Good afternoon, and thank you, Professor Dan Meltzer, for that warm welcome. I am so indebted to you for all that you have taught me over the years, both formally in the classroom and informally by your stellar example as a colleague while you were in government. And as always, I absolve you of any responsibility for mistakes that I make despite your extensive instruction of me. It is a pleasure to be home. I had the opportunity this morning to take a proverbial run down memory lane along the Charles River with some present-day Harvard Law School students, with one of my comrades from Iraq who is at the Business School, and with Dr. Ken Leinbach, one of my law school classmates who settled in Belmont. Just a great place to run—and as scenic a study break as it ever was. And then while walking to campus, I happened to come upon exactly the intersection here in Cambridge where some twenty-four years ago I was riding my bike in from our apartment at top speed on a cold morning to make torts class on time. My bald bike tires hit an icy patch that sent me skating on my rear end—any paratroopers here will know that to be our “fourth point of contact”—for what seemed like a full city block before I came to a stop at the feet of a nice couple out for a walk. Their dachshund actually started licking my forehead. I am confident my anonymous spill had nothing to do with Dean Elena Kagan’s opening of an ice skating rink here at the Law School some 15 years later, though I was impressed with her wisdom in doing so and could only wonder what might have been if I’d had that safer alternative for my own skating urge.

Earlier today, I had the pleasure of visiting Professor Jack Goldsmith’s “Foreign Relations Law” class, which is studying Hamdan v. Rumsfeld and the evolution of the law since September 11th, 2001. Then, just before lunch, I enjoyed attending Professor Phil Heymann’s class on “Decision Making and Leadership in the Public Sector,” which right now is examining how government lawyers in leadership roles are constrained but also empowered by the public’s insistence on compliance with law. Both classes, and this address, have given me a valuable opportunity to elaborate rather than merely restate what I believe are significant reforms in the military commissions system that I first outlined to the American Bar Association’s Standing Committee on Law and National Security last December and to the New York City Bar Association in January.

As I mentioned on each occasion, those remarks of mine, in turn, grew out of two strong and thoughtful speeches on law and national security—one by Assistant to the President for Homeland Security and Counterterrorism John Brennan here at the Harvard Law School last September, and the other by Defense Department General Counsel Jeh Johnson at the Heritage Foundation last October. John Brennan’s speech came just as I returned from Afghanistan and started my assignment as Chief Prosecutor. As that speech was hosted by the Harvard and Brookings Project on Law and Security, it is fitting that I should now expand and extend my ideas on reformed military commissions in yet another forum hosted by the same impressive Project. I understand that the Harvard National Security Journal is a co-host for this talk, and I thank the Journal as well for this opportunity.
To summarize the defense I began in Washington and New York, I acknowledge up front that despite having long been part of the American experience at the intersection of armed conflict and law enforcement, military commissions are controversial in many circles. In fact, there are some people and organizations whose minds have already been made up to oppose them. I also acknowledge that the systems of military commissions attempted in 2001 by presidential order and in 2006 by initial legislation were flawed. That is not where we are any more. The reforms subsequently incorporated into the 2009 Military Commissions Act have resulted from action by all three coordinate branches of our government. While appreciating the criticisms and concerns, we believe that these reformed military commissions are fair and that they serve an important role in the armed conflict against al Qaeda and associated forces. There is increasing evidence in opinion surveys and legislative actions and resolutions, both in Congress and at state and local level, that the American people support reformed military commissions as part of our country’s overall counterterrorism and justice institutions. I note this while emphasizing that making sound policy for such institutions must never become a campaign for popularity and while stressing that all of our institutions should be continually subject to scrutiny.

Despite recent successes against al Qaeda and associated forces—who are identified as enemies not merely by the executive branch but also by Congress in the Authorization for Use of Military Force of 2001—these elements continue to pose a serious and adaptive threat. They are irregular, shifting, non-state actors who purposefully attack civilian populations, cleverly employ widespread new technologies, and patiently plot in the shadows of international boundaries and ungoverned terrain. By both scorning and cynically invoking the law for refuge, they tempt even peaceful peoples to respond outside the law. Such responses are a serious mistake, however. Despite our enemies’ tactics, we must always operate in the space defined by the law and by our values. If we treat the law as a luxury, we sacrifice legitimacy. I do not believe I am overstating the threat we face or the importance of how we respond.

