

NATSECDEF Conference 2017
Opening Remarks

**The GTMO Military Commissions –
Where We Are and the Way Forward**

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Good morning. I'd like to thank Dean Morant and the George Washington University Law School for hosting this event. I also want to thank the NATSECDEF Conference for, once again, inviting me to share my thoughts on the current state of the military commissions in Guantanamo Bay, as well as my thoughts on the way ahead.

I apologize for speaking to you via this pre-recorded video, but I ran into an unanticipated scheduling conflict and making a video was the only means of my attending today's session.

I am going to start with a brief introduction. I am the Chief Defense Counsel for the Military Commissions and I am privileged to head an organization called the Military

Commissions Defense Organization, or the MCDO as we call it. The MCDO's mission is to "provide[] ethical, zealous, independent, client-based defense services under the Military Commissions Act in order to defend the rule of law and maintain public confidence in the nation's commitment to equal justice under the law."

Put into one sentence -- the MCDO defends the rule of law from a military commission apparatus that is flawed in both design and execution.

I am a career Marine, with 28 years of service. I've been all over the globe with the Marines. My background is primarily in military justice with pretty significant experience in all three seats in the court room – defense counsel, prosecutor, and military judge – and I consider myself well acquainted with, and a big fan of, the court-martial process. Before coming to the MCDO, I never thought I would witness such extraordinary legal events, so perilous to rule of law, as I have seen unfold in the Military Commissions down at Guantanamo over the last two years.

As the Chief Defense Counsel, I do not represent any accused, but instead lead the defense teams that represent their individual clients. I see myself primarily as their protector and advocate – I watch them in court, I fight to get them resources, and I listen when they want to discuss things. One of the advantages of my position, is that I get to see all the

teams at work and in court, which gives me more of an overview of this crazy system and a different perspective than the individual team members, who are focused on their cases and their client.

You may expect that I will talk about certain things when describing these military commissions: the history of military commissions in the US, the military justice system in general, how these military commissions compare legislatively and procedurally with the military justice or federal systems. I am not going to do that. Indeed, I can't because the Guantanamo Military commissions are not a natural evolution of acceptable jurisprudence. They are so far removed from what we consider normative standards for justice, a discussion of historical context would be largely academic (or should be left in the courtroom) and I am not here to lead an academic discussion.

Instead, I will call it as I see it. And to be clear – these views are mine, and mine alone – they do not reflect the views of the Department of Defense, the United States Government, or any agency or instrumentality thereof.

Let me start with my ultimate conclusion. **The Guantanamo Military Commissions are a failed experiment – and considering the gravity and importance of these cases, that failure is one that hurts us all.**

This failed experiment being conducted down at Guantanamo comes in the worst possible package – what’s the phrase – hard cases make bad law.

- First, these are major cases – incredibly complex, held years after the events in question, involving massive amounts of information. The 9/11 case, for example, requires defense investigation on five continents. Much of this information is highly classified. Questions about the law and its application to these cases would be enormously complex in an established judicial system – and ours is anything but an established judicial system.
- Second, some of these cases are capital, and if found guilty, the accused may be sentenced to death. Our well established military justice system, of which I am a normally a huge fan, has demonstrated an inability to handle death cases. Indeed, the court martial process has an 80% reversal rate in death cases. If the court martial process, with its well-defined rules and even playing field, is ill-equipped to handle capital cases, the Commission system has no business referring any case capital.
- Third – and this touches upon everything – the United States chose to secretly detain and torture the men who now face trial in these commissions. Justice was an afterthought. As a CIA interrogator told a detainee, “[you will] never go to court, because ‘we can never let the world

know what I have done to you.”¹ The legal ramifications of this secret detention impact these commissions in so many ways, driven by what I see as the US government’s manifest interest in keeping torture out of these trials. The chief prosecutor who was serving a decade ago when the CIA’s high value detainees arrived at GTMO has since said, “Rather than bolstering the prosecution’s case, allegations of abuse required further investigation and might leave the prosecution in a weaker position.”² Wow – was he right! Torture impacts every aspect of the litigation of these cases. Indeed, in argument during a motion session during the 9/11 cases last summer, a prosecutor noted that the term torture had been used in court more than 500 times, while the phrase 9/11 had been used less than 200 times.³ And the focus on torture’s impact on the military commissions will continue because, writ large – legally, morally, and for the legitimacy of criminal trials that must serve as an example, and not an exception – justice cannot be done absent a full accounting of these events, commensurate with the requirements of any capital case, and the extreme nature of the Government’s misconduct.

