

**HUMAN RIGHTS FIRST:
RETIRED MILITARY LEADERS CONFERENCE CALL**

**ON REPORTS THE ADMINISTRATION PLANS TO ABANDON THE
FEDERAL COURTS IN PROSECUTING 9/11 TERRORISM CASES**

**WELCOME AND MODERATOR:
SHARON KELLY MCBRIDE,
COMMUNICATIONS DIRECTOR,
HUMAN RIGHTS FIRST**

**SPEAKERS:
REAR ADM. (RET.) JOHN D. HUTSON,
U.S. NAVY**

**LT. GEN. (RET.) HARRY E. SOYSTER,
U.S. ARMY**

**MAJ. GEN. (RET.) WILLIAM L. NASH,
U.S. ARMY**

**ELISA MASSIMINO,
PRESIDENT AND CEO,
HUMAN RIGHTS FIRST**

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(Music.)

OPERATOR: Please stand by. Your conference is about to begin. If you should need assistance during your conference, please press *0. Good day everyone and welcome to the Human Rights First Military Leaders Conference Call. At this time, all participants are in a listen-only mode. Please note this call is being recorded. It is now my pleasure to turn the conference over to the communications director, Ms. Sharon Kelly McBride. Please go ahead.

SHARON KELLY MCBRIDE: Hi and welcome to the conference call. My name is Sharon Kelly McBride. I'm the communications director at Human Rights First. And today, I'm joined by three members of a group of retired admirals and generals who stood with President Obama on his second day in office when he signed executive orders closing Guantanamo and ordering the end to policies of enhanced interrogation.

The speaking order for today's call – we're going to start with Rear Adm. John Hutson, who served in the U.S. Navy from 1973 to 2000. He was the Navy's judge advocate general from 1997 to 2000 and is currently the president and dean of the Franklin Pierce Law Center. After that, we're going to go to Maj. Gen. William Nash. Gen. Nash served in the Army for 34 years and is a veteran of Vietnam and Operation Desert Storm.

And then we're going to go finally to Lt. Gen. Harry E. Soyster. He served as the director of the Defense Intelligence Agency during Desert Shield and Storm and also served as the deputy assistant chief of staff for intelligence, Department of the Army, Commanding General, U.S. Army Intelligence and Security Command.

So I'm going to turn things over to Adm. Hutson right now. Adm. Hutson?

REAR ADM. (RET.) JOHN D. HUTSON: Okay, thank you, Sharon, and good afternoon, everybody. Thank you for taking time to be on the call about this.

I'm going to just talk for a couple of minutes about my impression of what's going on now and to say that I think that the merits of trying terrorists in federal court are obvious and abundant.

If you were from Mars and came to Earth and were told that there were two options for prosecuting these guys, and one of them was federal courts, where we'd done 200 of these cases over the course of the last nine years, 90-percent-plus conviction rate, people successfully imprisoned, experience judges, experienced prosecutors and all of that, or you could go to a military commission, which the Supreme Court has already struck down once. They've got three cases, two guilty pleas; both of those guys are out of jail; no experienced judges, no experienced prosecutors and a tenuous judicial system at best, which is untried up to now in any real sense, which one you choose, I think, is pretty clear.

Then when you put on top of that, that the Constitution very clearly provides that the president in his capacity as commander in chief, is responsible for the execution, the prosecution, of the war, and I would argue, all of this is part of that responsibility in how we go forward with the war, and that the Department of Justice is responsible for the prosecution of federal prisoners, it's clearly in the realm – the responsibility and duty of the executive branch to do this. And I think it's sad and a mistake that we should politicize these decisions and get Congress involved in what is clearly the constitutional responsibility of the president.

So you know, I think that for all of those reasons, this is, literally, a no-brainer. And it would be a huge, huge mistake to send some of the worst criminals in the world to a courtroom where everybody is there for the first time.

MS. KELLY MCBRIDE: Thanks a lot, Adm. Hutson. We've also been joined on the call by Human Rights First CEO and President, Elisa Massimino.

ELISA MASSIMINO: Yep, I'm here. Sorry to be late.

MS. KELLY MCBRIDE: Great. So let's turn it over next to Gen. Nash.

MAJ. GEN. WILLIAM L. NASH (RET.): I think Ed Soyster was going to go next.

