

## **Harper's Magazine**

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### **A FEW GOOD MEN**

From a March 2004 email by Air Force Captain John Carr, then working as a military lawyer for the prosecution of Guantanamo detainees, to Army Colonel Fred Borch, then chief prosecutor of the Office of Military Commissions. Carr was reassigned in April, as he had requested; Borch was also replaced.

The OMC's work was halted last November, when a district court ruled the proceedings violated due process and the Geneva Conventions; the decision was reversed in July by the D. C. Court of Appeals, including Judge John Roberts. The email was obtained by the Australian Broadcasting Corporation in July.

Sir:

I feel a responsibility to emphasize a few issues. Our cases are not even close to being adequately investigated or prepared for trial. There are many reasons why we find ourselves in this unfortunate and uncomfortable position-the starkest being that we have had little or no leadership or direction for the last eight months.

It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort in concealing our deficiencies and misleading not only each other but also those outside our office who are either directly responsible for or asked to endorse our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, and other criminal conduct.

You asked in our meeting last week what else you could do but lead by example. In regards to the environment of secrecy, deceit, and dishonesty in this office, the attorneys appear merely to be following the example that you have set.

A few examples include: You continue to make statements to the office that you admit in private are not true. You have stated for months that we are ready to go immediately with the first four cases. At the same time, emails are being sent out admitting that we don't have the evidence to prove the general conspiracy, let alone the specific accused's culpability.

You 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. In private you stated that we are really concerned with review by academicians ten years from now, who will go back and pick the cases apart.

The fact that we did not approach the FBI for assistance prior to December 17 is not only indefensible but an example of how this office and others have misled outsiders by pretending that interagency cooperation has been alive and well for some time, when in fact the opposite is true.

It is my opinion that the primary objective of the office has been the advancement of the process for personal motivations-not the proper preparation of cases or the interests of the American people. The

posturing of our prosecution team chiefs to maneuver onto the first case is overshadowed only by the zeal with which they hide the specific facts of their case from review or scrutiny. 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 our accused, or the sustainability of our efforts.

If the appropriate decision-makers are provided with accurate information and determine that we must go forward on our current path, then all would be very committed to accomplishing this task. It instead appears, however, that the decision makers are being provided false information to get them to make the key decisions, only to learn the truth after a point of no return.

When I volunteered to assist with this process, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low level accused in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last fourteen months.

While many may simply be concerned with a moment of fame and the ability in the future to engage in small-time practice, that is neither what I aspire to do nor what I have been trained to do. I cannot morally, ethically, or professionally continue to be part of this process.

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**Australian Broadcasting Corp.**

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## **LEAKED EMAILS CLAIM GUANTANAMO TRIALS RIGGED**

By Leigh Sales

<http://www.abc.net.au/news/newsitems/200508/s1426797.htm>

Leaked emails from two former prosecutors claim the military commissions set up to try detainees at Guantanamo Bay are rigged, fraudulent, and thin on evidence against the accused.

Two emails, which have been obtained by the ABC, were sent to supervisors in the Office of Military Commissions in March of last year - three months before Australian detainee David Hicks was charged and five months before his trial began.

The first email is from prosecutor Major Robert Preston to his supervisor. Maj Preston writes that the process is perpetrating a fraud on the American people, and that the cases being pursued are marginal.

"I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people," Maj Preston wrote. "Surely they don't expect that this fairly half-arsed effort is all that we have been able to put together after all this time."

Maj Preston says he cannot continue to work on a process he considers morally, ethically and professionally intolerable. "I lie awake worrying about this every night," he wrote. "I find it almost impossible to focus on my part of mission." "After all, writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard, particularly when you want to call yourself an officer and lawyer."

Maj Preston was transferred out of the Office of Military Commissions less than a month later.

### **Rigged?**

The second email is written by another prosecutor, Captain John Carr, who also ended up leaving the department. Capt Carr says the commissions appear to be rigged.

"When I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused," he wrote.

"Instead, I find a half-hearted and disorganised effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged." Capt Carr says that the prosecutors have been told by the chief prosecutor that the panel sitting in judgment on the cases would be handpicked to ensure convictions.

"You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and that we only needed to worry about building a record for the review panel," he said.

## **Significant find**

David Hicks' defence lawyer, Major Michael Mori, says the documents are "highly significant".

"For the first time, we're seeing that concerns about the fairness of the military commissions extend to the heart of the process," Maj Mori said.

David Hicks's father, Terry, says the latest revelations confirm what he has suspected all along. "These commissions weren't set up to release people," he said. "These commissions were set up to make sure they were prosecuted and get the time that they give them, and the other thing we've said all along, that we believe that this system has been rigged as they call it."

But the Pentagon's Brigadier General Thomas Hemingway, who is a legal advisor to the military commissions, says an investigation has found the comments are based on miscommunication, misunderstanding and personality conflicts.

He says changes have been made in the prosecutors' office. "I think what we did is work on some restructuring in the office, there was some changes in the way cases were processed, but we found no evidence of any criminal misconduct, we found no evidence of any ethical violations," he said.

Brig Gen Hemingway says he does not know if the Australian Government has been informed of the claims.

"I can't tell you whether they were informed formally, I have so many contacts with representatives of your embassy here in town, the exchange of information has certainly been constant, open and significant but whether or not we got down into the details of this, I really have no recollection," he said. "We certainly would have shared it with them if we found that there was any evidence of misconduct in the office of the prosecution, but we did not find any such evidence."

## **'Sufficient evidence'**

Brig Gen Hemingway denies that the cases being prosecuted are low-level.

"All of the cases I have recommended that the appointing authority refer to trial, are cases upon which I thought there was sufficient evidence to warrant sending to a fact-finder," he said. "In each of the four cases which have been referred, the appointing authority John Alterburgh made an independent determination that the evidence was sufficient to warrant trial."

He also denies that the commission panels are being hand-picked to insure detainees are not acquitted.

"I can tell you that any such assertion is clearly incorrect," he said. "There is absolutely no evidence that it is rigged."

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