¹ SSCI Report Forward (released with redactions 9 December 2014), at 4, citing internal CIA documents.

² Morris D. Davis, *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 Case W. Res. J. Int’l L. 115 (2009), available at: <http://scholarlycommons.law.case.edu/jil/vol42/iss1/5>.

³ *U.S. v. Mohammad, et al.*, Unofficial/Unauthenticated Tr. at 11930.

These issues – particularly the impact of torture - would cripple any normal court case. But they are layered on top of problems embedded in this failed experiment that we call the Guantanamo military commissions, and I'd like to turn to those now.

I am frequently asked why these trials are taking so long. For many, delay is the biggest concern. Delay *is* a huge problem, but the delay that leaves us in September 2017 with no trial dates in sight is the byproduct of problems that are more fundamental, with the potential to reach far beyond these cases, both as precedent and by corrupting our core principles.

So where are we today? I am going to answer with a Week in the Life of the Military Commissions Defense Organization, because some events we have dealt just last week alone demonstrate, at varying levels, why the Guantanamo Military Commissions are a failed experiment that hurts us all.

First, the defense team representing Nashwan al Tamir has been forced to move to abate their commission because Nashwan's health has deteriorated to the point that he cannot attend legal meetings. For months, Mr. al Tamir had been reporting increasingly severe pain and other neurologic symptoms related to problems with his spine. Two weeks ago, medical experts with Physicians for Human Rights assessed information available to counsel and immediately took action to advise JTF-GTMO that Mr al Tamir might become permanently paralyzed if he did not receive emergency

diagnoses and surgery within 24-48 hours. We think he was hospitalized soon after that, and received emergency back surgery, perhaps only due to his defense counsel's actions. But we do not know for sure because, in a system that claims to be transparent, the only consistent sources of information about our clients' current health is Carol Rosenberg from the Miami Herald and the handwritten letters we get from our clients. And in this instance, Mr. al –Tamir's medical condition made it impossible for him to write to his counsel for more than a week. During that period, JTF leadership and medical staff refused to support any kind of communication between Mr. al-Tamir and his lawyers even though a pretrial hearing is scheduled for the first week of October. If medical care at Guantanamo requires a return to a state of incommunicado detention, something is broken.

Second, the Nashiri case should be in session today – the fourth day of the first week of a long scheduled three week hearing. But they are not in Court. Why not? It's not because of Hurricane Irma. No, well before Hurricane Irma was named, the military judge had to cancel three weeks of hearings because the single Learned Counsel – the death-penalty lawyer who is required by statute to represent Mr. al-Nashiri in his capital case – had a significant personal matter that he had to attend to that precluded his travel to GTMO. This is the second hearing this year that has been cancelled because the only Learned Counsel on a capital team was unavailable for court. And still, the Convening Authority refuses to fund a Second Learned Counsel for my capital

defense teams. This is only one example of many situations where the Commission system has been stopped its tracks because the government refuses to give us the basic resources we need for some of the most important criminal cases in U.S. history.

Third, and I will spend some time on this issue, my defense teams and I are dealing with the government's continual disregard for the sanctity of the attorney-client privilege. This is an umbrella issue that has plagued military commissions for years.

The Government's disregard for the attorney-client privilege of military commissions defendants denies them the right to counsel, and sets a dangerous precedent for the American criminal justice system.