MS. KELLY MCBRIDE: Okay. Gen. Soyster?

LT. GEN. HARRY E. SOYSTER (RET.): Oh, I'll be happy to do that. From my perspective and one of my concerns is what it looks like to our enemy. And they certainly should be delighted with what appears to be great confusion, great ambiguity and inability to address the issue. So they should feel that they are making progress if, in fact, our initial stand is reversed.

And from my perspective, the president chose the harder right over the easier wrong when he made the stand, supported his attorney general – the chief attorney in this country – and he should hold firm to that. It was a good decision, both from the standpoint of prosecuting our efforts against terrorism and also in administering the great justice system of this country. He should stand firm and not give into political pushes that would push us clearly in a wrong path with long-term consequences. Thank you.

MS. KELLY MCBRIDE: Thanks a lot, Gen. Soyster. Gen. Nash?

GEN. NASH: Okay, well, thank you. I guess I got kind of worked up this morning when I read your article, Peter. You know, at any time you do something hard, there's a time that you have second thoughts. And it's the time any good leader has got to remind himself of the story about steady boys, steady.

And I'll save you from the story but I would emphasize that we knew – for many years now, we started this effort – that it was going to be a hard job to close Guantanamo and do the

right thing by the rule of law. And I would just say that machinations of those who are afraid of these terrorists, who are afraid of American laws, who are afraid of the process that is – that we've lived by under the rule of law for many, many years – centuries – this is not the time to allow them to have their fear to drive us away from doing the right thing.

And I would just say to you that we all have great admiration for President Obama's strength and willpower up to this point on this issue and his leadership from day one, during the campaign. And as he said in his inauguration, our security and our values are not in competition; they go together.

And I would be deeply saddened if this thing would be reversed and it would give aid to our enemies, it would lessen our reputation with our allies who have been extremely happy with the reverse of course that we've taken. And this is not the time to be scared. This is not the time to accommodate those who have led this country under an aura of fear for eight years. And it's time to do the right thing and persevere through. Thank you.

MS. MASSIMINO: Thank you, Gen. Nash. This is Elisa. I just wanted to also add to that. Of course, these reports are just reports so far and you always have to take these previews a little bit with a grain of salt. You know, is it a trial balloon or is it somebody who opposes the president's announced decision to try these cases in civilian courts, trying to change facts on the ground? It's hard to say.

But if it's true that the president's advisors are – or some of them – seeking to reverse course on this, then I think, as you can tell from the comments of these distinguished military leaders, he's getting some pretty bad advice.

Sharon, I don't know what the game plan was for the rest of the call, but it looks like we've got a lot of people on who may want to have – ask some questions. Should we move to that right way?

MS. KELLY MCBRIDE: That sounds great. Okay, Operator, we're ready to take some questions.

OPERATOR: Okay, absolutely. At this time, if you would like to ask a question, please press the * and 1 keys on your touchtone phone. You may remove yourself from the question queue at any time by pressing the # key. Once again, if you would like to ask a question, please press the * and 1 keys now. We'll pause momentarily to allow questions to queue. (Pause.)

We'll take our first question from Evan Perez with Wall Street Journal. Please go ahead.

Q: Hi, thanks for allowing me to ask a question here. One thing I wanted to get your input on is, the White House and people who are pushing for the president to go this way, the way of military commissions, seems to be laying the groundwork this way – that essentially Congress and people in – lawmakers are foreclosing all the other options; that they're basically being pushed into this direction, and that essentially this is the only option that is left open to them. Do you believe that?

ADM. HUTSON: This is John Hutson. Evan, you know, every action has an equal and opposite reaction. They probably are being pushed, but it goes to my earlier point about the constitutional responsibilities of the president in his capacity as president and in his capacity as commander in chief.

And as Bill Nash said so well, if it is the right thing to do – to do this in Article III courts – then the president has to push back and say, this is the right thing to do and I’m going to do it that way. I’m not going to succumb to the political pressure of people that are trying to undermine the administration.

MS. MASSIMINO: This is Elisa. Evan, I think, you know, just to put maybe a blunter point on that – (chuckles) – it takes two sides to be bullied, you know, for bullying to happen. And I think there’s obviously no question that Congress has been trying to hold hostage the president’s national security agenda and push back against the senior military officials in previous administration, in this administration, who have all said that closing Guantanamo and bringing these terrorists to justice in civilian courts is a key national security imperative.

