in an academic setting, where I know that you are thinking about these things carefully. It is not going to be just about slogans.

I want to talk to you about these issues because where we are now is at a mature and accountable institution; that five different acts of Congress, and I am talking about the two different Military Commissions Acts of ‘06 and ‘09, and then successive national defense

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1. Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2013).
 2. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).
 3. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).
 4. *Boumediene v. Bush*, 553 U.S. 723 (2008).

authorization acts, two different presidents coming at it from different perspectives, and now, increasingly, our courts have weighed in on.

This is the only lawful path forward for reasons I am going to mention for trials of some of the most serious alleged members of Al-Qaeda and associated forces. So, military commissions.

Let me say four things up front, given the international perspective of many of you and being part of the great Cox Center, and I will put this in sort of an international context.

First of all, it is really important, I think, to distinguish between detention under the law of armed conflict and a criminal trial under the law of armed conflict. So detention under the law of armed conflict is the taking of a combatant off the battlefield, a regular combatant, somebody wearing a uniform or somebody not.⁵

You have that authority. States have that authority until the end of the conflict. Not a controversial source of authority under international humanitarian law under the law of armed conflict. That's one topic, and that tends to be associated with Guantanamo detentions in Afghanistan and Iraq that are occurring in the context of hostilities.

Then you have the trial of alleged violators of international law, of the law of armed conflict; criminal trials. So if you don't make that distinction, I find people on all sides of these different issues if you imagine four quadrants. You can be for the system of detention that is right now supervised by our federal courts: you have habeas with regard to Guantanamo detainees and you have the habeas petitions in the United States District Court for the District of Columbia, federal court, providing independent review of the lawfulness of detention.

So you might be for that system, say, and against military criminal trials. You might be for the high standard of proof, the rigor that I will talk about with regard to a criminal trial, putting somebody on notice of charges and trying them in a criminal trial in a military commission, and against the longer term detention that can happen even under federal court supervision. So you can be for one, against the other. You could be for both or against both.

I have found that you see people all around the world in every one of the quadrants. So it is important so as not to make any analytical errors and first level errors to see that distinction.

Having spent a good deal of time in the law of armed conflict detention effort around the world in Afghanistan and Iraq, I am now clearly working in this area of criminal trials. So what I am talking about today is military commissions, which is distinctly the criminal

5. LTC RICHARD P. DiMEGLIO ET AL., LAW OF ARMED CONFLICT DESKBOOK, 96-97 (MAJ William J. Johnson & MAJ Andrew D. Gillman eds., 2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2012.pdf.

trials aspect that must be, I think, disentangled. So that's the first observation.

The second is, since 2006, we have very clearly been within Common Article 3 of the Geneva Conventions. The court held, as I said, that you must comply with that. What was that rule? That if you are going to try an individual under the law of armed conflict, you must provide a regularly constituted court affording all of the judicial guarantees recognized as indispensable by civilized peoples.⁶ So we are clearly operating within that international legal obligation.

The third point I will make up front is that two other sources of authority—we are not party to the additional protocols to the Geneva Conventions—but in early 2010, our government indicated that we were recognizing two other provisions, Article 75 of Additional Protocol I and all of Additional Protocol II; that we were following them out of a sense of legal obligation.⁷

And as you know, in customary international law, that's one piece of customary international law. The other piece is long-standing state practice. But we made it clear that we were following Additional Protocol I, Article 75, and all of Additional Protocol II out of a so-called *opinio juris*, and those provide additional safeguards regarding the criminal trial of individuals, both in international armed conflict for Article 75, Additional Protocol I, and non-international armed conflict, for Additional Protocol II.⁸

And then, finally, military commissions can be understood as a national forum for offenses against the law of armed conflict, which is important to point out. Even in our international courts—International Criminal Court, Article 10 and the International Criminal Tribunal for the Former Yugoslavia, Article 9—you have got concepts of complementarity and concurrent jurisdiction.⁹

6. *Hamdan*, 548 U.S. at 630–32.

7. *Law of War Detention and the President's Executive Order Establishing Periodic Review Boards for Guantanamo Detainees: Hearing Before H. Armed Servs. Comm.*, 112th Cong. (2011) (statement of William J. Lynn, III, Deputy Sec'y of Def.).

8. *See id.*

9. Rome Statute of the International Criminal Court art. 10, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (stipulating that nothing in the statute conflicts or limits existing or developing international law); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 9, U.N. Doc. S/25704 and Add.1 (May 3, 1993), *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *last amended by* S.C. Res. 1877, U.N. Doc. S/RES/1877 (July 7, 2009) (establishing that the Tribunal shall have concurrent jurisdiction to prosecute).

