Remarks of Brigadier General Mark Martins  
Chief Prosecutor, Military Commissions  
To the New York City Bar Association  
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“Legitimacy and Comparative Law in Reformed Military Commissions”

Good evening, and thank you, Jim, for that generous introduction and for the warm hospitality you have shown Kate and me and our colleagues, friends, and family who are present tonight. I was born about 11 miles from here at Misericordia Hospital in the Bronx to second-generation immigrant parents who were native New Yorkers, went to West Point just up the Hudson, and indeed remain a New Yorker myself in official Army personnel records; still, infantry and JAG life have kept me far from this magnificent city for most of the past 51 years, save all-too-brief visits. It is always a bit of a wake-up call to be reminded of the uniqueness of this place and of those who live in the Big Apple. In much of the rest of the world, “Halt” means “Stop.” And here, I’ve learned again today that a “Don’t Walk” signal means “Run.” Meanwhile, I’ve been advised by family who still live in New York to reassure all of you New York Giants fans that the star I wear does not mean that I play for the Dallas Cowboys. My team is the United States armed forces.

My team is also the Prosecution for reformed military commissions. Tonight I would like to make a few general comments as well as outline several specifics about these reformed military commissions. My formal remarks can then perhaps serve to introduce a question-and-answer session. Two great Jims among your number—former Chief Judge of the United States Army Court of Criminal Appeals and retired brigadier Jim Cullen and Akin-Gump Super Lawyer and former terrorism case prosecutor Jim Benjamin—provided me a list of topics that might be of interest to this audience, which I understand includes members of the Committees on Military Affairs and Justice, International Human Rights, and Criminal Law, as well as the Task Force on National Security and the Rule of Law. These and the other some 150 active committees of the City Bar, whose history and reputation I know from experience to extend around the world, are a truly impressive tribute to the power of civil society. It is a special personal and professional thrill to be in this landmark building on 44th Street and addressing the Bar of Elihu Root, Ruth Bader Ginsburg, Jeh Johnson, and Mary Jo White.

I am going to try to meet some of your particular and sophisticated interests by building upon rather than merely restating what I told the American Bar Association’s Standing Committee on Law and National Security early last month in Washington. As I mentioned at the time, those remarks of mine, in turn, built upon two strong and thoughtful recent speeches on law and national security—one by Assistant to the President for Homeland Security and Counterterrorism John Brennan at Harvard Law School on September 16th, and the other by Defense Department General Counsel Jeh Johnson at the Heritage Foundation on October 18th. In addition to these speeches, I also commend to you two indispensable studies of criminal prosecutions and terrorism, the first an article from June 2011 in the Journal of National Security Law and Policy by former-Assistant Attorney General for National Security David Kris, entitled, “Law Enforcement as a Counterterrorism Tool,” and the second the famous 2008 White Paper In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, authored by your very own Jim Benjamin and Rich Zabel and published by Human Rights First.
In addition to collaborating with Jim on the format and contents of tonight’s session, I had the pleasure of speaking with Rich yesterday, as part of a valuable set of meetings with Rich and with Preet Bharara and the United States Attorney’s Office for the Southern District of New York. Next month, we’ll be doing the same with Loretta Lynch and the United States Attorney’s Office for the Eastern District of New York, and we are grateful for the cooperation and assistance being contributed to our effort by these great professionals and by the similarly impressive federal law enforcement and national security agencies we all work with everyday.

**Importance of Law and Constraint to Legitimacy of Reformed Military Commissions**

Before launching into particulars, I will first summarize what I offered in my remarks to the ABA and what I continue to draw from the authorities I have cited. In brief, I recognize that despite their long historical vintage—beginning with the trial in 1780 of British spy Major André in Tappan, New York, a mere 40-minute drive from here up Route 9A and the Palisades Parkway—military commissions are controversial in many American legal circles, including this one. Systems of military commissions attempted in both the November 2001 Military Order and the 2006 Military Commissions Act (“2009 Act”) were flawed, and we have worked hard on reforms—reforms spurred by all three branches of our government. 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.

In this conflict, we are pitted against unconventional, non-state actors who purposefully attack civilian populations and who demonstrate formidable staying power by morphing and metastasizing. Despite the tactics of our enemies, we must always operate in the space defined by the law and by our values. These are not luxuries—they are essential to maintaining the legitimacy that ultimately helps us defeat adversaries who scorn and yet may also cynically invoke the law for refuge.