Our approach should be relentlessly empirical and pragmatic, while demanding compliance with law. All instruments of our national power and authority, including law enforcement, military force, and certain combinations of the two, must be used to oppose these modern asymmetric threats. We must base decisions not on preconceived notions about what seems to be a “tough” response to terrorists but rather upon what will actually enhance our nation’s security and protect the American people. And we must recognize that the instruments that are governed and guided by our core values, including the rule of law, are the only truly effective and sustainable instruments.

The binary choice that is sometimes portrayed between a law enforcement approach and a military approach is a false choice. As Attorney General Holder said last month, the unlawful activities of our adversaries can in many cases be fairly characterized both as terrorism offenses under our federal criminal code and as violations of the law of war. Federal courts have successfully met the challenges of hundreds of international terrorism prosecutions since September 11, 2001. In most cases, federal courts will likely be the most appropriate venue in light of a variety of factors long employed by prosecutors from differing districts having concurrent jurisdiction over a particular suspect. Yet in cases of violations of the law of war,
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, reformed military commissions will offer a more appropriate forum for prosecutions under the law of war, and I will develop this point more over the course of this hour.

My focus at the American Bar Association last December 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 at the New York City Bar Association in January was on how careful comparisons between reformed military commissions and the federal courts can help highlight the two systems’ similarities, expose the systems’ differences to be consistent with the rule of law, and debunk the myth of military commissions as unsettled and unfair. Unresolved issues within the reformed commission system do arise, as issues arise in all legal systems that attempt to apply general rules to the particular facts of an individual case, and the framework and substantive law in place is structured to ensure careful, impartial, and thoughtful analysis and decision. I urge any inclined to rush to judgment on this matter to view a reformed military commission hearing on pre-trial motions.

My focus today is on how America’s widely respected system of military justice—and specifically its version of the common law jury and the rules of procedure and evidence associated with military jury selection and decision-making—offers a lawful and pragmatic process for confronting modern international terrorists who violate the law of war. I specifically address the claims that officer juries are insufficiently independent to render fair verdicts. Rather, as I describe in what follows, a set of popularly supported reforms have improved and now protect from harmful influences the officer jury panel that is at the heart of military commissions for members of al Qaeda and that has always been at the heart of courts-martial for United States service-members. I propose today that if observers will withhold judgment for a time, the system they see will prove itself deserving of public confidence. They will see that the system appropriately limits the prerogatives of military command that could undermine justice, while preserving the powers necessary to defeat a committed adversary.

Reformed military commissions are not the special, separate, and exclusive terror court that some have sought and others have feared, and that is because these military commissions are fully integrated within our federal framework of criminal justice, are overseen by our Article III appellate courts, and are strictly and properly confined to their law of war jurisdiction. Reformed military commissions can and will deal effectively, independently, and fairly with the law of war violations referred to them for trial, and they are already featuring a specialized interagency legal practice within the law of armed conflict and counterterrorism. Moreover, the worthy characteristics of reformed military commission juries will, I believe, increasingly illuminate why they are both necessary and optimal for a narrow but critical category of prosecutions of non-U.S. citizens.

*Edmund M. Morgan and the Making of a Uniform Code of Military Justice*

Harvard Law School is no stranger to military justice, as one of the most important figures in establishing our modern military justice system was Harvard’s own Professor Edmund M. Morgan. Eddie Morgan, as he was called by friends, served as Chair of the Committee to
establish a Uniform Code of Military Justice at the request of Secretary of Defense James Forrestal following World War II. He was a distinguished and well-loved teacher and scholar, serving as Royall Professor of Law and twice as Acting Dean here at the Law School, and also as the lead drafter of the American Law Institute’s path-breaking Model Code of Evidence. To give you a sense of his stature, he received at the end of a career spanning the first seven decades of the 20th century the prestigious American Bar Association Medal. Among the other recipients of the ABA Medal have been Oliver Wendell Holmes, Roscoe Pound, Thurgood Marshall, William Brennan, and Sandra Day O'Connor.