No one has conceived that national courts wouldn't have a role in prosecuting crimes against the law of armed conflict, right? I mean, the community and nations want as many possible forums in which to try those who have committed such offenses. So those are four points up front that I think try to put military commissions into context.

And the Geneva Conventions, among other sources of authority, clearly recognize military courts of nations as long-standing, law of armed conflict forums. They have had a long-standing pedigree.

So what are commissions? I will start with what they are not. They are not the secret, exclusive, separate terror tribunal that some, frankly, sought ten years ago and others feared. That's not what happened. What we have now is a system that is authorized under a law passed by Congress and signed into law by the President that provides all of the protections I would submit that are consistent with our values. So what are they?

Well, they are military courts, the system that I have been practicing in all of my career. It is a system that is regularized, a regularly constituted court by the Military Commissions Act.¹⁰ It lays out the procedures by which they are constituted and run.¹¹

The process begins with something called referral, referral of charges to a military commission, and in its first meaning, a military commission, a military court, refers to that board of officers, that panel, that jury fact finder in the system.¹² A panel of officers is the military commission.

So how does the commission get charges? It is through this process of referral formalized under the statute. It begins with an investigation coming to me, to my office establishing in fact, in evidence, that someone has violated one of the thirty-two crimes that are codified in the Act.¹³

These are long-standing law of armed conflict violations: attacking civilians, attacking civilian objects, murder of protected persons, using a flag of surrender improperly, perfidy, treachery, and terrorism in the context of hostilities.¹⁴

So I get evidence that one of these things has occurred, and if the evidence is admissible, if there is a reasonable prospect of success on the merits at a full trial, a full adversarial trial, I swear charges or someone in my office swears charges. I actually then endorse the

10. Military Commissions Act of 2009, 10 U.S.C. § 948b (2013).

11. *Id.*

12. *Id.* § 950c; DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, UNITED STATES II-34-II-36 (2010), available at <http://www.defense.gov/news/d2010manual.pdf> (last visited Dec. 30, 2014).

13. 10 U.S.C. § 950t.

14. *Id.* § 950t(1)–(3), (17)–(18), (24).

charges after reviewing them independently myself. I will endorse them and forward them to a convening authority.

A convening authority in military justice is historically a commander, and convening authority is part of command.¹⁵

When I was a field commander in Afghanistan, I had convening authority as part of maintaining the discipline, morale, welfare, and accomplishment of the mission of my unit and troops, and convening authority was one piece of command, part of the responsibility and authority of a commander, to maintain that discipline and to accomplish that mission.

So a commander has convening authority. The convening authority of the military commission is a senior official designated by the Secretary of Defense.¹⁶ It is either the Secretary of Defense under the statute or a designated officer, a senior officer.

That's Mr. Paul Oostburg Sanz right now, who also happens to be the General Counsel of the Department of Navy. A senior officer has this convening authority. He must, with the advice of a legal adviser, a trained person within military justice, and a lawyer with criminal justice background, review the charges; find that the evidence shows that a crime was committed; that the accused is the one who did it; and that the offense states an offense under the Military Commissions Act of 2009.

If he finds those things, he will refer the case. There is that word "referral" to a military commission. At that point, the chief trial judge of the trial judiciary appoints a judge to the case to preside, who has the statutory authority to preside over the case.

Now, this is not an Article III independent life-tenured independent judge. I would submit it is an independent judge, typically an Army Colonel, Navy Captain, Air Force Colonel, Marine Corps Colonel. It is somebody with military justice, who is in a separate chain of command for independence and has statutory protection from any kind of influence, from people within the executive branch.¹⁷

This is the same trial judiciary that we use in our military justice system. Although not Article III judges, I would ask any of you to look at their decisions and then defy you to say they are not independent.

I mean, one military commission judge did not allow Abu Ghraib to be destroyed following allegations that arose in Abu Ghraib; he

15. See *Legal Services: Defense/Personal Representative Services Addendum*, JAG (last visited Dec. 30, 2014), http://www.jag.navy.mil/legal_services/defense_services_addendum.htm.