Moreover, within such space we must be relentlessly empirical and pragmatic. That means using all instruments of our national power and authority, including diplomacy, law enforcement, and even military force where necessary, to counter these adaptive and asymmetric threats. That means making decisions based not on preconceived notions about what seems to be a tough response to terror but rather upon what will actually enhance the security of this country and the safety of the American people. And that means recognizing that the most effective and sustainable instruments are ones that are constrained and guided by our core values, including the rule of law.

Because 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, there will be trial forum choices to be made. This reflects the nature of the conflict in which we are engaged. Federal courts have routinely met the challenges of international terrorism prosecutions with great success, and when a defendant is convicted by a federal court, the legitimacy of that verdict is unquestioned. In many, if not most cases, federal courts will be the more feasible and better choice based on the same strength of interest and efficiency factors long employed by prosecutors from differing districts having concurrent jurisdiction over a particular suspect. This must be a case-intensive analysis, weighing all of the considerations I discussed last month at the American Bar Association and that are outlined in the 2009 protocol.
by which the Justice and Defense Departments resolve choice-of-forum questions. In cases of violations of the law of war, however, federal courts have not traditionally been the primary forum for trying such crimes and, I submit, 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.

My focus last month at the American Bar Association was on how prosecutorial discretion is and must be constrained and guided for reformed military commissions to serve a legitimate and strengthening role in our national security and justice institutions. My focus tonight is on comparisons between reformed military commissions and the federal court system. A systematic comparison highlights the similarities between the two systems and serves to debunk the myth of military commissions as unsettled and unfair. Rather, it shows that military commissions are in many respects modeled after the federal criminal justice system, and diverge based on principled departures consistent with the rule of law.

Systematic comparisons between reformed military commissions and federal criminal trials can and will promote the ends of legitimating and strengthening our national security and justice institutions if undertaken rigorously by judges, counsel, and informed organizations in civil society. To successfully promote such ends, the set of dimensions compared must be extensive and broad, including the bases of the different trial forums’ establishment and their stated purposes, their subject-matter jurisdiction, the substantive law they apply and the procedures they follow, the independence of their judges, the professionalism of their advocates, the investigative services that bring them evidence, the legal traditions and cultures they have evolved within, the resources that are committed to them by society, and so on.

Need for Comparisons between Reformed Military Commissions and U.S. District Courts

“Comparative law,” or “comparative legal systems” most commonly compares vastly different courts, legal institutions, or laws from diverse nations across the globe. The comparisons that we will be making together tonight are instead between two criminal trial forums within the same United States federal justice system and involving, as required by statute, an identical appellate channel through a federal Court of Appeals to the United States Supreme Court. This is a worthy undertaking, nonetheless—not least because comparative analysis between federal district courts and reformed military commissions is actually something we who practice before the latter are directed to do by law. The Military Commissions Act of 2009, for instance, requires that the opportunity of an accused under that Act “to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.” There are additional areas, such as in procedures for balancing the protection of classified information with due process for the accused, in which military commissions judges and counsel are expressly directed by the 2009 Act to look to federal practice. And a provision of the Uniform Code of Military Justice that applies to reformed military commissions states that the President, in prescribing pretrial, trial, and post-trial procedures, shall, “so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” subject to the requirement that such application “not be contrary to or inconsistent with” either the Uniform Code of Military Justice or the 2009 Act.
Apart from the fact that they are statutorily required, comparisons are an instinctive and instructive thing to do. They are a way to begin to understand a process different from one’s own practice. They are also as old as law itself. We have all seen the lists or charts comparing procedural protections across the different forums in which offenses that involve terrorism might be tried. Since 2001, these charts have been popular. For example, Human Rights First years ago contributed a table, entitled “Comparing Fairness Protections,” which included simple “yes” or “no” entries for United States federal courts, military courts-martial, and military commissions. The Congressional Research Service has prepared a number of reports featuring similar comparative tables, including not only federal courts and courts-martial of service members but also international criminal courts as forums for comparison. The reformed military commissions website includes a comparative table. David Kris’s article that I cited before includes a summary of comparative data in a tabular form as an appendix. Law students at Vanderbilt University recently compiled one of the better tables I have seen, an Excel electronic spreadsheet complete with links to supporting references. This type of tabular comparison is popular and has an educative role.

I myself have listed in public remarks the ways in which reformed military commissions are comparable to federal courts in their incorporation of all of the fundamental guarantees of a fair and just trial demanded by our values. 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; and the right to appeal to a federal civilian court of appeals consisting of lifetime-tenured and independent judges, and ultimately to the United States Supreme Court.