Many of Professor Morgan’s original papers are accessible right here in Langdell Hall through the Curator of Modern Manuscripts and Archives, and the materials he gave to Harvard include personal and professional documents from his years as Committee Chair working on a single modern criminal legal code to replace the separate disciplinary codes that then existed for the military services. Morgan’s service during World War I as an assistant to the Army’s Judge Advocate General and his deep expertise in the law of evidence and criminal procedure made him well-suited for the task of reforming military justice.

But characteristically, Professor Morgan did not rest on his laurels or on academic theory. He led the committee’s study of newly gathered data on the existing military court-martial system and on perceptions by those inside and outside the system about what worked and what did not work in actual practice, in both peacetime and in war. He and the committee held widely advertised regional public hearings in ten different cities across the country, hearings that produced more than 2500 pages of transcripts. Committee members digested hundreds of letters and conducted additional hundreds of interviews. They analyzed 321 responses to an extensive questionnaire that had been distributed to a sample of officers of all ranks, as well as enlisted men and civilians. They followed up with numerous queries to the Department of Defense and to the separate military services. They were given a free hand.

Professor Morgan’s committee made bold and effective use of that free hand because millions of conscripted service-members who had returned from World War II were committed to changing the court-martial system they had seen for themselves during the war. The “greatest generation” had not liked what it saw, and the reformed system these war veterans pressed their elected and public officials for is yet another lasting and incalculable contribution they made to our country. While the committee was struck by the absence of allegations that innocent men had been unfairly convicted, it was equally struck by “the disparity and severity of the system on the guilty as to bring many military courts into disrepute both among the law-breaking element and the law-abiding element” and by the “serious impairment of the morale of the troops [that] ensued where such a situation existed.”

Among the leading criticisms of the old system were that there were not enough officers properly trained in courts-martial duty, that defense counsel were often ineffective because of a lack of experience and knowledge or a lack of zealouness, and that procedures and outcomes varied widely across the uniformed services. But the most prevalent criticism, and one that echoed centuries of civilian mistrust of military tribunals, was that domination of the system by commanders made it incapable of doing real justice or of being widely perceived as just.
The new Uniform Code of Military Justice that Congress passed in 1950 upon hearing the Committee’s recommendations addressed these and other criticisms in one hundred and forty articles that comprehensively modernized a system unchanged in many respects over the previous three centuries of British and American military experience. The UCMJ, as it came to be called in the already acronym-friendly armed forces, fixed the qualifications of those who could serve on courts-martial as trial and defense counsel, making it mandatory for these officers to have been admitted to legal practice in the Federal courts or the highest court of a State. True to its name, it established uniform procedures across all military services. And it codified a host of large and small changes to counter the problem of command domination.

The new code incorporated three major innovations to counter such domination. Major innovation number one was to establish a civilian Court of Military Appeals, which was empowered to supervise, review, and set aside the findings and sentences adjudged by courts-martial. Major innovation number two was to define the role of the judge advocate serving as “law officer” on a court-martial to be that of a judge, empowering him to make final rulings on interlocutory questions of law and giving him the duty to instruct the members on the presumption of innocence, burden of proof, and elements of the offense, but also taking him off the jury and preventing him from retiring and deliberating with it. Major innovation number three—actually dating from separate legislation two years earlier but codified and reinforced in the UCMJ—was to make it unlawful and punishable for anyone, including a commander, to attempt to coerce or influence any court-martial jury member with respect to their findings or sentence or any law officer judge, or counsel, with respect to their military justice functions.

