Thank you, General Alexander, for that welcome. Today I follow many distinguished speakers who have addressed this gathering in prior years on the topic of “Intelligence Under the Law,” so fitting a theme in light of the honor bestowed here today upon former General Counsel Vito Potenza, whose career at the National Security Agency was dedicated to just that. I want to address this topic in two parts. First, I will offer a distinction—sometimes obscured in discussion of these matters—between what is lawful and what is legitimate, using an illustration from history that I hope will resonate with an audience comprising so many intelligence and legal professionals. Second, I will try to show why the legitimacy of intelligence activities is nonetheless unsustainable if outside of the law, drawing upon my observations of recent war crime and international terrorism prosecutions to make the point.

Lawfulness and Legitimacy

For me—a simple infantry soldier and Army lawyer—terms like “legitimacy” can be a challenge. The subject of a massive literature in political philosophy, legitimacy is, at its essence, that characteristic of a government which makes it deserving of allegiance from the governed. What makes a freely elected democratic government deserving of allegiance from the people and therefore legitimate? And what specifically might be said about the legitimacy of activities undertaken by such a government’s security and intelligence organizations? This infantryman’s and Army lawyer’s approach to such daunting questions is to first look to history. In particular, it is to look to the history of armed conflict, wherein states featuring various levels of democracy in their institutions have long struggled to achieve the optimal relationship between freedom and security.

In Thucydides’s masterwork, the History of the Peloponnesian War, which charts a twenty-year conflict between Athens and Sparta during the fifth century B.C., we gain certain timeless insights into what are and are not legitimate security institutions in a democracy. Although he operated in a world that long pre-dated cellular phones or satellites, Thucydides nevertheless had a sophisticated grasp of the centrality of good intelligence to protecting a state’s interests. For instance, in the fourteenth year of the war, at the Battle of Mantinea, the Athenians failed to see a trap the Spartans had laid in hopes of luring the Athenians into combat against the superior Spartan hoplite infantry. The Spartans diverted a river in such a way that it threatened to flood the Mantinean plain, which belonged to an Athenian ally, and instead of avoiding the trap and choosing better circumstances in which to engage their enemy, the Athenians took the bait and joined battle, which turned out disastrously for them. Thucydides wisely instructs that the Athenians would have fared much better if they could have learned and acted upon Sparta’s true intentions at Mantinea. Then, during the next fighting season, in the fifteenth year of the war and while still smarting from the defeat at Mantinea, Athens sought to conquer a weaker city-state allied to Sparta and inhabiting the nearby island of Melos. The Athenian generals’ attempts to intimidate the island’s population into capitulating, and the defiant responses of the leaders of Melos, form the “Melian Dialogue,” which among other things is one of the more profound expressions of what constitutes legitimacy that you will find in the annals of western civilization.

The Athenian generals—who commanded far stronger naval and land forces than the Melians—sought to take the island without a fight, and so they advised the Melian leaders to surrender themselves into slavery. The Melian leaders protested that it was neither lawful nor just for the Athenians to demand that the Melians surrender or else lose all of their freedoms. The Athenian generals famously replied, “you [Melians] know as well as we do that when these matters are discussed by practical people, the standard of justice depends upon the equality of power to compel, and that in fact the strong do what they have the power to do and the weak accept what they have to accept.”
So there you have, more than 2400 years ago, in the history of Athens, an early and very imperfect democracy at war, a primer on how lawfulness and legitimacy are related but also distinct. The Athenians were violating an emerging law of interstate relations which held that you don’t invade and subjugate neighboring city states, and when, soon after the Melian dialogue, they conquered the defiant islanders by force, they committed atrocities that Thucydides considered extraordinary even for that brutal and lawless era of warfare. The Melians, speaking in terms of both prudence and justice, had warned the Athenians about the longer term consequences of such lawless conduct, asking the Athenians how they could hope to maintain a stable empire if other city states were to witness the subjugation of Melos and thus feel threatened that they could be next. And the Athenians responded with the definitive hardnosed statement of realism that I just quoted: there is no justice, only power. The standard of justice you get depends upon your power. The strong do what they have the power to do. The weak accept what they have to accept.

No highly developed skill in intelligence analysis is needed to see certain lessons from the conduct of Athens as it thus entered the last phase of the Peloponnesian War. Athens’s leaders would indeed eventually be undone due to their predatory and lawless behavior, as the final and catastrophic Athenian invasion of Sicily would soon show. The Melians proved correct in this regard. However, “legitimacy” cannot be simply reduced to “lawfulness.” If a government lacks the power to protect itself and its people, it will be discredited and regarded as illegitimate even if it has scrupulously adhered to the law and otherwise proved deserving of allegiance. This is obvious when one considers whether the Athenian government was made more or less legitimate by its forces’ failing to detect the Spartan trap on the plains of Mantinea—no contest: less legitimate. And the government of Melos, as it succumbed to Athens’s military might, lost all of its peoples’ freedoms, and ceased to exist certainly also lost legitimacy as well. My friend Harvey Rishikof, who is here today, sometimes reminds his students that legitimacy is not formulaic. It has a know-it-when-you-see-it quality—ask yourself, for instance, what is it that causes troops to no longer follow the orders of a nation’s leaders? But anyone can see why the eloquent but weak Melian leaders would have completely lost the allegiance of the governed as Athenian forces occupied the island.

