

U.S. House of Representatives  
Committee on the Armed Services  
Testimony of John D. Hutson  
President and Dean, Franklin Pierce Law Center  
RADM, JAGC, USN (ret.)

Mr. Chairman, thank you for the opportunity to testify on this particularly important issue. With respect, I believe there are very few issues facing Congress today which are more vital to the United States than the question of how we resolve the fate of those detainees whom we hold in Guantanamo. Indeed, if done properly this is an opportunity for the United States to deal from a position of strength, not weakness, and to demonstrate to the rest of the world the ideals which our young men and women are fighting so bravely to protect.

I was an early supporter of the concept of military commissions and their use in the war on terror. I believed then, and still believe now, that they are historically grounded and the proper forum to prosecute alleged terrorists. However, as the Supreme Court recently told us in rather unequivocal words, they were neither properly authorized nor implemented. That was a significant embarrassment for our nation which has justifiably prided itself for generations on our unwavering support for the rule of law and human rights. The Supreme Court thrust upon Congress the opportunity to right the wrong.

If done thoughtfully and wisely, this will enable us to regain the high ground. There are many options available to this body, most of them fraught with peril. A few commentators may advocate for military commissions which are novel and break new ground. Many will take out a blank sheet of paper and a pen and start writing to create a new form of commission. I believe that these approaches would be a mistake because the risk of omitting a necessary provision or including an objectionable one is too great.

Many people will urge you to simply authorize essentially the same commissions the President created with only minor changes. I believe this is the worst option of all because the Court has already found them to be lacking in significant, but correctable, ways. The Court gave the Congress and the Administration a road map to follow. We must avoid more court challenges or another failure in this important work.

On the bookshelf of virtually every U.S. military judge advocate, stationed anyplace on the globe, sits a thick burgundy soft cover book. That book is the envy of every other armed force in the world. Congress enacted the core it in 1951 and amended it in 1969. It has withstood close scrutiny by the Supreme Court of the United States, the same court that found such serious fault with the military commissions as currently designed. The book I refer to, of course, contains the Uniform Code of Military Justice and the Manual for Courts-Martial.

The UCMJ and the MCM easily comport with the requirements of the Hamdan decision and also with Common Article 3 of the Geneva Conventions. As required by Common

Article 3, they provide “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” I know that some have suggested that you enact legislation which avoids or modifies our obligations under Common Article 3, but I ask: which part of that Article just quoted do we want the United States to say doesn’t apply to us? We should embrace Common Article 3 and sing its praises from the roof tops. To avoid it or try to draft our way out of it is unbecoming the United States. Now that the Supreme Court has spoken, the unmistakable impression around the world would be that this was a blatant attempt to cover ourselves. Moreover, doing so would endanger our troops now and in the future as well as government civilians and contractors in the field. If we engage in such “line item veto” in the middle of a war, other countries may follow our lead to our great disadvantage and regret. We would be unable to object.

That is not to say, however, that the court-martial system as contained in the UCMJ and MCM couldn’t or shouldn’t be modified in some narrow and specific ways. For example and fundamentally, jurisdiction would have to be conferred by Congress in order to create military commissions. The Military Rules of Evidence may need to be modified in some narrow and well defined ways to accommodate the vagaries of the environment of the war of terror. The rules regarding hearsay and chain of custody may be examples of this. But none of these are difficult or dramatic. And if done sparingly, none would undermine the validity of the basic construct. Clearly, evidence derived as the result of any form of coercion should not be admissible under any circumstances. The touchstones are our present “regularly constituted” court-martial system and “judicial guarantees which are recognized as indispensable by all civilized peoples.”

I have attached to my testimony a proposed draft of such amendments to the UCMJ as might be appropriate. This proposal was drafted by military law experts including the founder and directors, including myself, of the National Institute of Military Justice. This is certainly a worthy model. There may be others.

In closing, the United States Congress has been given a golden opportunity to get military commissions on course in a way that will pass judicial review as well as the scrutiny of domestic and international critics. It is imperative to the good reputation of the United States and, I believe, to the successful prosecution of the Global War on Terror that Congress meet this challenge. The benefits are great and, if done properly, the sweat equity is small.

Thank you.