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## **The Pentagon's Crooked "Judicial" Process**

**by Jacob G. Hornberger**

While Pentagon officials are celebrating the terrorism conviction of David Hicks in Guantanamo's military-tribunal system, the process by which Hicks was convicted and sentenced only confirms that the Pentagon's "judicial" system is as crooked as a dog's hind leg. After all, most everyone knew that Hicks, who has been held at Guantanamo for more than five years without a trial, never stood a chance of acquittal, but who ever thought that politics would play the determining role in what purports to be a system of justice?

On March 26, Hicks appeared before the military tribunal's presiding judge, Col. Ralph Kohlmann, along with Hicks' three lawyers, two of whom were civilians and the other a military attorney. Kohlmann refused to permit Hicks' two civilian attorneys to represent him at trial because, Kohlmann said, they had not complied with "procedural rules."

The two attorneys, Joshua Dratel and Rebecca Snyder, walked out of the courtroom undoubtedly appearing dejected, but they must have been roaring with laughter on the inside. Why? Because according to an article in Sunday's *Washington Post*, unbeknownst to Kohlmann Hicks' defense team had secretly gone over Kohlmann's head and over the heads of the prosecutors and had already cut a deal with the Pentagon's top military-commission official, a woman named Susan J. Crawford.

Why would Crawford secretly circumvent the prosecutors and the judge and negotiate a deal with Hicks' attorneys behind their backs? After all, isn't negotiating a plea bargain the job of the prosecutors? Isn't it the judge's job to determine whether a plea bargain should be accepted as fair and just?

Not in the Hicks case. The deal that Crawford struck with Hicks' attorneys was final and binding on the prosecutors, the judge, and the military tribunal.

Even more unusual were the actual terms of the deal. After the Pentagon had repeatedly said that Hicks was one of the world's most dangerous terrorists, Crawford agreed to a 7-year sentence, all but 9 months of which will be suspended. That means that after all the hullabaloo

about how dangerous and evil Hicks is, he only has to serve 9 months in jail, and he gets to serve them all in his home country of Australia.

But that's not all. In return for what was obviously a sweet deal for Hicks, Crawford added an interesting condition: For one year, Hicks would be prohibited from talking to the Australian media about how he was sodomized, subjected to forced injections, and beaten during his long confinement at Gitmo.

Why did Crawford intervene in the Hicks' proceeding? Why didn't she let the proceedings follow their natural course? Why did she secretly circumvent the prosecutors, the judge, and the tribunal? Why was it important to her to gag Hicks?

There can be only one answer those questions, and it is an answer that places the stamp of crookedness, corruption, and rot to the entire Guantanamo Bay military-tribunal process. That answer is: Politics.

You see, it just so happens that one of President Bush's close political allies, John Howard, is running for reelection as Australia's prime minister. Lately, he's been taking a lot of political heat for the U.S. government's mistreatment of Hicks, who happens to be an Australian citizen. According to the *International Herald Tribune*, "Howard has made it clear to the Bush administration, including in direct talks with President George W. Bush and Vice President Dick Cheney, how important he felt it was for Hicks to be returned home."

So, lo and behold, the Pentagon's top military-commission official coincidentally intervenes in the Hicks proceeding by entering into secret negotiations with defense attorneys, which results in a slap-on-the-wrist sentence for Hicks, to be served back in Australia, with Hicks' promising in return to keep his mouth shut until after Australia's elections. The probability is that Hicks will honor his promise to keep quiet until after the election because he knows that if he violates the deal he cut with Crawford, the entire 7-year sentence can be reinstated (which would also explain why Hicks apparently didn't receive credit for the 5 years he served in Gitmo awaiting trial as part of the plea bargain).

The most likely reason that Crawford circumvented the prosecutor and the judge was because she knew that they would never have gone along with the deal. The prosecutor, Air Force Col. Morris Davis, had planned to ask for a sentence of somewhere between 10 and 20 years. Thus, the chance that he would have settled for a sentence of only 9 months was nil. The same undoubtedly held true for the judge, who, don't forget, wouldn't even permit Hicks's civilian lawyers to represent him at trial. (While the prosecutor in the Hicks case is undoubtedly hopping mad at being left out of the loop on the plea bargain, he knows that he too has to keep his mouth shut, not only because his military career depends on it but also because he himself previously threatened Hicks's military lawyer with criminal prosecution for criticizing the military-tribunal procedures.)

So, what's wrong with a little politics being injected into what purports to be a judicial process? Why nothing at all, except crookedness, corruption, and rottenness.

After all, while there are certainly imperfections in America's federal-court system, given that it is an institution instituted and manned by humans, most people expect their judicial system to be free of politics and political influence. A courtroom is where justice, not politics, is supposed to be served. Once prosecutors and judges begin letting politics guide their prosecutorial and judicial decisions, that's when justice ceases and crookedness and corruption begin.

Imagine if our federal courts were run like the Pentagon runs its "judicial" system. Consider, for example, the trial of Ramzi Yousef, a Kuwaiti of Pakistani descent, who was convicted in federal district court of the 1993 terrorist bombing of the World Trade Center and who was sentenced to life in prison without parole.

Suppose that prior to Yousef's trial, the State Department, because of close political ties between President Clinton and the heads of Kuwait and Pakistan, had circumvented the U.S. Attorney and the U.S. District Judge and struck a deal behind their backs that permitted Yousef to serve a light sentence back in one of those two countries.

Which American would not instinctively have felt a deep sense of moral outrage if that had happened? Most everyone would feel a sense of violation because most everyone knows that politics plays no legitimate role in the administration of justice. As the Latin maxim states, "Let justice be done though the heavens fall."

Recall the famous Lady Justice statute, whose origin stretches back to ancient Greece and Rome. The woman depicted in the statute is Themis, the goddess of justice and law. Holding a sword in one hand and the scales of justice in the other, Lady Justice is blindfolded. The scales represent the impartiality that justice is supposed to serve while the sword represents the power wielded by those who make judicial decisions. The reason Lady Justice is blindfolded is to show that justice is not subject to influence.

Under the Pentagon's system, however, Lady Justice's blindfold, sword, and scales have been removed. If the defendant is an Australian or the citizen of some other country whose ruler is a friend and ally of our ruler, higher-ups step in and ensure that he receives a light sentence. But if he happens to be the citizen of another country, it's a different story. As Navy Commander Jeffrey Gordon, a Pentagon spokesman, bluntly put it, it would be "pure speculation" to suggest that the citizens of other countries will be entitled to receive the same treatment that Hicks is receiving. In other words, so much for the bedrock legal principles of impartiality and "equal treatment under law."

With the U.S. Constitution, our American ancestors brought into existence the finest criminal-justice system in history. With the Bill of Rights, everyone whom federal officials accuse of a crime, including terrorism, would be entitled to rights and guarantees that stretch back

centuries into British jurisprudence. Those rights and guarantees include right to counsel, right to confront witnesses, right to a speedy and public trial, right to trial by jury, and many others.

After 9/11, the president and the Pentagon persuaded a frightened American public to accept an alternative military-justice system in Cuba in which the Constitution and the Bill of Rights would be ditched for some (but not all) “enemy combatants” in the “war on terror.” We now see the results of that decision: David Hicks, who is a kangaroo skin hunter back in Australia, has himself been skinned by a crooked, corrupt, and rotten kangaroo court where politics trumps justice.

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