

ESCAPE FROM GTMO

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David Hicks left GTMO in May 2007 as a result of the first U.S. military commission in over sixty years. It was not through a dramatic trial resulting in his being found not guilty. The irony is that Mr. Hicks escaped GTMO not by fighting his case in the military commission system. His freedom after five years detention at GTMO in May of 2007 came as a result of a guilty plea in a case that had begun over three years before.

Mr. Hicks was the first GTMO detainee allowed to meet with an attorney in December of 2003 and the first person charged in the original military commission system in June of 2004, approximately three weeks before the U.S. Supreme court ruled in his favor in *Rasul v. Bush*, in which he was one of the original petitioners.

Yet the excitement of a win at the Supreme Court wore off very quickly. The reality was that nothing the Supreme Court said would result in Hicks's release from GTMO, or that of any other detainee designated by President Bush to face a military commission. The practical result of the *Rasul* case was that a detainee could get in the U.S. federal courts to raise a challenge to the detention at GTMO, which was only the beginning of the two-year process of working through federal courts, and finally to the Supreme Court, while the person remained at GTMO.

It might have been naïve to hope that through the military commission system some semblance of justice could be found. Mr. Hicks's legal team worked tirelessly for him. In Fall 2004, through the help of academic and legal experts across the globe, the team was ready to expose the system's failure to comply with Common Article 3 of the Geneva Conventions and that the offenses created were not valid under the laws of war. We were prepared to present leading experts in the law of war, international criminal law, and human rights law in support of our motion before the military commission in November 2004. The prosecution was unable to find one reputable expert to support the legal positions of the Bush administration. The only recourse for the commission was to ban *all* experts in an attempt to avoid exposing the foolishness of the administration's fabricated legal positions. Right or wrong, it was clear the military commission system was not going to provide Mr. Hicks the opportunity to put forth his defense. It was clear that justice did not have any part in the commission process.

By the fall of 2004, detainees were being released. It appeared that some detainees were released so the Bush administration could hide embarrassing situations from the courts or media as well as to curry favor with allies. Yet none of the detainees personally selected by President Bush to face a military commission had been released. That changed in the beginning of 2005, when two British citizens, designated by President Bush, were released because Britain would not tolerate its citizens going through the commission process. In Britain's view, the military commission did not comply with international legal standards. Additionally, the other Australian, Mamdouh Habib, was released to avoid the ramifications of his rendition and torture and, potentially as some speculate, to hide any U.S. or Australian official's fingerprints on his torture. Yet with this Australian's release it

seemed only to cement the Australian government's position that Hicks should go through the commission system.

With little hopes of a fair trial at GTMO and victory in the U.S. Supreme Court leading only to further years of litigation, it was clear that the only way out of GTMO before the end of the Bush administration was through a political solution.

Further litigation was mounted in the U.K. in 2005 to secure Mr. Hicks' British citizenship, as it was clear what the British thought of the commissions. In June 2006, when the U.S. Supreme Court ruled in favor of Hamdan, the administration's response was to import terrorists—the so-called “high value detainees” who had previously been held at “ghost” sites around the globe—to GTMO and push through the passage of the MCA. This action only reinforced that no one designated by President Bush for a military commission was going to be released from GTMO before the end of the Bush administration without going through the process.

After a win in the British appeals court in 2006, a final hearing was set to be heard in May 2007, which would have involved a British court ruling on the abuse suffered by Mr. Hicks at the hands of U.S. service members. Also, in the first week of March 2007, in a separate court action we instituted in Australia in an attempt to require the Australian government to secure Mr. Hicks release from GTMO, an Australian federal court judge denied the Australian government's request to dismiss Mr. Hicks habeas action in the Australian federal court making way for a full hearing on the merits of his case which raised the prospect of Australian minister needing to provide evidence. The Bush administration's trial tactic of delay, and the utter incompetence of the military commission system, assisted in its own undoing. The years of delay provided the opportunity for members of the Australian public and media to question the process and expose its flaws. This was the culmination of events when the offer that could not be refused came knocking.

THE PLEA

In a U.S. court-martial, a person can plead guilty only if in fact that person is guilty. Unlike a court-martial, a guilty plea before the military commission required only that a person to admit that he would be convicted before a military commission; in essence the person had to admit that he would be convicted in the unfair military commission of an offense which had been made up after the fact and was not a valid law of war offense.

It was not until the first of March 2007 that a new charge was brought against Mr. Hicks under the new military commission system enacted by the MCA in late 2006. Shortly following was an offer guaranteeing Mr. Hicks would leave GTMO within two months, if Mr. Hicks would plead guilty. After five years, Mr. Hicks could leave GTMO in two months.

Whatever the cause or where ever the pressure originated, an offer to leave GTMO within two months of pleading guilty could not be ignored, as solitary confinement wears down any one's will to resist. Fighting the case would have taken us into 2008. And as the Bush

administration publicly touted that—even if the unthinkable happened and a detainee was acquitted of all charges—that person would still be detained at GTMO as an enemy combatant until the end of the never-ending war on terror.

A political solution was offered: if Mr. Hicks would admit that he would be convicted at the unfair military commission of the made up charge, he could leave GTMO. On March 30, 2007, Mr. Hicks pleaded guilty and left GTMO in May 2007. His freedom did not lie in fighting the system and remaining in solitary confinement. His freedom was half way around the world, back in his country with his family.

The Hamdan commission is evidence of the fact that to fight the system would have left Mr. Hicks in solitary confinement for at least another year, if not more. Hamdan was predictably convicted in August of 2008 on charges that were sworn against him on the same day that Mr. Hicks' charges were made in February 2007. At the time Hamdan was released from GTMO in December of 2008, Mr. Hicks had been out of GTMO for almost seventeen months.

The military commission system had no credibility and will never be viewed as a fair system embodying the values of America. The Supreme Court decisions in 2004 and in 2006 had no lasting impact on the military commission process, as the rulings were circumvented by the administration to support the failing commission system. Delay was on the administration's side, as this led to continuing detention. Years of litigation equaled only years of confinement, confinement which only became more solitary and desolate as the years passed.

While the personal desire for an attorney may be to fight a trial after years of preparation, the responsibility is to the *client*, not the cause. Over three years of work by numerous lawyers and experts across the globe was put in preparing to defend Mr. Hicks before the commission. It took me to Kosovo, Pakistan and throughout the north of Afghanistan. There was effort by so many to prepare to defend an individual in a system designed to offer no hope of success. Yet, not employing all of the team's preparation was what was best for the client. Knowing that the legal team was on the right path on the legal issues raised in 2004 provides some minor satisfaction, as the affidavits produced for the Hicks commission in 2004 were used by the defense in 2008 during the trial of Hamdan. Nothing can compare, though, to seeing your client board a jet and escape five years of questionable detention. The system has been crumbling since its inception, leaving behind no semblance of justice, but the freedom obtained cannot be replaced.

Hicks's may be the only guilty plea that damaged the system that took the guilty plea. It may have contributed to exposing the farcical nature of this process and exposed the foolish media statements made for years on how dangerous Mr. Hicks was supposed to be.

This was not a criminal justice system but a political process. With the end of Bush administration, detainees remain at Guantanamo with only three military commissions ever completed seven years after President Bush first signed his military order resurrecting military commissions. It is strange irony that two of the three convicted detainees have left

GTMO, and that the freedom of these two men was a result of their going through the unfair system.