For the non-lawyers in the room, I want to take just a minute to highlight why the attorney-client privilege matters. The right to effective assistance of counsel includes the right of private consultation with counsel.⁴ The purpose of the attorney-client privilege, according to the Supreme Court, "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."⁵

Essentially, for the system to work, defendants must have the ability to trust their lawyers and speak with them in

⁴ *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

⁵ *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

confidence. If you don't have that, you don't have a legitimate legal system. The stark and depressing reality is - that down at Guantanamo, the defendants have no reason to trust their lawyers or think they can speak with them in confidence. Our clients know they cannot trust the sanctity of their communications with their lawyers. MCDO lawyers have told their clients that no one will read their privileged materials, that no one member of their defense team will violate the attorney-client privilege, and no one will "unintentionally overhear" their privileged communications with their attorneys. Yet, despite their best efforts, every time MCDO lawyers tell their clients they can speak frankly, another government intrusion is revealed and defense counsel look at best like fools, and at worst like liars.

Let's go back to 2011, when the cases in this latest iteration of failed Guantanamo commissions began. Joint Task Force Guantanamo (the command responsible for the custody of detainees in Guantanamo) seized, copied, and translated all written material in all detainees' possession. This included documents marked as attorney-client privileged.⁶ And, incredibly, this seizure of privilege materials was done *after consultation with the Joint Task Force's lawyers*. The military judge who first addressed this search and seizure concluded that it "infringe[d] on the attorney-client privilege."⁷ The government promised not to engage in conduct that infringed on the attorney-client privilege, yet similar conduct has continued.

⁶ *U.S. v. Mohammad, et al.*, Unofficial/Unauthenticated Tr. at 3910-46.

⁷ *United States v. al-Nashiri*, Unofficial/Unauthenticated Tr. at 168.

In February 2013, following a pattern of unusual events that I won't get into here, one MCDO attorney took it upon himself to climb onto a chair in an attorney-client meeting room in Guantanamo and write down the make and model of what Joint Task Force guards (and one Joint Task Force lawyer) had explained to be a smoke detector mounted on the ceiling. With the make and model, the MCDO lawyer returned to his office to Google the company, and discovered that the company did not make smoke detectors, but instead made microphones disguised as smoke detectors. These hidden listening devices existed in all attorney-client meetings rooms where commission defendants meet with defense counsel. When the issue was litigated, the government promised to not utilize such devices to infringe on the attorney-client privilege. As time has passed, we would learn this was yet another broken promise.

On a Sunday in 2014, shortly after church, two members of the FBI appeared at the home of a MCDO staff member. After some conversation (what interrogators call "rapport-building"), the FBI agents asked the MCDO staff member to reveal privileged information about the case he was working on, as well as other pending military commission cases. The FBI agents were successful in persuading the MCDO staff member to sign a contract to become a confidential informant against the MCDO and provided the government with a treasure trove of privileged materials. We have not even begun to appreciate the fall-out of that broken promise, as the litigation surrounding this issue is far from over.

I'm going to fast forward to this spring, and in doing so am skipping over several other examples of the government's refusal to respect the attorney-client privilege in Guantanamo. But, in the interest of time, I am going to move to the dilemma my teams face today.

We got inklings of this latest issue back in May of this year, when prosecutors in two cases (*al-Nashiri* and *Hadi al-Iraqi*) filed classified notices informing the presiding judges and the defense teams in those cases of certain classified information.

As a result of those filings, I advised all MCDO defense counsel to discontinue attorney-client meetings with their clients until they could "know with certainty that improper monitoring of such meetings is not occurring."

That was three months ago, and nothing has changed to cause me to change my advice. Indeed, the more I learn, the more resolute I have become in my position.

So that is where we stand today: **I, the supervisory attorney with the regulatory responsibility to advise all military commissions defense counsel on the ethical practice of law, have recommended that the defense counsel *not meet with their clients*.** It's hard to overstate how serious of a problem this is.

As any criminal defense lawyer knows, rapport with a client is critical to the representation. This is especially true in capital cases. Capital defense lawyers meet with their clients *a lot*.

But all attorneys are prohibited from revealing information related to the representation of a client without the client's informed consent. And given the history of the government's disregard for the attorney-client privilege in Guantanamo, and the recent revelations which I am not able to share with you, we are now at a crossroads. A defense lawyer's decision to continue to meet with his client in Guantanamo and discuss anything related to the case is fraught with ethical peril.