**Comparative Analysis: Admissibility of Statements Made by Accused**

But summarized tables and lists have their limits. They can lead to facile comparisons, without a deeper understanding of the complexities and practice. In fact, one of the things I like most about the David Kris article and the Zabel-Benjamin White Paper is their rich and careful analysis. Let me give you an example from the White Paper. In addressing doubts about the admissibility in federal court of un-Mirandized statements made by Guantanamo detainees during intelligence interrogations, the White Paper cautions that assessment of the issue depends on a careful evaluation of the facts. Zabel and Benjamin note that the applicability of *Miranda* warnings in the context of intelligence gathering, as opposed to criminal investigations, is still uncertain in federal district courts. Only then do they proceed to offer a few cautious general observations:

On one hand, a straightforward application of *Miranda* could indeed pose an obstacle to the admissibility of a defendant’s statements during Guantánamo interrogations, especially if they occurred in controlled circumstances resembling traditional police
questioning. However, there is a question as to whether [federal] courts would uniformly apply the *Miranda* requirement in the context of intelligence gathering, which may be quite different from the domestic law-enforcement scenario for which the *Miranda* doctrine was created.

This strikes me as an utterly reasonable analysis. The care taken to avoid sweeping conclusions fosters a fuller understanding of *Miranda* doctrine as it is being developed in the federal courts.

The careful Zabel-Benjamin analysis also provides the opportunity for a granular assessment of how far military commissions rules track those of federal courts in this area and where they may differ. Zabel and Benjamin note that the Supreme Court, in the 1984 decision of *New York v. Quarles*, recognized a public safety exception to the *Miranda* regime. The consequence is that statements may be admissible even though *Miranda* warnings were not given. Zabel and Benjamin also note that the factors listed by the Supreme Court in *Oregon v. Elstad* will apply to efforts undertaken by authorities to “cleanse” the taint of a prior presumptively involuntary statement during intelligence interrogation. A sufficient temporal break between interviews, change in setting, and change in interrogators can in certain circumstances cleanse any earlier taint and result in subsequent statements being found to be voluntary and thus admissible. Similar factors are relied upon in determining the admissibility of the accused’s statement under the reformed 2009 Military Commissions Act.

Let me pull back from this piece of micro-analysis to unpack and recap. We’re comparing the way reformed military commissions and federal criminal trials handle the admissibility of a defendant’s statement made prior to trial, particularly if it has not been Mirandized, or if there are independent questions about the voluntariness of the statement. Both forums protect against self-incrimination. Under section 948r of the 2009 Act, no statement obtained through the use of torture or cruel, inhuman, or degrading treatment is admissible into evidence in a military commission. Further—and this was one of its most significant reforms—the 2009 Act requires that before any statement of the accused may be admitted, a military judge must find the statement to be reliable, probative, and voluntary under a totality-of-the-circumstances test. The voluntariness test is the same one used in federal courts, with military judges guided by the 2009 Act to factor in “the circumstances of the conduct of military and intelligence operations during hostilities” and “the characteristics of the accused, such as military training, age, and education level.” There is a narrow exception to the voluntariness test for point-of-capture situations, where the accused makes a statement under lawful questioning during military operations “at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the [reliable and probative] statement into evidence.”

Reformed commissions diverge with federal criminal practice in that there is no so-called *Miranda* requirement in military commissions. Indeed the 2009 Act expressly states that the article of the Uniform Code of Military Justice requiring *Miranda* warnings is inapplicable. But it is too simple to say that federal district court judges would require *Miranda* where military judges would not. The decision in *Quarles*, which announced the “public safety” exception to the *Miranda* rule, and the 2d Circuit’s 2008 decision in the *Embassy Bombings* case, which stated that *Miranda* would have to be “applied in a flexible fashion to accommodate the exigencies of local conditions,” reveal far more practical wisdom than the public debate of this
issue portrays. Still more recently, a judge in the Eastern District of Michigan ruled that 50 minutes of post-arrest pre-Mirandized statements made by Umar Farouk Abdulmutallab, the 2009 Christmas day attempted bomber, fell within the “public safety” exception and were admissible. So it is downright reckless to conclude that the *Miranda* requirement is preventing questioning at point of arrest, precluding intelligence professionals from interrogating prisoners, or barring criminal prosecutions that rely on foreign law enforcement interrogations. A careful comparison actually suggests the contrary.