Overview of Modern Courts-Martial and Reformed Military Commissions

The reforms in military justice that Professor Morgan led paralleled in many ways the model code development underway during this period in our history affecting civilian state and federal criminal law, criminal procedure, and the law of evidence. It would be misleading to suggest that every important reform contributing to our modern military justice system happened in 1950 with the passage of the UCMJ. In fact, there were significant developments before and after 1950 by which military justice practitioners were held to increasingly higher professional standards, rights for service personnel were expanded, and civilian procedures were adopted while preserving the command authority necessary for effective and accountable armed forces. Prominent leaders of these developments prior to Eddie Morgan included Colonel William Winthrop, as well as Judge Advocates General Enoch Crowder and Samuel Ansell. Important names after Morgan included Colonel Frederick Bernays Wiener, Judge Advocate General of the Army Kenneth Hodson, Court of Military Appeals Chief Judge Robinson Everett, and Brigadier General John Cooke. Winthrop has been described by the United States Supreme Court in two landmark decisions as the “Blackstone of Military Law,” while Crowder was once famously described by Supreme Court Justice Felix Frankfurter as “one of the best professional brains I've encountered in life.” Wiener and Everett, meanwhile, were both Harvard Law graduates, and I appreciatively count the late Robinson Everett as a friend and mentor from my earliest days in the law.

Speaking to the New York City Bar Association in January, I highlighted the similarities between reformed commissions and civilian federal criminal trials, similarities which have ultimately grown out of the reforms Professor Morgan and these other leaders promoted for
military justice. The Military Commissions Act of 2009 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 UCMJ 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 UCMJ or the 2009 Act. These and many other points of comparison show 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.

But the similarities between military commissions convened under the 2009 Act and courts-martial under the UCMJ are even more fundamental than those between commissions and federal courts. Although the UCMJ does not apply to military commissions except where the law says it does, the 2009 Act expressly states that “[t]he procedures for military commissions . . . are based upon the procedures for trial by general courts-martial under [the UCMJ].” Even where the terms of the UCMJ or judicial interpretations of those terms by military or civilian appellate courts are not binding on military commissions, they are instructive. So there is a large body of law and practice to which military commission judges and counsel may turn to interpret applicable statutory law as well as the implementing Rules for Military Commission and Military Commission Rules of Evidence.

What, then, are the defining features of modern United States courts-martial or military commissions? These are tribunals formed under uniform procedures and with statutorily prescribed membership on a case-by-case basis as they are needed. So they are not standing courts of record that you can always find at a fixed address or building; their movable venue will enter the discussion again later. The formation of a court-martial or military commission is done by a “convening authority,” who under the UCMJ is a military commander. I was a court-martial convening authority, for instance, when I commanded Task Force 435 in Afghanistan and was thus responsible for accomplishment of assigned missions, but also for the discipline, morale, and welfare of the soldiers, sailors, airmen, and marines entrusted to my leadership. The convening authority for military commissions is not a commander but a separate official designated by the Secretary of Defense for that purpose. There is currently one convening authority for military commissions—retired Vice Admiral Bruce MacDonald, the able and respected former Judge Advocate General of the Navy.

Military courts-martial and commissions receive charges through a process known as “referral.” The process begins when investigation reveals that a crime has been committed by an individual subject to the court’s or commission’s jurisdiction and is subsequently “sworn” to, under oath, by a service member who has knowledge of the alleged offenses. As I described to the American Bar Association last December, we prosecutors, known as “trial counsel,” then ensure the charge is forwarded to the convening authority, along with a recommendation as to what the “disposition” should be. The convening authority, with formal counsel from an
experienced attorney known as a “staff judge advocate” under the UCMJ and simply the “legal advisor” under the 2009 Military Commissions Act, independently reviews the charge to determine if there are reasonable grounds to believe that an offense occurred, that the accused committed it, and that the specification of the charge states an offense under law. If he determines these things, he then “refers” the charge or charges for trial.

A “military judge” is then assigned to preside over the trial of the referred charge or charges. These are well-trained attorneys and members of a state or federal bar, with substantial training and experience in criminal trial work. They are insulated from improper influences by the statutory prohibition of such influences I have already cited, as well as by their assignment to the judiciaries of the services, separate from ordinary command channels, 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 studies their rulings in courts-martial or military commissions to date to say that they are not independent.

The trial subsequently conducted of the referred charge or charges incorporates all of the fundamental guarantees of fairness and justice demanded by our values. It also far exceeds the applicable international law standard of common article 3 of the Geneva Conventions in being a “regularly constituted court . . . affording all of the judicial guarantees recognized as indispensable by civilized peoples.” 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 requirement that admitted statements be voluntary; 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 exclusion 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 consisting of independent judges, and ultimately to the United States Supreme Court.

