Remarks of Brigadier General Mark Martins  
Chief Prosecutor of United States Military Commissions  
Royal Institute of International Affairs, Chatham House, London  
September 28, 2012

“Reformed Military Commissions, International Perceptions, and the Cycle of Terrorism”

Thank you, Nick Childs, for that welcome, and I thank Chatham House for the opportunity to address this distinguished institute. It has been nearly thirty years since my wife Kate and I last were able to spend a few days together in London. At the time, my tutors at Oxford, and the prospect of soon sitting for examination, had me engrossed with the famous works and vexing questions they had assigned. This was during a weekend that Kate was visiting while on furlough from her Army helicopter unit in West Germany. Is Isaiah Berlin right that our “negative liberty,” as he called it, is in peril? Will pluralism thereby be lost as government exercises increasing control? Such profound inquiries had to yield to Kate’s more pressing question: “Did we just miss the last train that could get us to London on time?” In my preoccupation, I had blown it. Once thus tugged back into the world, and thankfully forgiven by gracious Kate, there was never any doubt that this dynamic city would enthral us, and the unforgettable stay that followed remains one of our fondest memories. As often happens with needed respites, my understanding of tutorial assignments seemed actually to benefit from the change in surroundings. More on Isaiah Berlin a bit later.

It is a special pleasure on this return trip to be in Chatham House. I learned only well after those years living in Britain that our Philosophy-Politics-Economics (PPE) program at Oxford and the Royal Institute of International Affairs here in London—founded at very nearly the same time in the 1920s—grew out of kindred beliefs. Averting another Great War and promoting peace, freedom, and prosperity, the founders felt, would require new disciplines of study. The inspiration of PPE, as our Balliol College archives reveal, was to get future public servants in the habit of examining social phenomena from several complementary analytic frameworks while still at university. The founding inspiration of Chatham House, by comparison, was to get interested members of the Anglo-American community thinking about, discussing, and researching real problems in international affairs while out in the world and already confronting those problems.

Within that tradition, I am here to talk with you about the system of reformed military commissions instituted in the United States through legislation passed by the Congress in 2009 and signed into law that year by the President, with considerable guidance from the United States Supreme Court. It would be difficult to imagine the developments that gave rise to this reformed system had not 2,976 people—including more than 60 Britons and citizens of more than 80 nations—died in two major American cities and a Pennsylvania field on the morning of September 11, 2001. The problem dramatically thrust upon all of us as a result of those attacks was soon defined and addressed by the United States government to be one at the intersection of terrorism and armed conflict. I acknowledge that this definition of the problem was controversial in many quarters, both internationally and also domestically in the United States. I also acknowledge that the specific place at which we in the United States have arrived eleven years later is a unique outcome of our history, culture, law, and institutions, and is not transferable to or suitable for any other country. Still, the broader arc of how we came to what I will refer to as
the “accountable institutions phase” is discernible to other open societies that have endured major terror attacks—and I am speaking of spectacular violence with a political aim and carried out by formidable armed groups that envision themselves to be fighting as guerillas in a cause or even in a war. That this is a topic worthy of Chatham House study accounts for the scores of Royal Institute publications and events on related subjects over the past decade.

**International Perceptions**

I am mindful that international perceptions of military commissions are dominated by impressions formed of Guantanamo Bay over a decade ago. In photos released by the Pentagon in 2002, some of the first detainees brought to Guantanamo were wearing orange jumpsuits and blacked-out goggles, and many of them had their hands tied. These images, rapidly beamed around the world, resulted in an uproar beyond our shores that has never completely ended. The uproar was not merely based upon sensational photographs. The United States Supreme Court would come to judge that there were significant errors in the legal framework introduced by our government in response to the 9/11 attacks. In a 2004 decision, the Court ruled that detention under the law of armed conflict required a process by which detainees could meaningfully confront the basis on which they were being held. In 2006, it held that trial proceedings of detainees must observe the Geneva Conventions’ Common Article 3. And in 2008, it guaranteed the writ of habeas corpus—the great writ that our legal system is proud to have inherited from yours—to detainees at Guantanamo.