I find the Zabel-Benjamin work particularly helpful, even though it would be misleading for me to claim ignorance of relevant federal court proceedings. Like many military lawyers, I have extensive experience with and professional interest in federal criminal law and procedure. In clinical work during law school, I first learned many aspects of federal criminal trials from the revered Bob Cordy, now Associate Justice of the Supreme Judicial Court of Massachusetts, who then was one of the pre-eminent trial lawyers in complex federal public corruption cases. As a court-martial prosecutor, I invoked and applied at trial many rules of evidence that are identical to the federal rules. My military criminal practice over many years has also required me to coordinate closely with federal investigators and prosecutors on forum selection in particular cases as between federal district courts and courts-martial under a longstanding “Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction.”

As courts-martial frequently apply federal crimes under the federal Assimilative Crimes Act, I—like many present and past military advocates and judges, including Jim Cullen when he was Chief Judge of the Army’s Court of Criminal Appeals—have become intimately familiar with the elements of proof and associated defenses of a wide variety of federal offenses. We know that federal prosecutors enforce thousands of federal criminal laws, including scores of statutes commonly used in international terrorism prosecutions, whereas there are thirty-two offenses for violations of the law of war triable by reformed military commission. Because my thesis at National War College was a comparative study of four terror trials, including that of Zacarias Moussaoui in nearby Eastern District of Virginia, I have formally studied the federal terror offenses. And as co-lead of the Detention Policy Task Force in 2009, I had occasion to examine closely federal terrorism prosecutions in the course of Task Force work, which included helping to draft the Military Commissions Act of 2009. Many of the judge advocates and Defense Department lawyers serving as reformed military commissions prosecutors have similar significant exposure to federal courts supplementing and complementing their military criminal law expertise.

But despite such personal experiences with the federal process, day-to-day we military lawyers are all too pleased to be able to consult the eight federal prosecutors assigned to our office on comparative legal questions. Collectively we make it a point, meanwhile, to compare notes with Assistant United States Attorneys who do national security prosecutions in New York’s Southern and Eastern Districts and in Virginia’s Eastern District as well as with Lisa Monaco’s talented team at the Justice Department’s National Security Division. To their great credit, each of these expert teams has opened its doors and resources to us. Meanwhile, written hornbook-style references such as the White Paper, and the related federal court opinions and case briefs and other materials it cites, enable us to fulfill the frequent comparative tasks the law requires of us.
Comparative Analysis: Taking Depositions

How about another example that delves deeper than summarized tables outlining protections of the two forums? Let’s examine the rule governing the deposition of a witness in reformed military commissions and compare it to the rule in federal criminal practice. This is a less obscure micro-comparison than you might think, as law of war and international terrorism prosecutions can be expected to involve overseas witnesses who may not be available for trial. The best available evidence at the time of trial from a witness in a genuine zone of armed conflict or foreign jurisdiction may well be his prior testimony, preserved under procedures designed to ensure both that such testimony is competent and reliable and that the accused can confront the evidence against him.

In reformed military commissions, the relevant rule (Rule for Military Commission 702) states that “a deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use . . . .” This is very close to Federal Rule of Criminal Procedure 15, which states that “[a] party may move that a prospective witness be deposed in order to preserve testimony for trial” and that “[t]he court may grant the motion because of exceptional circumstances and in the interest of justice.” Both rules contain the basic ideas that depositions are extraordinary measures, motivated by the desire to preserve evidence that would otherwise be unavailable at trial, and done so in the interests of justice.

Many of the differences in the procedures for taking a deposition relate to differences in the officials who order the deposition or participate in the process. In reformed military commissions, the military judge orders depositions upon request of either party, unless charges have not yet been referred to a military commission for trial, in which case the convening authority orders the deposition (let me drop an oral footnote here: the convening authority is an official whose pretrial role is sometimes analogized to that of a grand jury but who is given many specific powers under the 2009 Act, including the power to convene military commissions, consider the sufficiency of charges and refer them for trial, approve pre-trial agreements, review records of trial, and consider post-trial clemency requests; in courts-martial, parallel functions are fulfilled by senior military commanders who serve as convening authorities while advised by senior staff judge advocates; Vice Admiral Bruce MacDonald, widely respected former Judge Advocate General of the Navy, now serves as the convening authority). A deposition officer fulfills duties such as arranging a time and place for the deposition, notifying the witness, parties, and reporter who is to prepare the verbatim transcript, administering oaths, etc. Under Federal Rule of Criminal Procedure 15, as most of you know, the court orders the deposition, and there is less detail in the manner of taking it, except for the requirement that a “deposition must be taken and filed in the same manner as a deposition in a civil action.”