16. U.S. DEP'T OF DEFENSE, *supra* note 12, at II-2.

17. See 10 U.S.C. § 948j.

saw it as a crime scene and defied very senior level, even presidential direction, to have Abu Ghraib destroyed for operational purposes.¹⁸

Also, at the beginning of the military commission's experience in 2009, the President had ordered a stay—wanted to abate proceedings, and the judge refused to abate proceedings.¹⁹ So these are people who are independent, very senior, retirement eligible, judge advocates serving on the bench. So you have the judge.

The panel is a board of officers.²⁰ In a noncapital case, it is at least five.²¹ In a capital case it is at least twelve, and these are officers drawn from the 200,000 plus officers, active duty officers of all services serving worldwide.²² They are selected by the convening authority.²³

This isn't a Sixth Amendment jury of one's peers randomly drawn from the district wherein the crime shall have been committed; they are selected by a convening authority, same exact statutory criteria used in military courts-martial. The convening authority—and I have a lot of experience selecting different types of panels, considering age, education, training, experience, length of service, and judicial temperament—so the convening authority selects a panel from amongst all of those officers.

So officers serving on the demilitarized zone in Korea, in Afghanistan, Iraq, post camps, and stations around the United States all are eligible, and the convening authority selects them, essentially selecting the jury pool.

That jury, that pool, is then subjected to rigorous examination and challenge by counsel from both sides with challenges for cause to be liberally granted and peremptory challenges also exercised by both sides. So you get an impartial fact finder.

The case is then tried, and the trial process, sharply adversarial, looks very much like what you are familiar with in civilian criminal trials; it has all of those guarantees, judicial guarantees, recognized as indispensable by civilized peoples.

The accused is presumed innocent. The prosecution must prove guilt beyond a reasonable doubt, the highest standard known in our law. The accused is entitled to notice, specific notice of charges in a language he or she understands: the right to counsel and choice of

18. Christiane Amanpour & Ayman Mohyeldin, *Judge: Abu Ghraib a Crime Scene*, CNN (June 21, 2004) <http://www.cnn.com/2004/WORLD/meast/06/21/iraq.abuse.trial/>.

19. *Id.*

20. 10 U.S.C. § 950f.

21. DEP'T OF DEFENSE, *supra* note 12, at II-22.

22. *Id.*

23. *See id.*

counsel; and in a capital case, learned counsel at government expense—a right that Congress was interested in providing because of concerns relating to access to counsel in Guantanamo—a right we don't provide our own service members in terms of learned, civilian, death penalty qualified counsel at government expense.

The right to presence: *Hamdan* was actually a case involving a presence issue, but a very strong right to presence at trial. Protection against self-incrimination; protection against the use of any statements obtained as a result of torture or cruel, inhuman, or degrading treatment, and the standard for admissibility of an accused's statements is voluntariness; the right to witnesses, to present evidence on one's own behalf; cross-examine government witnesses, witnesses and evidence that the accused obtained with the power of the state, compulsory process of the state to get that evidence into the court in front of that military commission jury.

The right to exculpatory evidence: you are familiar, those of you taking criminal law, and I talked to two of your 3L classmates who ran with me this morning, you were very well represented by Joshua and Graham. I know they have learned *Brady v. Maryland*²⁴ and *Giglio*,²⁵ I mean exculpatory evidence. So the prosecution has an obligation to provide those things that undercut the government's case. It may be exculpatory, tend to reduce the belief the person is guilty or lessen the sentence, the appropriate sentence, the severity of the crime, and then even something that would go to the credibility of the prosecution's witnesses—*Giglio* evidence. If it would help an advocate impeach the government's witnesses, I have got to turn that over.

An impartial decision maker: I have spoken about that with regard to the military jury.

Exclusionary rules: I have spoken of the exclusionary rule relating to coerced evidence, but you know, this is a lay jury. They aren't lawyers, so there is the same concern about evidence that may be unfairly prejudicial. One of the risks of prejudice substantially outweighs the probative value excluded. I will talk about hearsay a little bit later, but we generally exclude hearsay. There is a slightly narrower aperture for hearsay than you would find in federal civilian courts.

Self-representation: if you are familiar with *Farretta v. California*, an accused can knowingly, voluntarily, intelligently waive the right of counsel; you don't have to be forced to take counsel, which is the same rule we have in our civilian process.²⁶

24. *Brady v. Maryland*, 373 U.S. 83 (1963).

25. *Giglio v. United States*, 405 U.S. 150 (1972).

26. *Faretta v. California*, 422 U.S. 806 (1975).

