Statement
JOHN D. HUTSON
RADM JAGC USN (ret)
Dean and President, Franklin Pierce Law Center
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The prison at Guantanamo Bay has been a black eye on the face of the United States for far too long. Closing it should be at the top of the detention and interrogation policy "to-do" list. It has been an impediment and a distraction. At the very least, it is a national embarrassment that so many voices of authority, including the President and Secretary of Defense along with a host of domestic and international observers and commentators, have called for its closure and yet we can't seem to do it. It portrays the United States as weak and dithering; a feckless shadow of the great nation that won World War II. It would be hard to imagine the "Greatest Generation" incapable of closing Guantanamo. We should close it not because we must, but because we can. It would be a sign of strength and courage, not weakness and fear. At its worst, its continued existence impedes the remedy of the basic ill of indefinite detention which results from the seriously flawed Combatant Status Review Tribunals and equally flawed military commission process.

We aren't dealing with thousands of prisoners. It's a few hundred. Finding places to hold them securely would not be an insurmountable obstacle. Thousands of World War II prisoners of war were successfully incarcerated on U.S. soil. Last year there were over 193,000 prisoners in federal custody and over 1.5 million total prisoners in the United States. Absorbing 350 detainees from Guantanamo would not be overly difficult if we really wanted to close it.

The real problem is not where to hold the detainees, it is what to do with them. Presently, we have two legal processes to deal with them, the Combatant Status Review Tribunal (CSRTs) and military commissions. Both are irredeemably flawed. We were told from the outset by the President, the Vice President, the Secretary of Defense and others that the detainees in Guantanamo were the worst of the worst, all trained killers captured on the battlefield, and so forth. Now, in December 2007 we have simply released half of them and prosecuted exactly one of them, ironically perhaps, a former kangaroo skinner from Australia. This is not a system that is working well by any measure.

The United States decided early on in the war that rather than using the Article 5 "Competent Tribunals" which are mandated by the Geneva Conventions as the forum to determine the status of an individual and whether his detention should be continued, we would bring these detainees to Guantanamo. The original goal was to use a location that would be beyond the reach of any law but the Supreme Court dashed that hope in Rasul. The Administration responded with the creation of the novel CSRTs. Unfortunately but predictably, they have not withstood close scrutiny because their procedure was reverse engineered to ensure continued confinement.

While the British debate whether they should amend their rules so they can hold alleged terrorists without charges for a maximum of 48 days instead of 24 days as their present law provides, we have detainees we have held without charge for six years.

I strongly urge that if the Supreme Court doesn't restore Habeas Corpus as the result to the cases it recently heard, that Congress do so unilaterally. That is the last, best hope of emptying the confinement facility of those men who shouldn't be there, while retaining those that should. Regardless of whether we are required by the Constitution to afford them the right of Habeas Corpus, it is a proven method for making that critical determination. It is a tool we should use. If it had been used in the beginning, we wouldn't be in this mess. (Nor would we be if we had used the Article 5 Competent Tribunals as we had done in the past.) Those who remain after a legitimate determination can then be prosecuted. That presents the next question: how are they prosecuted?

The military commissions are a failure and a sham. They are even a failure as a sham. A considerable and important aspect of justice is the appearance of justice. The commissions certainly fail by that measure as have the CSRTs. The shortcomings of the military commissions are completely transparent and have been amply cataloged elsewhere so I won't reiterate them here. No one can reasonably argue that they have been successful. The important question for the Congress is what to do about it. After removing whatever number of those men who shouldn't have been confined in the first place by use of Habeas Corpus, the best way to reduce the population in Guantanamo is to prosecute those who should be prosecuted.

We got off on the wrong track early on and never permitted ourselves a way to recover. At least in part the problem is that we are trying to do something that hasn't been done before and even though it clearly isn't working we stubbornly stick with it. That is, we are trying to prosecute alleged enemy combatants during the course of the hostilities. Moreover, we are looking to prosecute relatively minor players. During prior wars, captured drivers, assistant cooks, and the like, essentially the equivalent of low ranking enlisted personnel, were imprisoned and released at the cessation of the hostilities. The war trials took place at the end of the war for the most part and were reserved for those who were truly the "worst of the worst" not just rhetorically so.

We have confused prosecution of criminals with the prosecution of the war. The latter is a function for the Commander in Chief; the former is a judicial function. The military can shoot them, but they shouldn't prosecute them, certainly not the way we are trying to do it now. When the criminal prosecutions become part of the war effort, the natural tendency is to prosecute the people like we prosecute the war—assuring victory becomes assuring convictions because they are, after all, the enemy. It is a wrongheaded strategy and doomed to failure.

When we consider the judicial function, we argue that this is a war and they have to be treated like the enemy so we shouldn't provide them certain rights. When we look at the war fighting side of the equation, we say they are not POWs but criminals and have to be prosecuted. Trying to have it both ways and slip sliding from one argument to the other depending on which is the most advantageous at the moment is causing us insurmountable problems and raining down on us the opprobrium of the national and international communities.

The United States can justifiably and proudly claim two of the finest judicial system on Earth—the military court-martial under the Uniform Code of Military Justice and the Manual for Courts-Martial and the U.S. federal court system. Rather than hiding them under the leaky bushel of the military commissions, we should be touting them from the rooftops. We should use this as an opportunity to showcase to the rest of the world what America thinks justice, human rights, and the rule of law mean. It's not a human right if it only applies to certain humans, and it's not a rule of law if it applies only when it is convenient. We need to get these cases into courts-martial or U.S. District Courts.