So I think, as John said, the fact that there’s political resistance does not change the fact that this is important to the overall strategy to defeat al-Qaeda. And this president has, in the past, shown that he knows how to keep his eye on that ball.

Q: It sounds to me like you guys haven’t given up on this idea that you know, that it’ll be in an Article III court?

ADM. HUTSON: John Hutson. No, we certainly have not. Underline, underscore, emphasize, we have not given up on that. And I hope that the administration hasn’t, and will hold firm on doing what we all know to be the right thing to do.

Q: Okay, thank you.

OPERATOR: Thank you. We’ll take our next question from Julian Barnes with Los Angeles Times. Please go ahead.

Q: Hi, thanks. My question is do you see this as part of a bargain the administration is trying to make with Republicans or centrist, perhaps along the lines of the Lindsey Graham plan, but essentially to get Thomson opened, get Guantanamo closed, and therefore in order to do those things, they will concede that military conditions are the way to go? And if so, what’s wrong with that compromise? Isn’t closing Guantanamo important?

MAJ. GEN. NASH: Bill Nash. I’ll jump on that to begin with. My view, Julian – and, hi, good to talk to you – is that closing Guantanamo and moving the military commissions to the United States doesn’t really close the concept of Guantanamo. And there are a number of issues identified with Guantanamo, but this bastardized version of justice known as military commissions for common criminals – extraordinary criminals, perhaps – it really is leaving the job undone. So I would say to you that I understand somebody thinks they’re doing mostly good

by that, but I find it to be anomalous to the overall concept that we've argued for, for a number of years about the importance of the rule of law and the values we have as a nation.

LT. GEN. SOYSTER: And this is Ed Soyster. I don't think you have to compromise national security in an effort to do one or the other. Both should be done. Guantanamo should be closed, and the trials should be done in an Article III federal court as we have successfully done in the past. I don't think this is an area of when we talk national security where we have to make compromises. We need to do the right thing.

Q: If I could do a quick follow-up: In your view, if this decision goes through, how much of the original promises that you all watched on the second day of the administration when the executive orders were signed remain? How much of that agenda to change the Bush administration detention practices is still in effect?

MAJ. GEN. NASH: This is Bill Nash again. Two comments: First off, people talk about Article III or federal courts. That Article III, by the way, is Article III of the Constitution of the United States. And I think it's very important for us to remember that. Our argument is to follow the Constitution of the United States.

As to your point, if they go this way, I would tell you that my view would be that the glass would be less than half full, and I would not look back as fondly as I once did on that second day in office of that.

REAR ADM. HUTSON: This is John Hutson. You know, none of us think that any of this is easy. If it were easy, we wouldn't need a strong president as commander in chief. So it's times like this, when things are difficult, that we really need the president to stand up and be firm and do what's not only the right thing but it's also the smart thing. It's the thing that will protect our troops. And closing Guantanamo will do that. That's not done yet. Not holding people in indefinite detention will protect our troops.

All of those things have to be accomplished, and most of them haven't yet. There's still work on it, I guess, but there's still a lot of work left to be done.

MS. MASSIMINO: And this is Elisa. Just one final point on that: One of the other national security arguments for ensuring that these cases go into a civilian court is that to put these cases in military commissions, again, reinforces the narrative of al-Qaeda that it is a global army and that Khalid Sheikh Mohammed is a warrior in that army.

And that goes directly against the strategy that's laid out by Gen. Petraeus and others in the counterinsurgency manual. And our men and women in uniform right now are taking on increased risks to their own safety to follow this strategy which is our best chance of defeating al-Qaeda. And at home, we have to also be strong, and pursue what the secretary of defense, the attorney general, the secretary of state, the national security advisor and the president have all said is the best – and the vice president – the best way to go here.

To put the most important criminal case in American history in this experimental military commission system that has time and again shown itself to be vulnerable to criticism and delay and justified legal challenges is the reason why – that's part of the reason why the president made this decision to support the attorney general's recommendation to put these in civilian courts.