The United States Military Jury from Colonial to Modern Times

So where does this referral of charges lead? Well, the heart of the military justice system since ancient times has been a jury of officers whose members have no previous connection either to the charged crime or to the accused person. It is not an accident that the terms “court-martial” and “military commission” connote, in their first and simplest meanings, exactly such juries. I want to spend some time on this remarkable institution in order to demystify it a bit and to lay the foundation for a later explanation of its importance to legitimacy.

We can trace the origins of the modern United States military jury back in history to at least 1666, when English courts-martial were formed with a membership of thirteen to incorporate the tradition of common law criminal trials being conducted before a judge and twelve jurymen. This number of thirteen was inferred in England’s First Mutiny Act of 1689, and then was specifically set forth in successive sets of Articles of War passed by the British Parliament and the United States Congress thereafter. In 1780, George Washington referred the
matter of suspected spy Major John André—who was caught with documents suggesting a plot by the British to take control of the key fort of West Point from a traitorous Benedict Arnold—to thirteen officers, one of whom was the Continental Army’s Judge Advocate General and a respected attorney who would later become one of the first federal district judges in the new United States. The quorum number of twelve plus one was reduced in later Acts of Congress, and thus you’ll see smaller juries in famous military tribunals throughout our history, such as the 1944 court-martial of future baseball great but then-Lieutenant Jackie Robinson on charges of failing to obey lawful orders, an understandably serious offense in the military. It was a jury of nine Army officers, who had heard evidence of model soldier Robinson’s righteous protest against racial prejudice, which acquitted him of all charges. But the jury number of twelve is still found today in the 2009 Military Commissions Act, where twelve or more officers must unanimously vote to convict on a charge punishable by death in order for capital punishment to be imposed.

The parallel evolution of the modern United States civilian jury is no less interesting. We know that when the Pilgrims landed in Plymouth in 1620, they brought with them the cherished tradition of trial by jury, and it is sometimes easy to overlook its connection both to the Commonwealth of Massachusetts and to the earliest military troops quartered here. One of the jury system’s defining legends, of course, is the acquittal of seven out of nine British redcoats who were the accused in two different trials following the Boston Massacre of 1770. Arguing for a verdict of not guilty and recounting what could and could not firmly be known about the emotionally charged altercation that left five civilians killed, John Adams famously uttered the lines by which countless defense counsel and prosecutors, civilian and military, have since instructed jurors on their role: “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.” And three years before the Emancipation Proclamation and the formation of the 54th Massachusetts Infantry Regiment of freed African-Americans, a Worcester civilian court in 1860 impaneled the first African-Americans to be seated on a jury in the United States.

Today, of course, the constitutional civilian jury right of those charged with crimes remains a fundamental protection against all manner of tyrannies. The Sixth Amendment guarantees trial by “an impartial jury of the State and district wherein the crime shall have been committed . . . .” The specifics of that protection are implemented in federal district courts through the Jury Selection and Service Act of 1968 and the plans for random selection of jurors that the Act requires each judicial district to develop. In the populous Eastern Division of Massachusetts, for instance—which comprises an eligible adult population of about two and a half million spread across eight counties on this side of the state—the Clerk of Court is required to place in the Master Jury Wheel each year at least 35,000 names that are drawn using a random number generator from the source list for the Eastern Division. The diversity and representativeness of the resulting juries are policed, among other ways, through judicial application of the Duren v. Missouri criteria, by which a Sixth Amendment violation is found if representation of a distinctive group such as gender or race is not fair and reasonable in relation to the number of such persons in the community and if the underrepresentation is due to systemic exclusion.

A diverse jury is critical to getting at the truth in a way that is legitimate. When you have twelve lay people in a room deliberating, struggling with questions of guilt or innocence and of
bias and fairness, you want them to be seeing the evidence and confronting each other about it from a variety of angles. Although the development of United States military juries has never been anchored to the Bill of Rights—recall for instance the Fifth Amendment exception for cases “arising in the land or naval forces”—your armed forces do know something about diversity. That is not a boast, because history is witness to episodes of resistance inside and outside of military ranks to making it more representative of wider society, even as wiser leaders have pushed for such representativeness because they see its operational importance to fielding the most modern and effective force possible. That is instead a reflection of insistence by the people of the United States that our armed forces will not be allowed to become a separate caste. To appreciate that insistence, one need only look at the report last March of Congress’s Military Leadership Diversity Commission. It reviewed extensive data about diversity dating from President Truman’s executive order ending racial segregation in the military, and it outlined specific measures to further improve recruitment of minorities, give them more thorough instruction about advancement within an unprecedented range of modern occupational specialties, and provide greater opportunities to women service members.

