

Volume 10 | Issue 2

Summer 2007

Navigating the New Military Commissions: The Case of David Hicks

Joshua L. Dratel

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Joshua L. Dratel, *Navigating the New Military Commissions: The Case of David Hicks*, 10 N.Y. City L. Rev. 385 (2007).

Available at: 10.31641/clr100210

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

NAVIGATING THE NEW MILITARY COMMISSIONS: THE CASE OF DAVID HICKS

*Joshua L. Dratel*¹

Good afternoon. I'd like to thank CUNY Law School for having me—to Professor Sameer Ashar for extending an invitation, to Professor Jeff Kirchmeier, and to Mohammad Faridi.

I am the civilian counsel for David Hicks, who is an Australian detainee at Guantánamo, and the subject of a military commission that will begin with his arraignment.²

In that context, I apologize because I am essentially a stand-in for my co-counsel, Marine Corps Major Michael Mori, who would have been here, but who has to travel down to Guantánamo earlier than I do for the commission proceedings. The reason I apologize is because it deprives you of the rather ironic circumstance of a uniformed United States Marine Corps officer condemning these military commissions, which has in no short order deservedly made him somewhat of a folk hero in Australia, but at the same time the object of much criticism from the chief prosecutor for the military commissions. I have taken the latter as a supreme compliment of Major Mori's work.

Now to speak about David Hicks. The military prosecutor in the commissions has sworn charges against three detainees. However, David Hicks has been the only one thus far referred to a mili-

¹ Criminal defense attorney in New York City who represents David Hicks, an Australian detainee who was held at Guantánamo Bay until May 2007. Joshua L. Dratel is a past President of the New York State Association of Criminal Defense Lawyers and serves the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL). He is Co-Chair of NACDL's Amicus Curiae Committee and its Select Committee on Military Tribunals. He is also a member of the Association of the Bar of the City of New York, and serves on its Capital Punishment Committee. Mr. Dratel is co-editor (along with Karen J. Greenberg) of *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Cambridge University Press: 2005). He is a graduate of Columbia University and Harvard Law School.

² An Australian citizen captured by U.S. forces in Afghanistan in November 2001 and transported to Guantánamo Bay in January 2002, where he remained in custody until late May 2007. In August 2004, before a Guantánamo Bay military commission, Hicks pleaded not guilty to charges of conspiracy, attempted murder, and aiding the enemy. Those charges were dismissed after the U.S. Supreme Court issued *Hamdan v. Rumsfeld*, the June 29, 2006 decision invalidating that incarnation of the military commissions. Hicks was re-charged in February 2007 under a new military commission system following enactment of the Military Commissions Act of 2006. *See infra*, at ns. 8 & 12.

tary commission. The other two detainees are still waiting for formal commission charges to be instituted against them.

The rules of the military commission process have been much discussed in articles and journals. Just to illustrate for you some of the essential features, it is a completely rigged process that is ostensibly designed to mirror the court-martial process, but in fact has been manipulated to create certain very important exceptions to that court-martial system.

For example, with respect to competency of the evidence, the rules are such that what we may confront at a commission trial is not live witnesses, who might testify, "I saw so and so do such and such," but rather an interrogator who will say, "Ms. X told me that Mr. Y did the following," or, even one step further removed, "Mr. X told me that Mr. Y told him that Mr. Z did the following."

Thus, there will likely be multiple levels of hearsay introduced, which will deprive the defense of four means of valuable cross-examination and impeachment. First, we will not be able to probe the memory or the specific veracity of the declarant who made the statements that would be read into the record by the interrogator. Second, we will be deprived of the opportunity to probe the circumstances under which the statements were made: after how much interrogation? After what *kind* of interrogation methods were used? Did they include torture or other forms of coercion?

Third, we will not be able to inquire of the detainees if they in fact even made those statements that the interrogator attributes to them. We will not be able to determine whether the statements were made in a different language, or whether the interpreter translated accurately. We would not have access to the interpreters or their notes, or the original contemporaneous handwritten notes made by the interrogators. Fourth, we will not be able to explore and exploit any underlying bias that might be a factor in the detainee making statements, including whether they harbor any ill will towards the defendant.

In that context, it is important to note that many of the interrogations, particularly early on in the process, and particularly those not conducted or supervised by civilian law enforcement agencies such as the FBI, were conducted in a totally unprofessional way. In my 25 years as a criminal defense lawyer I have witnessed enough interrogations—with clients who are cooperating with the government—to know the difference between professional and unprofessional methods. The unprofessional way is to tell detainee Mr. X, "Mr. Y is saying ABC about you, and we are

interested to know what you can tell us about Mr. Y.” That is a very unprofessional way to conduct an interrogation because it creates several incentives to incriminate, exaggerate, or lie. A natural reaction to such a statement by an interrogator is for the detainee to think, “Oh Mr. Y is saying incriminating things about me, so why don’t I say incriminating things about him?”

That is the case regardless of whether such statements about Mr. Y are true, as Mr. X may just be angry at Mr. Y for talking about him, and retaliating in kind, or because Mr. X, since the interrogators have made their interest in Mr. Y known, sees informing on Mr. Y as a means of improving his conditions of confinement and other aspects of his detention. A person is capable of making up anything under those circumstances, whether in an effort to reduce their own troubles, or simply out of spite and fear: “if Mr. Y is going to rat on me, I’m going to rat on him.” Of course, Mr. Y may not be saying *anything* to the interrogators, but this is part of the psychological game that interrogators play, and Mr. X will not have a verifiable means of knowing one way or the other. The second part of the equation is that by telegraphing to a detainee what the interrogator wants to hear, the interrogator is providing the detainee a ticket to all the benefits the interrogators can provide.

