

RETIRED JAGS LETTER TO THE SENATE JUDICIARY COMMITTEE ON *Hamdan v. Rumsfeld*

**MAJOR GENERAL JOHN L. FUGH, USA (RET.)**  
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July 10, 2006

The Honorable Arlen Specter, Chairman  
The Honorable Patrick Leahy, Ranking Member  
Senate Judiciary Committee  
Washington, DC 20510

Dear Chairman Specter and Senator Leahy:

In the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld*, some commentators posit a stark choice between trials of accused terrorists in civilian courts and providing Congressional authorization for the deeply flawed military commissions that the administration established in 2001 and that the Court rejected in *Hamdan*.

We are writing to say that there is a better way — a middle ground consistent with America's interests, our values, and our laws. It is to bring accused terrorists to justice in military trials based on the Uniform Code of Military Justice (UCMJ) and Manual for Courts Martials (MCM).

As Congress considers its response to the *Hamdan* ruling, it should start from the premise that the United States already has the best system of military justice in the world. That system would provide the government with the tools and the flexibility it needs to prosecute accused terrorists through time-tested proceedings that protect sensitive information. It would ensure that military judges, prosecutors and defense counsel work within an established system of justice that affords clarity on laws, rules and procedures. It would give the victims of terrorism the justice that they deserve, while underscoring our Nation's respect for the rule of law and avoiding the questions of legitimacy that have embroiled the military commissions in litigation for the past four and a half years. If we use this system now, we will be well on our way to prosecuting the worst of the worst in our custody.

It is possible that Congress may want to consider narrowly-targeted amendments to enhance the already strong protections of classified evidence in the UCMJ and to accommodate specific difficulties in gathering evidence during the time of war. But the core American values that are incorporated in the UCMJ and highlighted by the Supreme Court in the *Hamdan* decision need to be preserved: defendants must be able to see and rebut all of the evidence against them; defendants must not be shut out of portions of the trial; and, defendants must be assured access to an independent and impartial court of review.

Throughout our Nation's history, both military commissions used to try enemies captured in war, and courts-martial used to try our own personnel, have applied the same basic procedures. It is precisely that fact — our longstanding promotion of the basic rights of all persons, including

even our worst and most vicious enemies — that makes our country worth fighting for and distinguishes us from the terrorists.

As retired judge advocates, we also strongly support the universal application of Common Article 3 of the Geneva Conventions.

Common Article 3 of the Geneva Conventions provides the basic protections of humane treatment and fair justice that apply to all persons captured in an armed conflict — and specifically those who fall outside the other, more extensive coverage of the Conventions. The United States military has abided by the basic requirements of Common Article 3 in every conflict since the Conventions were enacted — in the Vietnam War, in Korea, and in two conflicts with Saddam Hussein's Iraq. In each case, we applied the Geneva Conventions even to enemies that systematically violated the Conventions in their own actions. Congress, after considered debate, made violations of Common Article 3 a war crime in our country's criminal code. Last year, Congress made clear again that no person may be subjected to cruel, inhuman or degrading treatment, the type of conduct prohibited by Common Article 3. Our respect for, and application of, these universally applicable requirements of humane treatment protect our own soldiers as much as it protects our enemies. It is, after all, our troops who are forward deployed now and will likely be in the future. For this reason, from boot camp to officer schools, every sailor, soldier, airman, and Marine learns that the rules of humane treatment embodied in Article 3 of the Geneva Conventions are part of the core ethic of our armed forces and the highest law of our land. We sincerely hope that Congress takes no action to confuse the message our men and women in uniform have long received about this important standard. If we eliminate the applicability of Common Article 3's protections, it opens the door for our enemies to do the same.

It is time to replace trials of military commissions with a legitimate system to try accused terrorists. The UCMJ and MCM provide the model. We are fortunate already to have this tried and true system, which should be used to bring terrorists to justice, to showcase our respect for the rule of law and fundamental fairness, and to restore our moral authority at home and abroad.

We urge your consideration of these views on this matter.

With respect,

Major General John L. Fugh, USA (Ret.)  
Rear Admiral Donald J. Guter, USN (Ret.)  
Rear Admiral John D. Hutson, USN (Ret.)  
Brigadier General David M. Brahms, USMC (Ret.)  
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