Protection against double jeopardy, protection against ex post facto laws and the right of appeal. Remember I said this is a system within our larger system of democratic and constitutional governance: right of appeal to a military and civilian court—United States court of military commission review and then to the federal system, the United States Court of Appeals for the District of Columbia circuit is the second level of appeal, and then by petition for writ of certiorari to the United States Supreme Court.

So those are the rights afforded to the accused under the Military Commissions Act of 2009, and it is a system that is intended to deal with a defined threat: Al-Qaeda and associated forces. The 9/11 Commission called Al-Qaeda a threat that was patient, lethal, and adaptive—and that is still correct, even though the organization and its associated forces have morphed.

It is important to have a clear eye view of this, to neither exaggerate it nor minimize it. It is a group that intentionally targets civilians. It uses off the shelf technologies that are increasingly easy to get to, which enable them to combine and to figure out what the weaknesses are of open societies.

They can strike when they want, and they are quite patient, and while the number of casualties over a period of time might be low, it is folly to underestimate the psychological impact of the kind of crimes and hostile acts that they commit, and we are in this world where we have an overlap between something that is both a crime and an act of belligerence, and act of hostilities if illegal.

So it is important to have this view that is neither exaggerating it nor underestimating it, because the response matters, right?

I mean, this is the kind of attack and action that tempts even peaceful peoples to respond outside the law. And my sense is that that's one of the most serious mistakes you can make. You have to respond to this within the space defined by our law and by our values.

Within that space, we have to be relentlessly empirical and pragmatic and use every lawful, appropriate instrument of national power and authority to deal with them. Diplomacy, economic means, sure. Intelligence, yes, and military force when necessary.

On the twelfth anniversary of 9/11, I was reflecting back to where I was two years ago, and I had just been to Tarnak Farms in Kandahar where I was working and serving at the time, and then Garmabat Ghar, which was the Farooq camp in the Kandahar Hills not too far from Tarnak Farms, which were the headquarters of Al-Qaeda and went there with some of my Afghan partners and talked to them.

We needed to put boots on the ground there. I mean, you have to route out places where people were plotting with impunity. Military force—yes, when necessary. And I believe military commissions, which do have a long history, and have been updated to

become a national security and justice institution, a mature one for our time, when necessary.

So it is important to keep an eye on what is this threat, one that, again, all three branches of our government acknowledge we are in an armed conflict with. That's not a controversy with regard to domestic law.

Let me get you warmed up. I will map out six different criticisms of commissions. They will be familiar to you, and then I will take questions.

Military commissions are condemned as—I call them the six “uns”: unfair; unsettled; unknown; unbounded; unnecessary; and even un-American. So let's start with unfair.

People believe that these protections that Congress provided in the Military Commissions Act are not enough, that they are not fair. They don't measure up to protections in other courts.

William Shawcross, who is the son of Lord Hartley Shawcross, the British prosecutor at Nuremberg, has said that if the twenty-one defendants in the docket at Nuremberg were magically transported to Guantanamo, they would be astonished at their rights, privileges, and immunities.²⁷

Now, given where we have come, there has been a revolution in constitutional criminal procedure. We think much differently about discovery and the ability to mount a defense. That's appropriate. That's an appropriate development. But it does cause you to think a little bit differently about the notion that they are unfair.

Unsettled: this is the criticism that military commissions don't have a body of law. You know, it is not clear where you are going for your legal rules or where the judge is to look for decisions. I believe this is grossly overstated.

Military commissions draw upon an abundant source of law in the Uniform Code of Military Justice in the military criminal trial practice since 1950, as well as because the Military Commissions Act points us towards federal courts for a number of areas, as well as our federal district court decisions.

Because our practice relating to pre-2006 crimes is specifically pointed under Article 21 of the Uniform Code of Military Justice to the law of war,²⁸ we also must look to the international law of war.

But to imply that that is a system that lacks the anchoring—I mean, you understand the criticism, right? Part of justice and process

27. See William Shawcross, *Lessons from Nuremberg*, N.Y. TIMES (Apr. 9, 2011), <http://www.nytimes.com/2011/04/10/opinion/10shawcross.html?pagewanted=all>.

28. Uniform Code of Military Justice, 10 U.S.C. § 821 art. 21.

is a sense that you can discern what the rules are. It is an important principle of justice and fairness.

But the judge in a military commission system can find the law and hears it; it is in a sharply adversarial process with very competent counsel. Issues are presented for decision in a methodical way with appeal all the way to the Supreme Court, and decisions are made.

That's what happens in courts every day all across the country. And the law books are filled with disputes over what the law says and what it means and how it applies to a particular set of facts. That process is completely consistent with the fair administration of justice.