The federal court system also includes three important rules of practice—which are also followed in the military commissions system. Specifically:

(1) A defendant may not be deposed without that defendant’s consent;

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial;
(3) The Government must provide to the defendant or the defendant’s attorney, for use at the deposition, any statement of the deponent in the Government’s possession to which the defendant would be entitled at trial.

As a result, the deposition in both systems is really a mini-trial, complete with confrontation of the witness through cross-examination and provision by the Government of Jencks Act or so-called section 3500 prior statements of the witness that would be required in both systems at trial.

The level of stringency is necessary in part because the idea is for the verbatim transcript of the deposition to be admissible for all appropriate purposes at trial. Both reformed military commissions and federal courts thus allow for deposition testimony to be admitted under hearsay exceptions—in the former the exception is Military Commission Rule of Evidence 803, and in the latter the exception is Federal Rule of Evidence 804(b)(1).

For those who are unfamiliar with the legislative history, the hearsay exception now comprising Military Commission Rule of Evidence 803 is taken verbatim from the 2009 Act. This provision of the Act constituted a significant reform from the earlier commissions systems. It was specifically designed to ensure that hearsay statements would be admitted only after the judge applied a rigorous test to ensure that the statements bear the hallmarks of trustworthiness and reliability, and putting the burden on the party seeking to admit the hearsay to establish its reliability. Akin to the hearsay exception in federal court, the statements admitted must be material and probative, the witness must be actually and practically unavailable at the time of trial, and the admission must serve the interests of justice. The hearsay exception in reformed military commissions provides a bit more structure to the military judge’s consideration of the matter, requiring him also to weigh the degree to which the statement is corroborated and whether the will of the witness was overborne, as well as any “adverse impacts on military or intelligence operations that would likely result from the production of the witness.” But these factors could be expected to receive consideration by a federal trial judge as well if they were operative in a particular case and argued compellingly by prosecutors, even though not stated in the Federal Rule of Evidence. It is also worth noting that reformed military commissions judges are drawn from the trial judiciary that hears courts-martials of servicemembers under rules of evidence that are indistinguishable from the federal rules of evidence on hearsay. With such similar habits of analysis, it is speculative to conclude that the slight differences in rules will drive stark differences in rulings.

Of course, distinct from the hearsay analysis is whether the requirements of confrontation have been met. I notice that Rich Zabel and Jim Benjamin in their White Paper discuss in this regard United States v. Ressam, the millennium bomber case tried in the Western District of Washington. That court directly addressed the problem of witnesses who were not willing to travel to the United States to testify at trial but who were willing to be deposed. In Ressam, the court granted the Government's motion, over defendant's Confrontation Clause objection, to allow the deposition and admit the resulting testimony. The court was satisfied that constitutional requirements were met where: (1) the defense counsel had the ability to cross-examine witnesses at deposition, (2) the deposition was to be video-taped to allow the jury to observe demeanor of witnesses, and (3) the defendant would virtually be present at the depositions through video conference equipment and a private telephone line between defendant
and his counsel. More recently, in the case of *Abu Ali*, the 4th Circuit found that similar arrangements satisfied constitutional confrontation requirements. We are committed to affording the accused in reformed military commissions similar protections in connection with Rule for Military Commission 702 depositions to protections in connection with Federal Rule of Criminal Procedure 15 depositions that have satisfied constitutional requirements in Article III cases.

**Benefits of Deeper Comparison**

At least four things become clearer when one digs beneath the sometimes misleading entries in a summarized table of protections and undertakes this sort of deeper comparative analysis. First, the idea that military commissions need to create from scratch the procedures, precedents, and body of law that govern trials in that forum is harder for fair-minded observers to maintain. While there are unresolved legal issues, some of them quite important, there is also an impressive body of law, both enacted statutes and clearly applicable federal and military court case precedents, from which military judges and counsel are to draw. A great strength of our deservedly vaunted federal criminal trial courts is their settled experience and judicial wisdom, and a practicing bar well-accustomed to both. The reformed military commissions draw heavily on that experience. Identifying whether one system is more or less indeterminate than the other is more difficult than uninformed impressions may suggest.

