

# Military commissions' prosecutors charge: trials rigged against Guantánamo detainees

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As the Pentagon was making its final preparations last year for war crimes trials in the cases of four Guantánamo Bay detainees, two senior prosecutors charged in electronic messages that the trial system had been rigged against the defendants. The US military has denied the allegations.

In confidential e-mails written in March 2004 and obtained by the *New York Times*, the prosecutors wrote that proceedings of the Office of Military Commissions—overseeing the first such trials held by US authorities since World War II—had been secretly arranged to improve the chances of conviction, were organized to withhold evidence that could prove the defendants' innocence, and would hide evidence of torture of the detainees.

That the prosecuting attorneys themselves have criticized these trials is an indication of the degree to which these commissions—organized by the Bush administration in violation of international law and legal standards—are an utter travesty of justice. Copies of the electronic messages were provided to the *Times* by members of the armed forces who are critical of the military commissions, also known as military tribunals.

Capt. John Carr, one of the prosecutors, wrote in a March 15, 2004, e-mail message addressed to Col. Frederick L. Borch, the chief prosecutor in the trials, “[Y]ou have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and we only needed to worry about building a record for the review panel.”

Carr also said he had been told that any evidence that might help the detainees mount a defense would probably only exist in the 10 percent of the documents being withheld in the cases for “security reasons” by the Central Intelligence Agency.

The *Times* article adds, “Captain Carr’s email message also said that some evidence that at least one of the four

defendants had been brutalized had been lost and that other evidence on the same issues had been withheld.”

According to the *Times*, Carr wrote that the function of the trials “may constitute dereliction of duty, false official statements or other criminal conduct.” He added that “the evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of the accused or the sustainability of our efforts.”

In a damning allegation, Carr said that the military commissions were on a path to “prosecute fairly low-level accused in a process that appears to be rigged” against the defendants.

In an e-mail to another senior officer in the prosecutor’s office, prosecutor Maj. Robert Preston wrote on March 11, 2004, “I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the military justice system and even a fraud on the American people—surely they don’t expect that this fairly half-assed effort is all that we have been able to put together after all this time.”

Preston expressed, according to the *Times*, “that he could not in good conscience write a legal motion saying the proceedings would be ‘full and fair’ when he knew they would not.”

Colonel Borch, who has since retired from the military, responded to Capt. Carr and Major Preston on March 15, 2004, by characterizing their allegations as “monstrous lies.”

In response to the exposure of the two prosecutors’ allegations, Brig. Gen. Thomas L. Hemingway of the Air Force, senior advisor to the office running the military commissions, said that the e-mail messages had prompted a formal investigation by the Pentagon’s inspector general that found no evidence to support their claims.

Capt. Carr, since then promoted to major, and Maj. Preston both left the prosecution team within weeks of

writing their e-mail messages and remain on active duty. The Australian newspaper, the *Age*, reported August 3 that Capt. Carrie Wolf, another military commission prosecutor sharing their concerns over the process, asked to leave the office around the same time.

The trials of the first four defendants began last August, five months after Carr and Preston sent their e-mails condemning the proceedings. The commissions were barely under way when they were halted after US District Court Judge James Robertson ruled they violated military law as well as US obligations to abide by international treaties.

But on July 15, 2005, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit unanimously reversed that ruling. This thoroughly anti-democratic decision sided with the Bush administration's assertions that prisoners captured in the so-called "war on terror" have none of the protections afforded POWs by the Geneva Conventions (See "US court upholds military trials for Guantánamo prisoners".)

The panel included Judge John G. Roberts, appointed to the appeals court by President Bush and the president's current nominee to fill the vacancy on the US Supreme Court.

The Defense Department is now actively preparing to resume the military commissions. Slated to go on trial within the next few weeks are detainees Ahmed Hamdan, a Yemeni, and Australian David Hicks. Pentagon officials say they plan soon to charge an additional eight detainees with war crimes.

Hamdan was captured in Afghanistan in November 2001 and brought to Guantánamo. He has acknowledged having once been a driver for Osama bin Laden, but has denied being a member of Al Qaeda or having participated in any terrorist activities.

David Hicks, 29, has been held in Guantánamo Bay since January 2002, a month after he was captured in Afghanistan. He has pleaded not guilty to charges of attempted murder, aiding the enemy and conspiracy.

Major Michael Mori, Hicks's US military-appointed lawyer, denounced his client's upcoming trial in light of the new exposures further demonstrating the sham character of the proceedings. In a written statement, he challenged the Australian government, which has insisted that the case against Hicks is strong and that he will receive a fair trial by the military commission.

"It is no longer appropriate for the Australian government to rely on US assurances as to the legality of the military commissions," Mori wrote. "This is a system

in which one side writes the rules, chooses the members, makes all the decisions and then reviews their own decisions."

Terry Hicks, David's father, called for the commissions to be abandoned, stating, "The American people, the Australian people have been told how fair the system is when it's not."

The government of Prime Minister John Howard has defended David Hicks's detention at Guantánamo—now in its fourth year, much of it spent in solitary confinement—on the basis of support for the Bush administration's wars in Afghanistan and Iraq.

Dismissing the new evidence that the commissions are rigged, Attorney-General Philip Ruddock said Monday that Carr and Preston were not "major players" in the prosecution and commented, "The Americans have been assiduous about ensuring that any trial is fair."

The Office of Military Commissions, the Howard government's vote of confidence notwithstanding, has faced widespread criticism both internationally and by human rights groups since its establishment on November 13, 2001, by Presidential Military Order. Rules governing the trials allow prosecution witnesses to testify anonymously, and any information determined by the presiding judge to be "probative to a reasonable person" may be admitted into evidence. This standard is heavily weighted in favor of the prosecution and leaves open the admission of evidence obtained under torture.

Prisoners tried by these commissions have no recourse to any US, foreign or international court, and the final decisions on sentencing and conviction lie with the president or secretary of defense. The latest charges that military panels sitting in judgment are to be stacked in favor of the prosecution have ominous implications, as a unanimous ruling can send a convicted prisoner to his death.

The Pentagon's intention to proceed with the military commissions in the David Hicks and Ahmed Hamdan cases is one more indication of the growing threat posed by the Bush administration's "war on terror" to the democratic rights and civil liberties not only of the Guantánamo detainees, but of citizens and non-citizens alike within the US.



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