Although many detainees have now been established through the civilian judicial process of habeas to be lawfully held as members of al Qaeda or the Taliban who are engaged in armed conflict, many of the nearly 800 detainees brought at some point to Guantanamo were released as captured without sufficient grounds or as not posing a threat. Some of this latter group were Muslim citizens of allied countries. In these countries, the view developed that the United States had overreacted to the 9/11 attacks and that laws were being broken as part of the so-called War on Terror. The pressure brought by many countries for the return home of their nationals in light of this view has been understandable. Some deem the errors regrettable but excusable in the wake of such an alarming and vicious assault; others regard the errors as having stemmed from an abandonment of cherished values. As an army lawyer reassigned from local governance support duties in Afghanistan last year, my present and final mission until retirement is to implement the reforms contained in our Military Commissions Act of 2009 and thereby to seek justice through transparent and fair criminal trials of detainees.

Whatever you and other international partners think of the name and image of Guantanamo, I accepted this Chatham House invitation to at least try to persuade you that the conditions and processes now in place are in all respects consonant with the high standard of justice you hope for in the United States. Please allow me to make four points in this regard at the outset. First, as my friend Ben Wittes notes in his book, *Detention and Denial*, it is important to distinguish between processes for the review of legal and factual bases to detain a person and processes for the trial of a person under the law of armed conflict. It is possible to support the detention review process now overseen by the United States Federal Court of Appeals for the District of Columbia Circuit while opposing reformed military commissions as a forum for trying alleged violations of the law of war. Conversely, it is possible to oppose the detention review process while supporting trials by reformed military commission. And it is of course possible to support both or to oppose both. But without recognizing the distinction, serious
analytical errors can result, and I have encountered international colleagues on all sides of these separate questions. Although I continue to think long and hard about both questions and have practical experience with both, my current duties focus me on seeking accountability for violations of the law of war through prosecution by reformed military commission. Other officials in my government continue to be dedicated to ensuring humane detention conditions and due process in the review of legal and factual bases for detention.

Second, it should not be overlooked that all three branches of government in the United States now regard military commissions as being bound to comply with the requirement of Common Article 3 of the Geneva Conventions of 1949. The pertinent provision requires that an accused detainee be tried by a “regularly constituted court affording all of the judicial guarantees . . . recognized as indispensable by civilized peoples.” The protections incorporated into the Military Commissions Act of 2009 clearly far exceed this international standard.

Third, the United States government in 2011 made clear its support for two other important components of the international legal framework that bear upon military commissions and upon perceptions that they reflect commitment to the rule of law. While not party to the Additional Protocols to the Geneva Conventions, the United States now observes the requirements of Article 75 of Additional Protocol I and all of Additional Protocol II out of a sense of legal obligation. Article 75 of Additional Protocol I sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. Additional Protocol II contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts. An extensive interagency review has concluded that United States practice is consistent with these provisions, and frequent visits by the International Committee of the Red Cross to Guantanamo assist us in continuing compliant practices.

Fourth, while Nuremberg and contemporary international tribunals furnish legitimate multinational models for prosecuting violations of the law of war, the principles of complementarity and concurrent jurisdiction clearly preserve a role for national prosecutions as well. The complementarity principle is reflected in Article 10 to the Preamble of the Rome Statute of the International Criminal Court, which gives national courts priority to exercise jurisdiction in the Statute and defines the ICC’s enforcement as complementing prosecution in national courts. The concurrent jurisdiction principle is reflected in Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which gives primacy to that International Tribunal but which also preserves concurrent jurisdiction over qualifying offenses for national prosecutions. The international order thus recognizes its interests to be best served by maximizing the legal forums in which serious crimes reviled by all societies can be prosecuted. It is clear as well from the Geneva Conventions that military courts are envisioned as viable national law of war trial forums.

**What Are Military Commissions, Anyway?**

By now, the Chatham House member who has not followed developments too closely will have asked, “what are the basic features of these military commissions, anyway?” I will start with what they are not. Reformed military commissions are not the special, separate, and exclusive terror court that some have sought and others have feared. That is because they are fully integrated within our federal framework of criminal justice, are overseen by our federal
civilian appellate courts, and are strictly and properly confined to their narrow law of war jurisdiction involving demonstrated members of specific armed groups capable of protracted violence.