REAR ADM. HUTSON: This is John Hutson. We don't ask the Department of Justice to fight our wars and we shouldn't ask the Department of Defense to prosecute our terrorists. If they go into a military commission, you will find a judge that has never tried a terrorist case before, a prosecutor who has never prosecuted a terrorist case before, court personnel that have never dealt with terrorist cases before, rules of the trial that haven't even been implemented yet. Who are we kidding? This is not ready for primetime.

MS. KELLY MCBRIDE: Can we have the next question?

OPERATOR: Absolutely. We'll take our next question from Brian Montopoli with CBS News. But once again, if you would like to ask a question, please press the * and 1 keys, now. And Brian, your line is now open.

Q: Thanks. And thank you for taking the question. Actually, what I was going to ask was covered largely by the last two questions. I guess I'll just see if anyone wants to add to the – I guess, the notion that, I guess, could be put forth, which is, look, we want to close Guantanamo; Congress isn't going to let us have the money to do that if we don't compromise on this, and so we're making a hard, political calculation. It's not ideal, it's not what we want, but this is what we need to do if we're going to get any of these priorities done.

Are you guys sympathetic at all to that idea?

MS. MASSIMINO: This is Elisa. Let me just underscore what Gen. Soyster said in response to Julian's question. Guantanamo is a policy; it's not a place. And so if you compromise to achieve an agenda and you end up undermining that agenda, then you haven't moved the ball forward. So if the argument here is that we have to not close Guantanamo in that we are maintaining the worst policies of Guantanamo in order to close it, then that's obviously not worth doing.

LT. GEN. SOYSTER: And I think the commander in chief should let our troops know what his position is as the commander in chief. And if the Congress won't support that, they should also know that.

REAR ADM. HUTSON: John Hutson. And the American public should know that.

LT. GEN. SOYSTER: Exactly. Always think of our troops, and the support of the commander in chief is very important to them. They do know who he is.

OPERATOR: Thank you. And we'll take our next question from Marisa Taylor with McClatchy. And just as a reminder, the Admiral's full name and title is Rear Adm. John D. Hutson, and you'll be receiving his bio via e-mail shortly. And Marisa, your line is now open.

Q: Hi, thanks a lot. I'm just wondering, just concretely, what are the differences between the two forums that concern you the most? What would potentially concern you about the military commission forum more than federal court in terms of the administration of justice?

REAR ADM. HUTSON: John Hutson. First and foremost, I suppose, is what I just mentioned: the abject lack of experience of any of the personnel. It also is subject to judicial scrutiny.

You know, the first time we went through this – we're creating an issue for appeal; an unavoidable issue for appeal and an inevitable issue for appeal if we prosecute people here because the Supreme Court has already once said that commissions don't stand up to close scrutiny. The commissions have been changed since then but we still don't know whether they're going to satisfy Common Article III of the Geneva Conventions or satisfy the United States Supreme Court.

The substantive rules of hearsay are not as robust. I think that we can't be afraid of U.S. district and federal courts. It's the best judicial system in the world. And to prosecute terrorists in a court that is untried, untested and unresolved by the Supreme Court is not the way to go.

Marisa, I'm not concerned about the – what you hear about the inability of federal courts to maintain and preserve national security secrets, the means and methods, identities of witnesses and informants. Indeed, it's the federal courts that have had the experience in doing that successfully under the Classified Information Protection Act, CIPA. The opposite of what the opponents say, I think, is the case, which is that if you're really concerned about preserving those things, you ought to do it in the forum that has had decades of experience doing it.

LT. GEN. SOYSTER: And with a lot – this is Ed Soyster again – with a lot less sophistication. I live directly across from the federal courthouse in Alexandria. I could hit it with a 16-pound – no, I could have at one time. It's now an 8-pound shot put. But I could hit the courthouse.

I watched with great pride the professionalism, and I watched them move Moussaoui from the prison where he was held. It delayed traffic about, oh, maybe seven or eight minutes. I watched the way it was done. The fact it was tried in a federal court right across the street from me, and it was very effective. I don't have the same confidence in how we're going to do that somewhere else in a military court for all the reasons that John Huston has articulated.

OPERATOR: Thank you.

MS. KELLY MCBRIDE: Can we have the next question?