Second, unresolved issues within the reformed commission system arise within a framework that is structured to ensure careful, impartial, and thoughtful analysis. Military judges, like their federal court counterparts, decide a multitude of motions challenging every aspect of the justice process. They are well-trained graduates of accredited law schools and members of a state or federal bar, with substantial training and experience in criminal trial work. They are insulated from improper influences by statutory prohibition of such influences, as well as by distinct performance evaluation chains, and their pay and benefits are based upon rank and years of active service as military officers and dictated by law and regulation. Though they are not life-tenured, I defy anyone who carefully studies their decisions to say that they are not independent. And as mentioned at the outset, reformed military commissions are part of the same federal appellate system that resolves unanswered questions arising in federal district courts trials, often by the case-intensive comparative analysis that is the essence of judging.

Third, while several unresolved issues are constitutional ones—in the two examples the major colorable issues involve the Fifth and Sixth Amendments—in practice the differences ought not have an adverse impact on the accused. I and my fellow prosecutors have no intention of going near the line of introducing statements that we conclude were involuntary within the analysis of section 948r of the 2009 Act. And we intend to make confrontation protections in depositions comparable to those found adequate in federal courts.

Fourth, rules for reformed military commissions diverge from the rules applicable in federal court for principled reasons, grounded in necessity and consistent with the rule of law. In fact, the examples I selected highlight some of the most salient differences. The nature of those differences, and the manner in which the 2009 Act addresses them, reflect the underlying need and value of the commissions: that reformed commissions provide accountability during armed conflict where there otherwise would be no adequate means to do so. The voluntariness test,
vice straight *Miranda*, and the hearsay exception’s incorporation of operational factors during hostilities are principled departures from federal civilian court rules grounded in practicality.

**A Note on Transparency**

I will very briefly address two additional comparative matters before concluding, perhaps also to simply introduce these massive topics in their own right for discussion during question time. Over three decades ago, the Supreme Court said in the *Richmond Newspapers* case 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.” Reformed military commissions are closely guided by federal practice in matters of transparency, such as decisions regarding public access to trials. For instance, military commissions prosecutors will continue, as we did in November and again 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. These motions rely upon a Rule for Military Commission permitting such viewing within the same scope and standards as those in federal criminal trials.

The best traditions of comparative inquiry call for us to allow the American people and world to witness these criminal trials. When they do so, they will perhaps come to see that reformed military commissions provide greater protections than those afforded an accused tried under the London Charter at Nuremberg following World War II. They will perhaps concede, as they should, that he also receives stronger protections than an accused in many respected criminal justice systems around the world. I must take this opportunity, by the way, to recognize the leadership and hard work of Doug Wilson, Jeh Johnson, Bruce Macdonald, Mike Chapman, Mike Breslin, 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.

**Then Why Use Military Commissions at All?**

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

While the procedural differences in protections are indeed slight, they can be decisive in case-intensive analysis undertaken by prosecutors and counter-terror professionals in our interagency community. The exception to the hearsay rule requiring consideration of operational and intelligence factors, for example, preserves confrontation rights but properly balances the realities of armed conflict and our national security. We can discuss in the question period whether differences between juries of civilian citizens and panels of military officers matter, or
whether the safety of trial participants and communities surrounding courthouses should be seen as meaningfully favoring one forum or the other. We can consider when charging under the law of war might better permit a full presentation of the wrongful conduct allegedly committed by the accused, or make legally available a sentence more proportionate or reflective of the alleged offense.

But the upshot is that while federal courts will and should objectively be the appropriate forum in most instances, reformed military commissions will sometimes be the better choice. It is not difficult to understand that even if numerically few, such instances could implicate hugely important interests, fully justifying the energy and expense invested. The question can thus be flipped around: why, facing an uncertain array of future international terror cases, would any President take out of the inventory of available options a forum that protects both our national security interests and the interests of justice and a forum that while recently reformed from an ad hoc system into a standing one is nonetheless older than our federal court system?

**Conclusion**

I conclude by restating my point at the outset. Systematic comparisons between reformed military commissions and federal criminal trials indicate the similarities between the two systems and the principled departures that are made. A thorough and fair comparison can and will debunk many of the myths about the commissions and thereby legitimate and strengthen one of our key national security and justice institutions. This is not merely work for judges and counsel directly participating in proceedings. Rather, it is also essential that rigorous comparisons be undertaken and continued by members of informed civil society organizations such as this one.

Such comparisons are part of a broader legitimating effort pursued by our forebears who similarly sought to hold accountable violations of the law of war by their enemies. We aim to follow that broader precedent. It is the precedent by which those 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 we cannot make decisions to please the public or the Congress. Like our forebears, we are not seeking "victor's justice," but justice consistent with the rule of law and our longstanding values and ideals. 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. Thank you all.