These tribunals are formed under uniform procedures and using statutorily prescribed criteria for membership. As with courts-martial of service members, the formation of a military commission is done by a “convening authority.” The sitting convening authority is 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 commission’s jurisdiction and is subsequently “sworn” to, under oath, by an official, typically of my office, who has knowledge of the alleged offenses. We prosecutors, known as “trial counsel,” then ensure the charges are 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 legal advisor, independently reviews each charge to determine whether it is warranted by the evidence, whether the accused committed the alleged offense, and whether the specifications of the charge state offenses 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 before a panel of officers who must have had no previous connection to the case and are subject to causal and peremptory challenge to assure impartiality. The judges are well-trained attorneys and members of a state or federal civilian bar, with substantial training and experience in criminal trial work due to their having sat as judges in trials of accused United States servicemembers under our Uniform Code of Military Justice. They are insulated from improper influences by a statutory prohibition of such influences, as well as by their assignment to a separate organization within the military, distinct from ordinary command channels. 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 encourage anyone who may doubt their independence to study their rulings.

The trial subsequently conducted of the referred charge or charges incorporates all of the fundamental guarantees of fairness and justice. 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.
Recalling the Brighton Grand Hotel Bombing of 1984 and Its Aftermath

In an attempt to describe how military commissions have come to serve a narrow but significant function within United States national security and justice institutions, I am going to recount, perhaps somewhat unexpectedly, aspects of the bombing of the Grand Hotel in Brighton on October 12th 1984 and the aftermath of that bombing. On an autobiographical note, that jolting event was the second terror attack to make a strong impression upon me, the first having been the suicide bombing of the U.S. marine barracks in Beirut one year earlier, just after I had arrived at Oxford. The Grand Hotel bombing is also the atrocity absorbed by this society with which I am most personally acquainted, having visited Brighton before and after the attack, having shared the tragic sadness of my British friends as we watched bodies being pulled from the rubble on a grainy television set in the Balliol middle common room, having seen the outrage and disfranchisement Britons felt at someone seeking to hijack democratic processes by violence, and having wished like so many others that there were something I could do to help.

I then witnessed with empathy and admiration the responses of a people I had grown to love and a political system I had been taught by wise British teachers to analyze. While I certainly claim no special expertise in the attack or its reverberations, and while I acknowledge my ignorance of many features of British government, society, and law that figured in the aftermath, I nevertheless offer a few comparative observations in a spirit of deference and humility and in hopes of stimulating discussion.

The Brighton bombing, as many of us well remember, occurred during the week of the annual Conservative Party conference and at the hotel in which the Prime Minister and cabinet were staying. In the early hours of October 12th, at 2:54 a.m., a huge blast emanating from a sixth floor hotel room ripped through the building, causing a large chimney and the fifth, sixth, and seventh floors near the blast to collapse onto those below. A section of the front of the Grand Hotel was reduced to wreckage. Senior government ministers and their spouses, occupying first floor rooms, largely escaped unharmed. Five other people in the hotel were killed, and several were seriously injured. Thirty-four people were taken to the hospital and later recovered from their wounds and symptoms of shock. The Prime Minister, up working on her speech for the next day when the blast dislodged plaster and shattered glass in the adjacent bathroom, was led from the building by security officers. Police already on scene immediately began to secure the area, and firemen quickly arrived to begin rescue operations for those trapped in the debris. In an extraordinary demonstration of resilience, determination, and political reassurance, the party conference resumed on schedule that morning at 9:30, with many attendees who had been in the hotel wearing provisional clothing obtained at the Brighton Marks & Spencer, which had opened its doors early to meet the exigency. Both major political parties condemned the attack in the strongest terms. The Provisional IRA claimed responsibility for the bombing that day. It had narrowly missed being a catastrophic blow to the government and still ranks as one of the worst acts of terrorism in this country’s history.