OPERATOR: Absolutely. We'll take our next question with Josh Gerstein with POLITICO. Please go ahead.

Q: Hi, thanks for doing the call. I had a question which was, you folks have railed against the idea of using military commissions because you're arguing that they're flawed. But isn't it in fact the case that Eric Holder, who made this announcement to go to a military commission for these 9/11 plotters – or these alleged 9/11 plotters – also sent a bunch of other cases to the military commissions? And hasn't in fact the Obama administration been laying the groundwork for this all along, in keeping this, what you see as an unfair option, on the table?

MAJ. GEN. NASH: This is Bill Nash. We've told the – I've been present when we told the attorney general that we disagreed with the use of the military commissions under all conditions. We felt that if you couldn't try them under Article III, going to a lesser form of justice did not serve the purpose of our values, and I personally have quarrel with the use of the commissions under any case.

I certainly resent the implication that the military will try them because we don't believe in justice, so don't worry about it; we'll just do the kangaroo court under the military guise. And I find that insulting.

Q: And if I could just follow up on that. Isn't there going to be a perception if this decision is reversed that that's precisely what has taken place here? That the other system couldn't handle it, so we're going to send it to the system where it's easy – or, where it's easier to lock people up or give them the death penalty or whatever?

MAJ. GEN. NASH: Frankly, sir, that's my biggest concern.

REAR ADM. HUTSON: And guess what –

LT. GEN. SOYSTER: The track record won't support the last part of your question.

MS. MASSIMINO: Right.

REAR ADM. HUTSON: That's exactly right. And you know, I spent 28 years working in military justice, and those guys are subject to the same Constitution that we've been talking about.

And to build Nash's point, if the idea is to send them to military commissions because we can turn those into kangaroo courts where the rules of evidence and criminal procedure don't apply, we will have made a huge mistake and taken an unnecessary hit both domestically and internationally. The military commission – the officers will try to do the best job they can; they just don't have the tools or the experience for it.

MS. MASSIMINO: And Josh, just to push back also on that – you know, I don't think that the – I think that where we are right now is not that there would be a judgment that the civilian courts can't handle these cases. I mean, the administration has already made that

judgment and has strongly articulated the reasons why they think that the civilian courts can handle these cases and can handle them better than military commissions.

What's happened here is a political squeeze – that the Congress has been holding this judgment by the commander in chief hostage. And you know that's what's going on here is the kind of withholding of the funds unless the judgment of the Congress is substituted for the commander in chief's here. And that's what appears to be going on; not that they're having second thoughts of the capabilities of the civilian courts to handle these cases.

OPERATOR: Thank you. And once again, if you would like to ask a question, please press the *1 on your touchtone phone. We'll take our next question from Ken Jost with CQ Press. Please go ahead.

Q: Hi, it's Ken Jost. The advocates of military tribunals say that their advantage is in part the less robust discovery and in particular the ability to shield classified information from the defendants. Your response?

REAR ADM. HUTSON: This is John Hutson. I testified at one point and said that the United States of America simply can't say to a terrorist, we know a guy – we can't tell you who; who's given us evidence – we can't tell you what; that indicates to us you're guilty – we can't tell you why.

And that's the direction that supporters of military commissions would like those commissions to go. It's simply unacceptable.

MS. MASSIMINO: And Ken, you know, that may have been a reasonable argument to make some years ago, but the MCA revisions from last year imported the civilian classified evidence procedures into the military commissions. The problem is that the actors in the military commission system don't have near the experience in dealing with those rules. So I don't think that's really a valid argument anymore.

LT. GEN. SOYSTER: And I would tell you as an intelligence officer, that's the idea of – the things that we can do to allow and have the necessary information before courts is not only provided by law but is a task that can be easily accomplished that will do two things: protect the sources and methods, et cetera, and at the same time, provide the necessary information to the courts. That's a weak read when you use that as an excuse for anything. We do that on a daily basis with our allies, with others, in concerns of how we handle classified information – simple task.

MS. MASSIMINO: Thanks, Gen. Soyster. That was Gen. Harry Ed Soyster, former director of the DIA.

MS. KELLY MCBRIDE: Can we have our next question?

OPERATOR: I'm showing that we have no further questions in queue, but once again, if you would like to ask a question, please press the * and 1 keys now. And we'll pause momentarily to allow other questions to queue.