**Intelligence and Legitimacy**

Let’s fast forward two and a half millennia to current times, being careful not to suggest too close a comparison between Athens and the United States. For while our form of government was indeed partly inspired by the experiments of our Greek forebears, our modern constitutional democracy seeks to reconcile freedom and security in a vastly different world. In this regard, I commend to you an excellent and thoughtful monograph by Benjamin Wittes of the Brookings and Harvard Law School Project on Law and Security called “Against a Crude Balance: Platform Security and the Hostile Symbiosis Between Liberty and Security.” Wittes posits, using illustrative examples from United States history—including a contemporary example involving the question of whether and in what circumstances to use surveillance—that liberty and security are best understood as necessary preconditions for one another. The absence of liberty, Wittes maintains in light of these more modern examples, will tend to guarantee an absence of security, and conversely, one cannot talk meaningfully about an individual’s having liberty in the absence of certain basic conditions of security. Thucydides did not quite anticipate many of the nuanced modern applications Wittes studies.
And while like the Athenians we have imperfect government and must face up to our inevitable imperfections, the United States has not ever sent its men and women overseas in the past century to build an empire. As Secretary of State Colin Powell once said, “we have asked for nothing except enough ground to bury [those who died], and otherwise we have returned home . . . to seek . . . to live our own lives in peace.”

Despite our distance from ancient Greece, the battle of Mantinea and the Melian dialogue have great relevance to our current armed conflict with al Qaeda and associated forces. It is a conflict in which the intelligence gained by this agency and other organizations in our government must serve such an important role. Because in spite of recent successes against them, our enemies continue to pose a serious and adaptive threat, even if that threat cannot fairly be described as an existential one. We face 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. While not threatening to our very existence, their mode of fighting tests who we are and defines us in how we respond. And as they do not present themselves anywhere near as clearly as did the crafty but uniformed Spartan infantry on the Mantinean plain, intelligence about the identities, methods, and intentions of transnational terrorist organizations—if we are to prevail against them without causing devastating collateral harm—is absolutely necessary.

Necessary, yes. But sufficient? No, at least not over the longer term. By both scorning and cynically invoking the law for refuge, our modern enemies tempt even peaceful peoples to respond outside the law and to risk short-sighted power moves analogous to those used by the Athenians at Melos. I want to suggest today that such responses are a serious mistake. 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. In other words, the Athenian generals were wrong: leaders who assume that power and justice are the same thing might enjoy a brief season of willing allegiance from a population comforted by more visible security in the wake of an unnerving defeat, but legitimacy—and indeed effectiveness beyond the near term—comes from more than power alone. I am making the same point that many of you in this room have made when you’ve said “just because we can do it doesn’t make it right.” But I am also trying to highlight the desirable quality of sustainability in intelligence methods, and I am saying that in this country the only sustainable approach is one that protects us from determined adversaries while being compatible with democratic freedoms and the rule of law.

But what does such a sustainable approach look like? Well, I submit that it is relentlessly empirical and pragmatic, while demanding compliance with law. All instruments of our national power and authority, including intelligence and law enforcement, are part of this approach, which rejects the idea that these two communities cannot cooperate or that the admittedly distinct paradigms they inhabit cannot co-exist. We need both attentiveness to future threats and rigor in establishing facts about who committed or supported which attacks in the past. We need both protection and accountability. We need both the evidence that new advances in signals technology can bring and the human intelligence that is best gained voluntarily from a cooperating convict who acknowledges his sentence. We need both secrecy about sources and methods and transparency about how our government makes decisions, with oversight to ensure that details are not hidden merely because they are embarrassing or reveal the breaking of a law.
To adapt a metaphor from Robert Jackson, a sustainable approach to intelligence and to national security requires that “Power [pay tribute] to Reason.” Jackson, a twentieth century Thucydides, Supreme Court Justice, and Chief Prosecutor at the Nuremberg trial of major Nazi war criminals, recognized that the balance I have been talking about today is not easy. Tribute is rarely pleasant or easy for the payer. In my own current assignment, I can readily see that it takes public military commissions trials within an adversarial process. It takes providing accused persons all of the protections of a fair trial demanded by our values and inevitably giving such persons, as Jackson himself described it, “something of a sounding board” while also “stay[ing] the hand of vengeance.” It takes wise enforcement of rules which, like those in our federal courts, ensure protection of genuine national security information. It takes more than high sounding phrases about freedom and justice. In the collective task of all of us here today, it takes the commitment of institutions, people, time, resources, and leadership. It takes intelligence under law. Having served with you and benefited from your work for many years, I am confident that, with your continuing support, we will be up to that task. Thank you.