Four Phases of Response to Terror in A Democracy

What happened following the Brighton attack was what United States terrorism scholar Jack Goldsmith might call a microcosm of accountable democracy’s four-phase response to terror. Though I am not aware that he has thought specifically of the Grand Hotel bombing in these terms, Professor Goldsmith happens to have been another American in Oxford on the day...
of the 1984 bombing. In phase one, despite the unified condemnation and resolve to bring the perpetrators to justice, recriminations against those seen as responsible for preventing such attacks began. It took only a few days to reach this first phase. An impressive track record and extenuating circumstances provided security officials only partial insulation from criticism. Most critics were careful to acknowledge that hindsight is 20/20, but some notably forgot the acknowledgment after making it. And from the perspective of hindsight, they discovered disparate pieces of information that could have been pieced together but were missed. Critics unwound the clock to see what went wrong, suggesting that the elaborate preparations necessary to hide a time-detonating explosive in the hotel three weeks prior to the conference should have been noticed and must have involved confederates. A combination of systemic obstacles, analytical misjudgments, human errors, technical problems, and competing priorities prevented the connecting of dots or the emplacement of adequate protective measures. Some denounced the responsible authorities in righteous tones for not keeping the country sufficiently safe.

After the recriminations against the authorities, and despite professional forensic work that soon led detectives to suspect 35-year old Patrick Magee of Belfast as the planter of the bomb, came recriminations against the accountability system under which the authorities had functioned. In this second phase following the Brighton terror bombing, Parliament heard testimony about how officials had tended to be pressured by watchdogs, opposition leaders, and the media into balancing the security-liberty trade-off perhaps too far in favor of civil liberties. Some officials lamented being distracted from protecting against potential attacks by frequent inquiries, requests, and reporting requirements. Lawyers came in for criticism on similar grounds. Some of the guidance to police on their powers was criticized as being over-legalistic when it seemed in hindsight that it should have been clearer and more permissive of the marginal decision to detain or to question. Courts too were criticized for previous decisions that appeared to have chilled the government from questioning those who could have known about preparations underway for the attack.

In the third phase after the attack came a range of new powers or expanded use of existing powers, all intended to strengthen the authorities’ hand. Commendably committed to fighting the terrorist threat under the rule of law but also chastened by the recriminations, ministers and civil servants dutifully produced the laundry list of legal authorities and procedures thought needed to meet the threat but felt to have lacked public support prior to the attack. Many of these had to do specifically with security measures for annual party conferences, which have never been the same and which foreshadowed the sorts of blanketing measures that characterize major public events in Britain today. Also, the Police and Criminal Evidence Act of 1984 had been passed earlier that year, was to be published in its first impression by the Stationery Office a month after the Brighton bombing, and was scheduled to go into effect in 1986 after a period of police training. At the time, there was a heated debate over whether the Act had extended or restricted police powers. The bombing briefly reduced the former concerns and bolstered the latter. And although Magee would ultimately be tried and convicted by a jury of six men and six women at the Old Bailey, the system of Diplock judge-alone courts in Northern Ireland, begun in 1973 as a means of trying terrorist crime in a context of apparent strain and danger to the jury system, gained a boost in popularity for a time as the body politic metabolized the viciousness of the Brighton murders and mayhem.
The fourth phase, however, was that the accountability mechanisms criticized in phase two revived and arguably grew in strength. I call this the accountable institutions phase. The media, motivated by new forms of police and intelligence power and perceived secrecy, redoubled its efforts to report from the shadows. Opposition politicians, bucked up by the media and a human rights community sounding alarm, voiced worries about the unprecedented new authorities conferred upon the executive. The new policing and intelligence authorities were often contained in expiring legislation or conditioned on officials compiling burdensome compliance reports, which in turn required additional government lawyers and checkers to monitor and guarantee compliance. Additional complaint procedures against claimed official misconduct gave new rights to those seeking to hold police accountable. Motivated, well-financed human rights organizations found ways to bring novel claims against the novel forms of government power they deemed scary. And independent courts, including the European Court of Human Rights, despite enduring their own criticisms after the attack, eventually came to grant some of these novel claims. This revived accountability system uncovered that some of the new authorities exercised at the outset of the perceived crisis led to mistakes and abuses that some officials and a segment of the public later regretted, especially as the threat appeared to recede over time.

Reformed Military Commissions As A Matured United States Response To A Defined Threat

Awareness of these overlapping phases in the cycle of response to terror by an accountable democracy, I submit, helps to better understand the United States revival of military commissions in 2001 as an exercise of executive war powers not previously used since World War II. It also explains the subsequent interruption of those executive branch commissions by the Supreme Court—with substantial contributions from the media, members of the legal bar inside and outside of government, inspectors general, and nongovernmental advocacy groups.

