

# THE Nation.

## Gitmo Justice

by **AZIZ HUQ**

April 4, 2007

A man who the government **claims** fought "on the front line" of terrorism is given a door to freedom: Australian Guantánamo detainee David Hicks has entered a plea deal before one of the military commissions created by the Military Commissions Act, and agreed to serve nine months with immediate transfer to Australia.

Yet on April 2, the Supreme Court consigned almost 400 other detainees who have never been able to be heard in court, and who are charged with no crime, to years more of toilsome litigation by denying them a chance to present their cases.

These vastly disparate outcomes are hard to square--unless you ask how the chips fall politically. For although we cannot peek behind the green curtain of Defense Department policy-making, the government's decisions reek of politics of the worst sort.

Consider first the Supreme Court's decision not to hear the detainees' case. The case is the same one that went to the Court in 2004 as ***Rasul v. Bush***. In *Rasul*, the Justices ruled that federal courts had jurisdiction to hear the detainees' cases. Concerned that review would reveal how weak the case against many detainees was, the Administration engineered legislation to cut short the cases in midstream--the Court's decision this week means it succeeded, and therefore put off the embarrassing day of reckoning when the detainees can come into court.

The Court's decision impacts the lion's share of detainees who, unlike Hicks, have never been charged in a military commission. For many, the evidence suggests that the Administration simply has no evidence against them. (Keep in mind that any evidence the government possesses was gathered at Guantánamo. And of course, if you torture enough people often enough, you soon have the evidence to lock up everybody.)

The Court has consigned the detainees to the limited avenue of review provided by the 2005 Detainee Treatment Act. Whether that limited review will be functionally adequate remains to be seen. (I personally have grave concerns that the DC Circuit will be all too eager to act as a rubber stamp for military detention decisions.)

But one thing is beyond doubt: The Guantánamo detainees will have to wait years more before they have their day in court. Indeed, the Court of Appeals took more than two years to issue its recent awful decision denying the detainees all rights.

By contrast, David Hicks will leave Guantánamo soon. He will be in an Australian jail for nine months. And then he is wholly free. Unlike the other detainees, he has been charged with a crime--so one would have thought that he is more dangerous than the others.

The Hicks plea offers no evidence that military commissions are intended to dispense justice. Like the

recently revealed attempts by the White House to manipulate the prosecution decisions of US Attorneys, it demonstrates White House willingness to make the administration of justice grist for the political mill. A quick look at the charges against Hicks and the course of the trial proves as much.

Unlike the 400-odd detainees whose petitions were denied April 2, Hicks has been charged with what the Administration calls a violation of the law of war. What did he do? According to the chief prosecutor, Hicks was charged with "**material support**" of terrorism because "he was issued a weapon. He was issued hand grenades. He was sent out to guard a tank, I think at Kandahar airport, and there wasn't much action there. He wanted more excitement so he went to Konduz and then to the front lines."

And that's it.

But these aren't violations of the law of war. Yes, a person who fights and kills and violates the laws of war can be prosecuted--but only for his acts of killing. The mere act of carrying weapons or guarding a tank simply isn't a war crime.

Is this the best case the Administration can come up with? Until it decided to move fourteen "high-value detainees" from CIA "black sites" to the Cuban base, it seemed there were few at Guantánamo who had, in fact, even fought. If Hicks is among the most dangerous of the detainees, what can we infer about the least dangerous?

Moreover, there simply is no such thing in the law of war called "material support for terrorism." This is yet another of the Administration's dangerous inventions. In effect, this offense risks use against anyone with even a tangential connection to terrorism--say, a grandmother in Switzerland who gives money unknowingly to a charity with terrorist ties, or a person who teaches English to a terrorist's son.

This dangerous, open-ended discretion, coupled with the weak procedural rules of the military commissions themselves, creates a risk that commissions will be used against politically unpopular groups to attain easy convictions.

Even after charging Hicks with a noncrime, the commission still could not play fair. Both of Hicks's civilian lawyers were tossed out by the commission. One was Josh Dratel, who is one of the finest defense attorneys in the country when it comes to terrorism cases. He was given the boot because he declined to agree to abide not only by the commission's regulations but also any future regulations the commission might issue. Dratel could not sign such a sweeping provision without violating ethical obligations to his client--and he didn't. So out he went.

In the end, rather than a fair trial, the Convening Authority, a political appointment by the Defense Secretary, negotiated a deal with Hicks's military counsel, Dan Mori (cutting out, incidentally, the prosecutor).

The deal, which you can look at [here](#), sentences Hicks to seven years but says he has to serve only nine months. It also requires Hicks to affirm that he was "never...illegally treated" by government officials and that he was held "lawfully pursuant to the law of armed conflict." It's not hard to guess why those are in the deal.

Even more interesting, there is a one-year gag rule that prohibits Hicks, his family members and any other person on his behalf from talking about his detention. That is, the commission proposes that it can silence not only Hicks but his father, his sister, his lawyers and anyone else who speaks to him and then wants to talk to the world.

But the gag provision does cast light on the reason Hicks will walk free. There is likely to be an **election** in Australia before the end of the year. And the gag provision would silence Hicks until after that date. The conservative John Howard government in Australia has come under increasing pressure about Hicks's case--thanks in large part to Dan Mori's amazing advocacy down under.

The Hicks deal, coming when it does, takes the pressure off the Howard government--and at the same time allows the Administration to crow that its commissions are a "success."

So David Hicks is charged with a noncrime and gets a nonsentence, thereby giving our ally down under political cover. Meanwhile, the hundreds of detainees who have never been charged--and many of whom would prove a major embarrassment to the Administration were they ever to have a day in court--get to languish for years more without a fair day in court.

The net result appears to be that the best way to leave Guantánamo is to plead guilty. Which, since the Administration has always assumed that everyone there is guilty, makes perfect sense from their perspective.

There is, in fact, nothing inconsistent about the news from Guantánamo. It is the same sad story of law and courts (of whatever kind) being used for political gain. It is the same sad story of individuals' rights trampled in the rush to secure "victories" in the "war on terror" and to vindicate the extraordinary powers seized by the Administration over the last five years. And it is the same sad story of America's reputation ground into dust.

---

#### About Aziz Huq

Aziz Huq directs the liberty and national security project at New York University's Brennan Center for Justice. He is co-author of ***Unchecked and Unbalanced: Presidential Power in a Time of Terror*** (New Press, 2007)

He is a 2006 recipient of the Carnegie Scholars Fellowship and has published scholarship in the *Columbia Law Review*, the *Yearbook of Islamic and Middle Eastern Law*, and the New School's *Constellations Journal*. He has also written for *Himal Southasian*, *Legal Times* and the *American Prospect*, and appeared as a commentator on *Democracy Now!* and NPR's *Talk of the Nation*. [more...](#)

---

Copyright © 2008 The Nation