Thus, while not perfectly representative of society, the population of roughly 200,000 active duty officers from which the convening authority appoints jury members is impressively diverse. And I do not wish to bury a key point of difference from civilian juries: military members are selected rather than drawn randomly. But they are selected in a process that yields juries worthy of public confidence. The entrance requirements for able-bodied service as an officer in an all-volunteer force mean that a military commission juror will be generally younger than his or her civilian counterpart, have a college degree, be a resident from anyplace in the United States rather than a single community, and be self-selected for service wherever the country requires. Still, I want to counter somewhat the notion of a homogeneous group. Right here in the audience today, for instance, are Captain Khalil Tawil and soon-to-be Lieutenant Vanessa Strobbe. Captain Tawil is a Lebanese-American who learned how to speak Arabic in Cairo and is a two-time combat veteran infantry officer. Vanessa Strobbe, a Harvard Law 3d year student recently selected for service in the Army’s Judge Advocate General’s Corps, might be challenged off of military commission jury duty by one of the parties on that basis, but in hailing from New Mexico, majoring in print journalism and psychology, and captaining her high school varsity track and field team, she has a record that could be one of many thousands in the military commissions jury pool.

Having served on a court-martial as a young infantry lieutenant, spent many years as a trial counsel and staff judge advocate, and had convening authority myself as a general officer in field command, I know how mindful selecting officials are that diversity and representativeness on military panels serve the interests of justice. Military jurors drawn from units all across the globe are chosen because, in the convening authority’s independent opinion, they are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. I mentioned challenges a moment ago—each party has an unlimited number of challenges for cause after having had an opportunity to voir dire the members. No member of the armed forces is eligible to serve as a juror if she is an accuser, witness, counsel, or investigator in the case. There are also several other grounds for causal challenge, including that the member has expressed a definite opinion as to guilt or innocence or that a substantial doubt would be raised as to the commission’s legality, fairness, and impartiality. Each party also has a peremptory challenge. Military judges police these rules. For instance, since 1988, military
courts-martial have applied the analysis of *Batson v. Kentucky* to the exercise of government peremptory challenges in trials by courts-martial.

When one studies military juries in the modern era, it is harder to conclude that they are more likely to convict or impose harsh sentences. Indeed, the available data, though incomplete and subject to hazards in interpretation, are difficult to square with the stereotype of rigid severity. For instance, in the European Theater of Operations during World War II, 1672 defendants were tried by the U.S. Army for law of war violations, resulting in 1416 convictions and 256 acquittals. The conviction rate was 84.7%. Modern data from U.S. courts-martial shows a conviction rate of 80%, based on a study of the 3231 contested trials before military juries between 1988 and 1993, which resulted in 2576 convictions and 655 complete acquittals. By imperfect comparison, according to the Zabel-Benjamin 2009 report on international terrorism prosecutions, there were 214 defendants tried between September 2001 and June 2009 in federal civilian courts, resulting in 195 convictions and 19 acquittals. The conviction rate was 91.1%. The comparison is imperfect because I do not have precise percentages for federal prosecutions that are actually heard by juries, and I welcome that data being added to the discussion. Sidenote: at Nuremberg, 19 Nazi officials were convicted and three were acquitted by civilian judges deciding matters of both fact and law on that International Military Tribunal—a conviction rate of 84.2%. These data suggest that a defendant has a substantial chance of being acquitted by a military commission, not dramatically different than his chances in the federal system.