The reformed military commissions that have emerged from this cycle of response continue to be opposed by some, and I am mindful that certain organizations may be resistant to supporting what they have reviled for so long simply out of habit. Yet while policies to counter terrorist threats and preserve civil liberties must never become a popularity campaign, there is increasing evidence in opinion surveys and local resolutions that the American people broadly support this now modernized and matured institution and will continue to do so provided it remains subject to scrutiny. The public, current and former officials aligned with both major political parties, and diverse professionals within government seem to have recognized that the systems of military commissions attempted in 2001 by presidential order and in 2006 by initial legislation were flawed. These same stakeholders also appear to recognize that the reforms subsequently incorporated into the Military Commissions Act of 2009 have resulted from action by all three coordinate branches of our government and from the operation of a great number of checks and balances. We are at the accountable institutions phase; like Britain in the Brighton aftermath, it took us a while to get to this place, but we are here now, and it would be a shame to have to repeat the cycle when the next attack comes.

While appreciating the criticisms and concerns, those of us charged with implementing our policies and laws are committed to ensuring that these reformed and accountable military commissions are fair and that they will serve a positive role. “A positive role in what?,” you may ask, given that the United States seems capable of regarding terror attacks as either crimes or acts
of war. The answer is that the reformed commissions are part of both a law enforcement and a military approach, and they complement rather than displace the other legal authorities and accountability mechanisms in our government. Although often mistakenly understood to be an exclusively military institution, they draw counterterrorism, investigative, justice, and intelligence expertise from across our government, as well as from the uniformed and non-uniformed ranks of all services of our military and, with regard to defense counsel, from the most experienced and respected members of our private civilian criminal defense bar. For instance, my staff includes nine accomplished federal civilian terrorism prosecutors in our Department of Justice as well as some of our government’s best criminal detectives from the Federal Bureau of Investigation; meanwhile, all six of the individuals currently arraigned before military commissions are being defended by top flight counsel teams of civilian and military defense counsel, at significant government expense.

This system addresses a defined menace. Despite recent successes against al Qaeda and associated forces—formally identified as an armed enemy in successive laws and executive actions that have been left intact by our courts—these elements continue to pose a serious and adaptive threat. Gone are most of the camps in Afghanistan and other ungoverned spaces where the extensive training and patient preparation necessary for strikes on the west once went undisturbed. Yet though far from the existential threat posed during the World Wars, these are nevertheless still formidable, shifting, non-state actors who seek to attack civilian populations throughout the Muslim world as well as the West, who employ off-the-shelf technologies, and who plot in the shadows of international boundaries. They continue to organize and distribute equipment, to forge travel and identification documents, to attempt to secret weapons and precursors of weapons into public venues, to study the operations of various modes of mass transportation, and to open checking accounts, establish lines of credit, and pre-position funds at locations around the globe. Because of the psychological dimension of their chosen method of fighting, their impact cannot be trivialized by reference to the low number of successful attacks, an insight I attribute to my friend Barton Gellman, yet another American in Oxford at the time of the Brighton bombing.

By both scorning and cynically invoking the law for refuge, these groups tempt even peaceful peoples to respond outside the law. Such a response, however, is among the most serious mistakes conceivable against such threats, as their strength and support can swell in proportion to the target society’s overreactions. Despite the attackers’ tactics, we must always operate in the space defined by the law and by our values. The law is not a luxury; rather, it is essential to legitimacy. I do not believe I am overstating either the threat we face or the importance of how we respond.

**Lingering Domestic Concerns and Counterpoints**

Most domestic critics in the United States grant that the reforms of the 2009 Act have improved the system. Lingering criticisms can be summarized by six “Uns”—that military commissions are unfair, unsettled, unknown, unbounded, unnecessary, and un-American. As to the critique that they remain unfair, William Shawcross, son of Britain’s Nuremberg prosecutor Sir Hartley Shawcross, correctly notes that were those in the dock in 1945 in Germany to be suddenly transferred into this system, they would be astonished to learn of their rights, privileges, and entitlements. In light of the changes in our views since Nuremberg about what constitutes a fair trial, this is as it should be, and the 2009 Act’s prohibition on the use of coerced
evidence and narrowing of the introduction of hearsay evidence are important guarantees that justice will be done.