But, here's the problem. While discontinuing attorney-client meetings might be the only ethical option from the defense counsel's perspective, abandoning a client is not an option. It is a tremendously difficult situation for a defense lawyer to be in.

I know you want more detail on why I issued that order, but in this forum I cannot go into any more detail – except to say that a government attorney has admitted on the record in an unclassified setting that the government has quote “unintentionally [] overheard”⁸ some attorney-client meetings involving MCDO defense counsel. The rest, as they say, is classified.

The secrecy itself, which conveniently surrounds this and so many other important aspect of our cases, tells a story of the illegitimacy of the system

⁸ *U.S. v. Abd al Hadi al_Iraqi*, Unofficial/Unauthenticated Tr. at 1370.

How this gets resolved, I honestly don't know. Whether an appellate court will say that the current situation in Guantanamo amounts to a denial of the right to counsel is an open question. But *it's one by which the legitimacy of the entire system hangs*. Yet, there has hardly been a blip in the news cycle about this and I wonder how many of you sitting the audience are learning of this issue for the first time this morning.

I realize that covering Guantanamo is not easy, and I credit the journalists and NGO observers who have dedicated time to cover them. But I am hopeful that more attention will be given to commissions in the coming years. We will be sorry, if we recognize too late, the threat these commissions pose to the rule of law.

So where do we go from here?

I was asked to speak about the way forward. I want to be the first to acknowledge that, while I have many criticisms of the system as it is currently structured and implemented, I don't have a solution. *The experiment has failed*, and I don't know if what remains can be salvaged.

In the 9/11 case, Monday marked the 16th year since the tragic events charged in that case. The *Nashiri* case, which concerns the attack on a Navy destroyer, the USS Cole, is even older. In both of these capital cases, the accused have been in custody for well over a decade, and the government first brought

charges almost *nine* years ago. ***But these cases are nowhere near trial.***

Of the two pending contested non-capital cases—(*United States v. Abd al Hadi al-Iraqi* and *United States v. Encep Nurjamen* (aka Hambali))—trial dates may come sooner than if the government had pursued the death penalty, but there is little indication that the trials will look substantially like the regularly-constituted courts in the United States.

To be blunt, I don't have a "way ahead" and I can't tell you how to fix these military commissions – it's not my role. Every case has at its core an accused, and defense counsel who must determine and act in his best interest. I can say I wish the media and other observers were better able to cover these amazing and historical events. Aside from the logistical challenges to get to Guantanamo or Ft Meade, it is incredibly difficult to understand these hearings and what they mean.

I urge every one of you, first and foremost, to make the effort to observe at least one hearing. I urge media and other observers to contact defense counsel before observing a hearing, to help you make sense of what you will see. And ask hard questions, of defense counsel, but also of the prosecutors, who must explain the Government's actions to the American people, and to history.

I am going to end, where I should have begun. I would like to take a moment to express how proud I am to lead this

organization and to recognize the phenomenal work done by the people assigned to it. **If we, as a Nation, are going to “play the ethical midfield,” as Secretary Mattis calls it, the MCDO must continue to be the voice for the rule of law.** Our attorneys, paralegals, investigators, security officers, analysts, interpreters, information technology experts, and operations and administrative support personnel, all work long hours, spend weeks at a time away from their families, and deal with daily frustrations and indignities, all in the name of the rule of law, not only in the United States, but around the world. I am proud of each and every one of them. Every American—and anyone who cares about the rule of law—should be proud of them as well.

Speaking of Defenders of the Rule of Law, I encourage you to attend this year’s NATSECDEF keynote address, at which Alberto Mora, former Navy General Counsel and now Senior Fellow at Harvard’s Kennedy School, will address the stigma of torture. When, as the Navy General Counsel in 2002, Mr. Mora confronted the question of whether the military should be employing interrogation tactics beyond those permitted in the Army Field Manual, he exemplified what Secretary Mattis has asked of DoD today: he counseled that interrogators remain inbounds. Faced with what some saw as a moment to make exceptions to our historically-robust safeguards against detainee abuse, Mr. Mora was a voice for the rule of law. Today - *the MCDO is that voice*. I hope you continue to listen.

Thank you for your attention this morning.