Meanwhile, results from cases that have gone to trial in recent military commissions also can be interpreted as defying the stereotype of a panel more predisposed to harsh outcomes. Salim Hamdan received five and a half years, for instance, for crimes that many federal practitioners believe would have netted him a far more serious sentence in an Article III court. Although not yet before a military jury for their input on an appropriate sentence, Majid Shukat Khan will receive 25 years of confinement, not including the 9 he has spent in detention to date, based on a pre-trial agreement; this is a figure comparable to what one could expect under the U.S. Sentencing Guidelines and has been considered fair both by victims and by observers with no connection to his crimes. He will have an opportunity to decrease that figure by as much as 6 years—that is, to 19 years from today—based upon his level of cooperation, the input from the sentencing jury, and other factors. This figure is again not readily distinguishable from how things would play out in the federal system. Also, although mostly anecdotal, analysis from modern era courts-martial, meanwhile, indicates that military jury dynamics are not materially different than those in civilian jury trials. And experienced defense lawyers who have practiced before both civilian and military juries praise the latter’s ability to follow the judges’ instructions and to do justice.

**Reformed Military Commissions and the Limits of Command**

Stereotypes die slowly. It was fifty years before Professor Morgan’s new Uniform Code of Military Justice, once harshly criticized as just more drumhead discipline in a different form, actually received praise from civil liberties and human rights organizations. Notably, the praise was a bit backhanded, as it came in the course of arguments that courts-martial provided a more appropriate forum than unreformed military commissions for trial of alleged terrorists who had violated the laws of war. Time as well as a series of decisions by our civilian appellate courts
and additional legislation by Congress was necessary to ward off the specter of unlawful command influence, thus incrementally raising the UCMJ’s credibility. The American people, more so than civil liberties groups, accorded UCMJ proceedings legitimacy as they were able to view the newly public trials and better judge for themselves.

United States reforms undertaken to make military courts more modern and fair are, I believe, best understood as seeking accountability over those who wage war while constraining the arbitrary exercise of power. In the context of the military juries that we have been discussing, this has meant a host of structural arrangements, rules, judicial decisions, and transparency mechanisms to protect the officers deliberating an accused person’s fate from being influenced by anything other than their duty to do justice.

Juries are one of the most important bulwarks against the despotic and arbitrary use of authority ever devised, and they are part of the genius of American legal institutions, civilian and military. Military juries in the United States have evolved in order to provide a thoroughly American system of justice and discipline for armed forces that, while still being trained and commanded to fight effectively, must be modernized to account for who those troops are and for how America and security threats have changed. As Major General John Schofield wrote in a passage that is committed to memory by all who attend West Point, “the discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment.” In forums of authority everywhere, civilian or military, justice is not served by punishing the innocent. Neither are military discipline or national security. The longstanding authority of military courts to try violators of the law of war who are not of our own military ranks means that this indeed distinctive but also genuinely American system of justice is available for service in the conflict against al Qaeda and associated forces. I and many others are committed to ensuring that the justice done in these proceedings is something all Americans can be proud of, and that the differences from rules and procedures typically seen in civilian trials are principled departures that properly balance the realities of armed conflict and our national security, and are not merely borne of convenience or expediency.

**But Are Military Commissions Worth the Trouble?**

It is perfectly reasonable to ask why—with concurrent jurisdiction over offenses that can be characterized as both federal civilian crimes and violations of the law of war and with comparable procedural protections—we should invest great energy and resources in military trials. The answer is that there is a narrow but important category of cases in which the pragmatic and principled choice among the lawful tools available to protect our people and serve the interests of justice is a reformed military commission.

While the differences in procedures between civilian and military trials are minor compared to their similarities, they can be decisive in case-intensive analysis undertaken by prosecutors and counter-terror professionals in our interagency community. Though some exaggerate its importance to the ability to gather intelligence of future attacks and discount the value of interviews with defendants after they have pled guilty in the civilian system, the *Miranda* warning requirement in that system undoubtedly can have an impact on such analysis. So can the minor differences in hearsay admissibility rules. There are also times 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. We can discuss in question time whether the safety of other trial participants and of communities surrounding courthouses should also be seen as meaningfully favoring one forum or the other, given that military commissions are not anchored to a specific geographic location.