MS. MASSIMINO: Sorry we can't give you guys lunch over the phone.

LT. GEN. SOYSTER: (Chuckles.) But you're keeping it from us.

MS. MASSIMINO: I know. (Chuckles.)

OPERATOR: Okay, and I'm still showing – oh, it does look like we have Richard Sisk with the New York Daily News. Please go ahead.

Q: Adm. Hutson, there's some question about the death penalty and military commissions. Could you go into that, sir? I think under the UCMJ, if you plead guilty, there is or is not a death penalty or – can you discuss it? Or has that issue been resolved?

REAR ADM. HUTSON: Well, I'm not sure it's been resolved exactly. Yeah, the UCMJ provides a death penalty, but it hasn't been – it hasn't been used since the early '60s I believe. And military commission, as I understand it – I'm not sure. I don't think military commissions – Elisa, do military commissions provide for death penalty? I don't believe they do.

MS. MASSIMINO: No, I don't think so. There's a question about whether you can plead guilty to a capital charge in military commissions, but it hasn't been resolved yet. Obviously, the death penalty would be available in the civilian courts.

Q: Right. So from your understanding, Elisa, the military commissions do not – do not have the authority to issue the death penalty?

MS. MASSIMINO: I think that the question is whether or not there can be a death penalty in a guilty plea.

Q: Mm-hmm.

MS. MASSIMINO: We can follow up with you. But they do have the authority, I guess.

Q: Right. And just indulge me for a second: Hi, Gen. Nash. I remember going into Bosnia with you in '95 in that business up on the Saber River.

MAJ. GEN. NASH: (Chuckles.) Well, good to be with you. I hope you haven't gotten any older since then.

Q: (Chuckles.) Thanks very much, sir.

OPERATOR: Thank you. And once again, if you would like to ask a question, please press the * and 1 keys now. (Pause.) And I'm showing at this time, we have no further questions.

MS. MASSIMINO: I think it's – I just want to clarify on that last point that so far the death penalty has not been used in the military commissions. And as Adm. Hutson said, it's almost never used in the military justice system generally.

But to the broader point about sentencing, you know, as we showed in the "In Pursuit of Justice" reports, the federal courts have so far imposed much harsher sentences on those convicted of terrorist crimes than the military commissions have. You know, they have – the federal courts have very strict sentencing guidelines. Military commissions don't.

And just one other further point I wanted to make back on the vulnerabilities of trials in military commissions as compared to trials in the federal courts – you know, there are a lot of questions about whether or not the – Adm. Hutson talked about the vulnerability on appeal.

And you know, frankly, the key – probably the best thing that the administration could do if it wants to go guarantee that the case of KSM is still hanging around in the courts by the time – by 2012 – would be to move this case into a military commission.

You have questions about whether some of the crimes that people are charged with were actually crimes at the time of their commission, whether or not things like immaterial support and conspiracy really qualify as war crimes. There are a lot of very, you know, kind of fundamental substantive issues that really are yet unresolved in the military commissions.

REAR ADM. HUTSON: John Hutson. Conspiracy had never been a war crime before now because you always wanted the enemy to have the opportunity to back out of the conspiracy. We've changed decades – or tried, in this context, tried to change decades – of, sort of, common law in war crimes.

MS. MASSIMINO: Do we have any further questions?

OPERATOR: I'm showing at this time, we do not have any further questions.

MS. MASSIMINO: And let's give it just – people time to think for about a minute. I also want to just remind people who we have on the call. Retired Rear Adm. John Hutson, Retired Gen. Bill Nash and Retired Gen. Harry Ed Soyster. This is Elisa Massimino, president and CEO of Human Rights First.

And for those of you who haven't seen it – and I think you all have – but you can see the statistics about trials in federal court on our Web site at www.humanrightsfirst.org.

So if there are no further questions, I want to thank everybody for participating, particularly our speakers, who are part of a larger group of retired flag and general officers who

stood with the president two days after he was inaugurated to witness the signing of the executive orders. Thank you all and I'm sure we'll be speaking again soon.

REAR ADM. HUTSON: Thank you.

OPERATOR: This concludes today's teleconference. You may disconnect at a time. Thank you and have a great day.

(END)