With regard to the complaint that the military commissions system is unsettled, it should be observed that these tribunals apply a well-defined and comprehensive body of law and rules from our respected courts-martial and federal courts and, like all judicial bodies, raise unresolved issues in a methodical way for reasoned and thoughtful resolution. Zealous defense counsel claim on behalf of their clients that within this system the defense function is insufficiently established, but examination of public filings recording outlays for defense investigators, experts, translators, and other resources support an alternative picture, as does the high level of advocacy of these attorneys themselves. Detractors note that many commission defendants are militant and refuse to acknowledge the authority of the court, but this is not military commissions’ special problem. Defendants in international terrorism trials in United States civilian federal courts often do the same thing. And it should be remembered that Patrick Magee claimed until the end of his trial that the palm print by which police linked him to the Grand Hotel bombing was planted by authorities to frame him, and when sentenced, he shouted defiantly while lifting his clenched fist at the court.

The concern that military commissions are unknown and conducted in secret is increasingly difficult to fathom, as the public and media now observe them both in person and by closed circuit transmission to sites in the United States. Legal motion briefs and same-day verbatim transcripts are posted on a website, further increasing transparency. In one session earlier this year, more than sixty news organizations had reporters covering the trials. Any closure of proceedings must meet the same strict criteria demanded in federal civilian criminal trials and must be tailored to be as narrow as possible. Also, while United States law requires closure of civilian as well as military proceedings in order to safeguard genuine sources and methods of intelligence gathering that can protect against future attack, this is closely analogous to precautions taken in the 1986 trial of Patrick Magee for the Brighton bombing. In every one of the military commissions convictions that have occurred to date, there has been zero use of secret evidence to prove guilt, and I as Chief Prosecutor have reserved the decision of whether we will ever do so; I will exercise that authority in order to assure that the public will be able to review what furnished the basis of the court’s and jury’s findings. Any introduction of secret evidence will generally be by the defense, as is their right, but the law requires such introduction to be done in a manner that safeguards real secrets requiring real protection. Note that it is not a justification for closing proceedings that the government or an official may be embarrassed or that the breaking of a law may be disclosed, and the rationale and basis must be preserved on the record for civilian appellate court review.

Similarly, the claim that commissions are an unbounded exercise of military jurisdiction cannot withstand scrutiny. That jurisdiction is well-bounded and narrow, applicable only in the context of genuine hostilities, involving those who are demonstrated with evidence not to have complied with the laws of war, and alleging offenses that are longstanding violations of those laws. Many of you have heard the now familiar hypothetical often suggested by those who fear military commissions: that commissions pose a threat to every old lady in Switzerland who makes a charitable donation to a mosque where some of the money might eventually make its way to Al Qaeda. That hypothetical is just that: a hypothetical law school exam scenario that won't happen because what is described would not be a crime triable by military commission to
begin with, because prosecutors are constrained, because defense counsel would challenge any charge, because the evidence could not support any charge and would be dismissed by the judge, and because the transparency of the entire matter would make it embarrassing ever to bring such a case.

To those who maintain that military commissions are unnecessary, I submit that while most crimes and precursor acts of international terrorism can and should be prosecuted in our capable and deservedly respected federal civil courts, there is a narrow category of cases in which two different administrations and Congress acting five times with guidance from the courts have recognized military commissions must be the forum used. Considerations such as the security of trial participants, ability to protect the court venue, capacity to obtain reliable evidence in zones of instability or armed conflict, appropriateness of available charges to the alleged offenses, and use of a voluntariness standard for statements rather than a strict requirement to warn a custodial suspect of the right to remain silent and seek legal counsel—one or more of these factors could cause prosecutors and counterterror professionals to select military commissions as the appropriate forum in a case-specific analysis. Moreover, the statutory constraints that Congress has emplaced, making military commissions the only option in certain circumstances, are real constraints. This has become a matter of the rule of law and of recognizing that at some point justice delayed really is justice denied.