So that's the unsettled argument and the counter that I would offer to you, but we can certainly talk about it.

Unbounded: this is military jurisdiction. We are a constitutional democracy, civilian control of the military. That's the process, right? Jury trial, our civilian institutions of justice, and that if you have expansive military jurisdiction, this can undercut our civil institutions, be corrosive of them. Understand the concern.

This goes back to *Ex parte Milligan*,²⁹ *ex rel Toth v. Quarles*,³⁰ *Reid v. Covert*,³¹ *O'Callahan v. Parker*.³² You are familiar with this line of criticism.

The response is that this is a narrow system. Again, remember I said this is not the separate exclusive terror court that was going to handle all terror cases. This is a narrow jurisdiction dealing with situations of genuine, no kidding hostilities, and hostilities have grip. It is a standard.

If you are familiar with the International Criminal Tribunal for the former Yugoslavia, a practice that Professor Scharf pioneered in many ways, the *Tadic* case is a good articulation of what hostilities are. It has to be protracted armed violence of a scope, nature, intensity, and duration, that a state must use its military force to deal with.³³

29. *Ex parte Milligan*, 71 U.S. 2 (1866) (considering the jurisdiction of military commissions).

30. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955) (discussing whether civilian ex-servicemen could be subjected to trial by court-martial).

31. *Reid v. Covert*, 354 U.S. 1, 10 (1957) (determining whether a civilian could be subjected to trial by court-martial).

32. *O'Callahan v. Parker*, 395 U.S. 258 (1969) (adjudicating on whether a member of the Armed Forces who commits a non-military crime cognizable in civilian courts should be tried in that forum or by court-martial).

33. *See Prosecutor v. Tadic*, Case No: IT-94-1-T, Opinion and Judgment, ¶¶ 624–59 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

That's a standard you can present evidence on, that separates out sporadic acts of violence. It really has to be armed conflict. That is actually an element of every offense that has to be proven in the military commission system. It has to be not just terrorism, the often spectacular violence to gain a political end and intimidate the population, et cetera, but it has to take place in the context of hostilities.

The accused has to be an unprivileged belligerent. This is someone who doesn't carry arms openly, is not subordinated to a commanding officer who causes compliance with the law of war, doesn't wear a uniform. You have to be an unprivileged belligerent in the context of hostilities, and it has to be one of those thirty-two offenses.

I am a big fan of federal courts. Federal courts can try some 3,000 crimes, a lot of precursor crimes, lots of things dealing with terrorism. Military commissions have a very narrow sphere dealing with violations of the law of armed conflict in the context of hostilities.

This hypothetical you will hear of: the little old lady in Switzerland who signs a check that winds up funding the Tamil Tigers, a terror group. Is the military commission system really going to haul her into court? That is just that. It is a law school hypothetical that could never happen. It doesn't fit the law, and it just couldn't happen. That's unbounded and you have got the comeback for it.

I have mentioned unknown. This is the idea that this is secret. This is transparent. There are going to be a lot of secret sessions. You think of the *Quirin* case.³⁴ I was just in the Robert F. Kennedy Department of Justice Building last week on the fifth floor there, and they tried the *Quirin* saboteurs in a secret trial. This is an open system. We follow the *Press Enterprise II* factors.³⁵

In the 200 hours in court that I have had as chief prosecutor, for Guantanamo Bay there are a little bit more than a half hour of closed proceedings. These are on interlocutory matters, pretrial. The government's case will have no closure. It will be all open to the public.

The judge in advance has to state that there is an overriding public interest foreclosure, and if it is a national security issue, it has to be really protecting sources and methods. It can't be justified or attempted purported justification that a law was broken or that it is somehow embarrassing. He has to preserve it all on the record.

34. *Ex parte Quirin*, 317 U.S. 1 (1942).

35. *Press-Enterprise Co. v. Superior Court of Cal. for the Cnty. of Riverside*, 478 U.S. 1 (1986).

Again, it is taking place in a sharply adversarial process, and all parties are going to be weighing in on it, and it is preserved for appeal. This is the *Press Enterprise II* factors. In *Richmond Newspapers*, the Supreme Court said in the criminal context that the people of an open society do not demand infallibility of their institutions.³⁶

But it is difficult for them to understand what they are prohibited from observing, and that's the operative principle here. This is an open system. We have sixty news organizations that cover Guantanamo. There is closed circuit TV video feed to locations in the United States.