But there are political and now statutory constraints that make military commissions the only option in certain circumstances. These constraints are real. They do not render the system unfair; rather, they exhort us to ensure that in those situations where military commissions are the only choice, they are fair, lauded, and respected. Under the 2009 reforms, these goals can and should be achieved if we put our minds and energies toward doing so, and I humbly ask you to help me with this, even if you have opposed the course of action that a coordinate elected branch of government has now repeatedly legislated and that the President has signed into law. This has become a matter of the rule of law and of recognizing that at some point justice delayed really is justice denied.

And the discussion today of the characteristics of military jurors—not only their diversity and independence but also their training and sworn duty to uphold the Constitution under adversity and while in personal danger—further suggests that a reformed military commission offers a fair and just venue. One can hold this position while still conceding the unique bridge civilian juries provide between government decisions and those they affect and while granting that civilian jurors have time and again shown their ability to withstand pressure.

The fact that juries, military and civilian, are intended to do their work away from the public eye raises the issue of compensating transparency in the remainder of the proceedings. Reformed military commissions are closely guided by federal practice regarding public access to trials, but Guantanamo is more remote and inaccessible than any federal district court. For this reason, military commission prosecutors will continue, as we have done since November of last year, 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. Also continued will be the practice of prompt internet posting of unofficial transcripts of proceedings, something not generally available free of charge even in civilian trials. The closed circuit transmissions, verbatim transcripts, and other transparency improvements have been made possible through the hard work of Doug Wilson, Jeh Johnson, Bruce Macdonald, Robin Jacobsohn, Mike Chapman, Mike Breslin, Wendy Kelly, and many others.

The upshot is that while federal courts will and should objectively be preferred in most instances, reformed military commissions will sometimes be the more appropriate forum. Even if numerically few, such instances could implicate core interests, fully justifying the energy and expense invested. The question can thus be reversed: why, facing an unpredictable set of future international terror cases and political circumstances, should options be reduced by eliminating a forum that protects both our national security interests and the interests of justice?
Conclusion

The late Justice Hugo Black’s majority opinion in the 1957 case of Reid v. Covert is essential reading for all military lawyers. In that case, the Supreme Court wisely held that a civilian United States citizen and spouse of a service member could not be tried by court-martial for crimes allegedly committed during peacetime while living in England. Justice Black reasoned, in describing a system still seen at the time to be pervaded by unlawful command influence, that “these tribunals are simply executive tribunals whose personnel are in the executive chain of command,” and “[f]requently, the members . . . must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service.” His reasoning extended not only to the members of military jury panels but also to others with court-martial duties under the recently enacted Uniform Code of Military Justice.

Fifty-five years later, while the role of the military in our constitutional democracy remains a matter of utmost concern, the command influence over military justice proceedings Justice Black described has been sharply and properly limited. Under the Military Commissions Act of 2009, the convening authority does not command or supervise the judge, jury panel members, or counsel, nor would he ever violate a well-understood law by seeking to improperly influence them. Nor are any others seeking to have an improper influence on this process. To place myself beyond suspicion of self-advancing motives and to offer continuity to the prosecution team through at least the end of 2014, I have recently requested that this be my last assignment in the military and that I not be considered for promotion and reassignment next year, as had been scheduled. But of course this legitimacy effort is not about me or any other individual, and I cannot stress enough how misguided it is to assume illicit motives or a lack of independent judgment even in those officers who will stay in the armed forces following their military commission duties. And recall that for jury members such duties consist usually of a single trial.

Your military exists to fight our nation’s wars, not to police its streets. We will not seek the duty, but when called upon to try those within our jurisdiction who have violated the laws of armed conflict, we will do so faithfully, transparently, respectful of the various roles within an adversarial and jury-based system, and in accordance with the rule of law. This means, as Justice Jackson said at Nuremberg, “staying the hand of vengeance” and ensuring that “power [pays tribute] to reason.” It means withholding judgment of an accused unless and until he has been found guilty beyond a reasonable doubt of specified offenses. I conclude by proposing that observers, too, should withhold their judgment of reformed military commissions. At least, they should do so until they have a chance to observe a trial firsthand, or review a transcript, or perhaps read an appellate opinion associated with the trial proceedings. If they do, I believe that they will see a system that is fair, and legitimate, and deserving of their confidence.

Thank you, and now I will be happy to take questions.