Happily, this also makes practical sense. While the military commissions have fiddled and diddled, federal courts have successfully and justly prosecuted and convicted a large number of terrorists. We can't be afraid to use them. In truth, using the federal court system may mean there is an occasional acquittal. If we aren't willing to risk an acquittal, we might as well be honest about it and just let the kangaroos run the court.

The court-martial process would work equally well. Indeed, the familiarity that the court-members, military judge, and prosecutors would have with the vagaries of war would serve as an advantage.

There is very little that would have to be changed in order to accommodate the unique aspects of prosecuting alleged terrorists. One rule that could not be modified is guilt beyond a reasonable doubt. If there is no evidence of a crime, there can't be a conviction. We can't base a conviction simply on the fact that somebody, somewhere, at some time, decided someone was a terrorist.

We can't say to them, "There is a guy, we can't tell you who; but he gave us information, we can't tell you what; that indicates you are a terrorist, we can't tell you why. Based on evidence you can't see, we find you guilty."

There is a third option which I hesitate to even mention because I don't believe it is the best option and it may be a fix that appears superficially to be face saving and therefore too tempting. Therefore, I don't recommend it. We could amend the Military Commission Act to bring it up to Common Article 3 standards, at the very least. This would required several major changes. First, all hint of political influence or partiality in the process must be removed. No trial finishes well if it doesn't start well. It can't start well if a lack of impartiality appears to influence the pretrial process: investigations, referral of charges, detailing counsel and members, and the whole gamut of pretrial decisions. Even if the decision on balance was correct, if there is even the hint of partiality, the result will be suspect and therefore flawed. Trial lawyers know that the real work often goes on behind the scenes and often before the charges are even referred. The public sees (or not, if the trial is closed) what happens in the courtroom but what happens in the courtroom is largely determined by what has happened outside the courtroom. Recently, the military commissions have at least appeared to lack impartiality.

Secondly, the review process must be changed. I would recommend that the military review for courts-martial be used through the Service appellate courts and the Court of Appeals of the Armed Forces. It is tried and true, and would bring the process in closer compliance with the Geneva Convention mandate of using the same criminal prosecution system as we use for our own troops.

Also, significantly, all evidence in the hands of the prosecution, whether incriminating or exculpatory, must be made reasonably available to the accused and/or his lawyer. We can't continue to countenance secret evidence at secret trials.

This option fails to showcase our extant judicial systems or take advantage of their experience. It runs the very real risk of more problems like the silly but real one we saw most recently of whether a CSRT determination of "enemy combatant" equates to "unlawful enemy combatant" for purposes of the military commissions. We must stop having to amend the process in reaction to court decisions. We need to do it right from the beginning.

The touch stone for prosecutions must be the higher standard between what Americans think is appropriate and Common Article 3 of the Geneva Conventions. The CA3 standard of those "judicial guarantees considered indispensible by civilized peoples" is not a difficult one to apply even if there is disagreement about certain nice evidentiary or procedural matters. For example, there must be a legitimate review of findings but how that review is accomplished is a matter of debate. Using the Federal Court system or courts-martial resolves much of that debate.

So in the end there are three things that must be done: 1. Close Guantanamo and move the detainees to a prison or prisons in CONUS; 2. Provide Habeas Corpus to those who wish to challenge their detention; and 3. Prosecute those who remain custody in Federal District Court or at a General Court-Martial.

This solution will generate cries of anguish from those who point out that we never did this in World War II or other wars. The comparison misses the point by using the slippery but often used debate tactic of arguing this is a war like other wars when that supports the position offered, but it is unlike prior wars when it is not helpful to the argument.

The point is not to repeat what we did sixty years ago; rather, it is to do the right thing now under the present circumstances. German and Japanese prisoners were captured on real battlefields and were clearly combatants. That is not the case now. Each of the individual detainees may or may not be a criminal, some surely are, but their situation now is nothing like the situation of enemy POWs in prior wars. The duration of the hostilities alone requires we employ different treatment. This is not to molly coddle the detainees. Unlike enemy soldiers in WWII, if these terrorists are convicted, they will face years in prison or death, not repatriation to Japan or Germany after only months or up to perhaps four years in prison camps.

The United States simply can't continue to do business as we have been doing it thus far. We must have the courage to look anew at the problems and make the necessary course corrections. We have been embarked on a Quixotic quest for the bottom, trying to figure out the absolute minimum rights we are required to afford the detainees. This mindset has caused us to redefine torture and the defenses to torture, use secret prisons and extraordinary rendition, disclaim the Geneva Conventions and ignore a host of other domestic laws. Notably, it has caused us to forsake our time honored judiciary for an ad hoc system that simply hasn't worked. Far too often the federal courts, notably including the U.S. Supreme Court, have had to step in to fix problems of our own making that should never have existed in the first place. We would be much better off if the appellate courts were reviewing appropriate convictions, rather

than flawed pretrial procedures.   Our mantra should be “close Guantanamo, release those we should, and prosecute the bad guys.”

There is another concern that should be raised here although there isn’t a convenient place to do it. There are reports of many thousand detainees being held in prisons elsewhere around the world. Given our track record for the several hundred located 90 miles from Miami, one wonders what is going on elsewhere. I urge Congress to require an accounting for them.