If you have an ID card with a photo, you can get in and watch the proceedings. It is not televised. We are using the same rule as in federal court and in our courts-martial, but it is public and open, and there are same day transcripts posted on www.mc.mil where you can get all of the pleadings.

You can make sense of the proceedings and see what the parties have briefed and what the issues are. It is so difficult to fathom the unknown aspect, although one of the reasons I am out talking to you, a very unlikely spokesman I am, is to try to help engender more understanding of the system. So that's unknown.

Unnecessary. This could be a whole discussion all in itself. We are in this world where what something can be both a violation of international terrorism crime and a violation of the law of armed conflict. It is just the nature of the conflict we are in with non-state actors who are appearing, or presenting as civilians, and you say, well, why can't we just do this all in a federal civilian court?

Again, I am a fan of federal civilian processes, and I believe my brother and sister prosecutors in federal courts are doing tremendous work and have had many convictions. Although the numbers sometimes are overstated, they have had convictions in terrorism cases, including about a dozen that involved Al-Qaeda defendants who were operating overseas and were convicted of crimes that could have been charged under the military commissions process. There have been about a dozen since 9/11.

So why not just do it all in federal court? The analysis that one must do is look to what each jurisdiction can charge. This is not a novel problem. Prosecutors do this when they have concurrent jurisdiction all the time.

You look to see what you can charge, what's the admissible evidence. Are there any legal barriers? You can think about efficiency factors and strength of interest factors, like what venue are you going to bring it? Is that a secure venue? What about the jury?

36. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

Is there some possibility for juror intimidation? I don't think any of these are totally dispositive.

I will tell you when I sat around the table with my fellow prosecutors, there are actually eight who work in my organization, eight lifetime federal civilian prosecutors from the DOJ, the no-Miranda rule, we have voluntariness under the totality of the circumstances, and we do have this slightly broader aperture for lawfully obtained probative, reliable hearsay, where the accused or the declarant is actually unavailable, can't come into court.

Those rules do have bearing on whether a case might be more appropriate for a military commission. But it deals with genuine operational and intelligence factors involving this threat, and it has to be in the interest of justice to leverage one of those differences. So that's unnecessary.

I believe there really is a category of cases in which the best choice is a military commission. And, of course, right now, we have a bar on having any detainee from Guantanamo. Congress, our legislature, has said no detainees will be moved from Guantanamo to the United States. That means the only place where we are going to do a rigorous criminal trial beyond a reasonable doubt standard, full discovery, notice of charges, is in a reformed military commission.

And then finally, un-American, my last comment. Anyone who wants to call military commissions un-American should. Go ahead and do it, but think about the historical example of John Yates Beall, and I take you back to February of 1865. Abraham Lincoln is reviewing the military conviction of John Yates Beall.

Beall was a confederate officer operating in upstate New York in late 1864, and he was convicted by a military commission for having sought to derail a civilian train. He was attacking civilians, the oldest crime we have got in modern humanitarian law in the law of armed conflict, violating this principle of distinction between combatants and non-combatants.³⁷

Beall was operating without wearing his uniform. He was in New York. Civilian courts are open in New York. He gets tried by a military commission. Think about what Lincoln is doing at the time as he is reviewing it in February of 1865.

In January of 1865, he has just succeeded in getting through the House of Representatives the Thirteenth Amendment to the Constitution. This was popularized in the recent film, getting through the House of Representatives the Thirteenth Amendment,

37. See Cameron S. Moseley & Dictionary of Va. Biography, *John Y. Beall (1835-1865)*, ENCYCLOPEDIA VA., http://www.encyclopediavirginia.org/Beall_John_Y_1835-1865 (last modified July 10, 2013); *Principle of Distinction*, INT'L COMM. OF THE RED CROSS (Oct. 1, 2014), <https://www.icrc.org/casebook/doc/book-chapter/the-distinction-book-chapter.htm>.

seeking to make permanent the Emancipation Proclamation that he issued earlier in the war. That's what he is doing in January.

What's he doing in March? In March, he gives his great second inaugural address, you know, one of the most sublime statements in our culture about "might" not being equated with "right." In between those two iconic moments in our modern constitutional democracy, Lincoln is approving the military commission conviction of John Yates Beall.

Now, that doesn't settle the rightness or wrongness of military commissions in the twenty-first century. It doesn't even settle Lincoln's controversial record on civil rights in wartime, but it certainly causes you to give pause when you want to call military commissions un-American, I would submit. So let me stop there. Thank you.