And those who mistakenly believe military commissions are un-American should become familiar with some of the hundreds of military commission convictions reviewed by Abraham Lincoln, including that of one John Yates Beall in February of 1865. Beall, a former confederate officer, had been found guilty of violations of the law of war for attempting to derail a train carrying civilians in upstate New York, where Beall and fellow guerrillas were operating while they themselves were disguised as civilians. Beall’s trial was conducted by military court while the civilian courts of New York had remained open. Lincoln had just completed, on January 31st, 1865, the exhausting but ultimately successful sponsorship of the Thirteenth Amendment in the House of Representatives; the House had voted out the Amendment to abolish slavery and make permanent and universal the prohibition that Lincoln had only temporarily and partially emplaced with the Emancipation Proclamation. Lincoln was soon, in early March of 1865, to give his Second Inaugural Address, one of the more profound statements of the principle that right is not reducible to might. These are hallowed months in the annals of democracy in the United States. And in the midst of this period, Abraham Lincoln considered one of his most significant duties to be the consideration of Beall’s military commission.

Lincoln effectively approved the commission’s findings and sentence. His well-established record had been that of a chief executive very willing to second-guess military courts—scholars note that he disapproved or granted substantial clemency on a full third of the cases that came to him for final action. And Lincoln was a fair student of the United States Constitution. The record of Beall’s military commission shows that the proceeding was sharply adversarial, that Beall was well-represented, and that following Beall’s conviction Lincoln received many pleas for clemency from Beall’s family and friends. That Lincoln endorsed Beall’s military commission trial in February of 1865 by no means settles the question of how to assess renewed military commissions in the 21st century. It doesn’t even settle the question of how to assess Lincoln’s own sometimes controversial record regarding individual liberties during our civil war. But it does undercut the claim that commissions are somehow un-
American, and it helps put into perspective why any president will be wary of eliminating from the range of forum options an institution that dates back even before Lincoln, to George Washington, who convened the first military commission in 1780.

In short the six “Uns,” though helpful reminders that we must remain ever vigilant, are themselves now unfounded, and resistance to moving forward fairly and openly and accountably is now unwise. Lingering concerns need not cause the military commissions system to be any of the six “Uns”; rather, these concerns exhort us to ensure that the system is laudable and respected.

Conclusion

To conclude, reformed military commissions should be understood as a lawful United States national forum, even if one cannot imagine use of a military tribunal in one’s own national system. The executive and legislative powers supporting this forum derive from enumerated provisions in the United States Constitution and have no direct parallel in the legal framework of any other country.

Looking back across the past decade, we might have hoped to get the balance of executive branch authorities and accountability mechanisms right in the first place, before a major attack came, in order to prevent both the attack and any ill-taken countermeasures. But all governments are limited by imperfect information, by uncertainty, and by the psychological reaction that terror induces when cooler heads are unable to assuage that reaction. Governments, inherently human and therefore imperfect, sometimes do not know in advance exactly what is necessary to keep the people of a dynamic and open society safe. Leaders, though surely motivated mostly by a desire to protect the people they were elected or appointed to serve, sometimes make hasty decisions that are based more upon fear than upon foresight, and sometimes trim facts and evidence to fit ideological predispositions. Then mistakes in the other direction occur because fear of a threat dissipates as the last attack recedes into the past and as indicators of danger are no longer visible to the public.

Coming full circle to my mention of Isaiah Berlin the outset, we remain almost as concerned about government growing too powerful as about our near-term security, and we know that every expansion of governmental power brings the possibility of abuse, error, or excessive control. Recall that Berlin championed a concept of liberty that was “negative”—not in any pejorative sense, but in the sense of an absence of government constraint—because he believed that advancing the entire range of pluralistic goods depended upon preserving such a sphere of individual freedom. The recurring lesson from repeating cycles of response to terror is that a government’s approach can be deserving of a public’s confidence only if it is relentlessly empirical and pragmatic, while demanding compliance with the rule of law. All appropriate instruments of national authority and international cooperation must be used to oppose the ruthless but entirely surmountable modern and transnational threats we face. Britons after the Brighton bombing were alarmed, but by maintaining composure and resolving to find sustainable protections against a disturbing new threat, you demonstrated how all attempts to destroy democracy by terrorism can be defeated. Our goal for the future should be to insulate government from the post-terror cycle—to build resilient, accountable, and fair institutions that adequately absorb and dismantle threats while safeguarding our precious liberties. Reformed
military commissions in the United States have a narrow but important role in pursuit of that worthy goal.

Thank you for giving me a reason to return to the country I consider my second home and for hearing me out in the best traditions of Chatham House. And now, I will be happy to take questions.