Further, an essential part of this whole drama, which began in Afghanistan and then continued at Guantánamo, is that every simple human, daily indulgence of life, whether it be food or a shower or a clean t-shirt, or whatever you can imagine, was available to a detainee at the whim of the interrogators. As a result, the detainees’ philosophy developed accordingly: if you want to be treated remotely like a human being, or enjoy the advantages of special treatment, then tell the interrogators what they tell you they want to hear. That way you can get the essentials of life you are otherwise being denied.

That describes just *some* of the problems we face with respect to the integrity—or lack thereof—of the evidence at these commissions. Another example of how unfair these commissions are, and are intended to be, relates to regulations governing the lawyers for the defendants. A provision in the regulations states that if the presiding officer or the Secretary of Defense, who is not a lawyer, issues a rule for the purposes of practice in the military commissions, that rule supersedes the ethical rules of professional responsibility that bind every lawyer licensed in the United States.³ For me, those ethical rules would be those governing lawyers practicing

³ The Manual for Military Commissions was published on January 18, 2007, to

in the State of New York. For Major Mori, it would be the Massachusetts rules.

The rules also apply differently to military and civilian defense counsel. If a military lawyer such as Major Mori were to stand up and object to a particular commission rule of practice that has been promulgated because it is in conflict with the State of Massachusetts ethical rules, Major Mori would then be removed from the case. If it is a civilian lawyer like me who objects, then I have a choice to either withdraw from the case altogether, or, if I decide to proceed despite my reservations about the conflict in rules, that objection is forever waived.⁴ This is the legal environment the government is creating in Guantánamo. The government could not exclude or remove lawyers from the process *entirely*, so it's trying the next best thing: create a wholly different paradigm of what a lawyer *is*, and deny the detainees the right to zealous counsel which we are all obligated to provide to our clients.

In the more than three years that I have been representing David Hicks, who was a defendant in the first round of commissions in 2004—which were invalidated by the Supreme Court last year⁵—one of the bitter ironies is that those original, fundamentally flawed commissions were endorsed by the Australian government, which expressed its support for them and the U.S. government's handling of Guantánamo.⁶ When the Supreme Court struck down those commissions⁷ for the reasons we argued from the beginning, there was no acknowledgment, by Australia or the U.S., that there was any merit to our objections—that we were right and they were wrong, and that any new system had to meet certain standards of fairness.

Instead, the government devised another flawed system.⁸ Again, it did not quite match the court-martial model because there were important things about evidence, which I've discussed already, and other facets of the process that in the court-martial system are simply too fair to be applied to the Guantánamo detainees. The government does not want to make this new commission

implement the Military Commissions Act of 2006, 10 U.S.C. §§ 948a, *et seq.* See Rule 109(b)(1).

⁴ *Id.*

⁵ *Hamdan v. Rumsfeld*, 26 S. Ct. 2749 (2006) (5–3 decision holding the Guantánamo military commissions illegal under the Uniform Code of Military Justice and the Geneva Conventions).

⁶ Law Council of Australia, *The Australian Government's Position on David Hicks*, (Dec. 6, 2006), <http://www.lawcouncil.asn.au/get/media/2431031696.pdf>.

⁷ See *supra* note 5.

⁸ The Military Commissions Act of 2006, 10 U.S.C. §§ 948a, *et seq.*

process fair. And when it was revealed, we went back to the same people who were wrong the first time, to say the new process still had intractable problems, but there is absolutely no recognition on their part that they could be wrong again—indeed, they act as if they got it right the first time.

Consequently, we will again be in court to challenge the new commissions, whether the available avenue is habeas corpus or the newly created statutory mechanism that funnels all appeals directly to the Circuit Court of Appeals for the District of Columbia for review of commission trials.⁹

The government's attitude has other aspects that are as troubling as they are confusing. One of the hardest things about the commission process is its incoherence. I always thought that an incompetent adversary was the most difficult adversary, aside from the lawyer with only one client, which is *always* a problem. Those are the old adages about lawyers and clients. But I have learned that, in fact, the hardest adversary to confront is one without any plan of action. It is that type of adversary we face in the commission process.

Here is a prime example that is emblematic not only of the lack of any plan, but also of the treatment to which detainees are subjected. The new commission statute and manual provide that the prosecutor shall serve the charges upon the defendant.¹⁰ In David Hicks' case, the first and only one thus far in this incarnation of the commissions, the prosecutors traveled to Guantánamo to serve the charges on him. They did not give us notice, or inform David in advance. While the purpose of the service requirement is, of course, that an accused be made aware of the charges he faces, the day before the prosecutors served the charges David was, without his knowledge or consent (but under the guise of being a new medication for his chronic stomach pain), administered a powerful sedative that knocked him out. As a result, when the prosecutors arrived at the prison facility the next day, David was effectively catatonic. He even fell asleep standing up and hit his head on a metal door. Yet he was read the charges while in that condition. That is what the prosecutors and those who manage the detention consider "notice."¹¹ They had no plan other than what occurred to them on the spur of the moment: let's incapacitate him for the requisite provision of notice.

⁹ *Boumediene v. Bush*, 127 S. Ct. 2930 (2007).

¹⁰ See Military Commissions Act, § 948q(b).

¹¹ See Federal Rules of Civil Procedure Rule 4.

From day to day, from hour to hour, from case to case, *there is no plan*. We have no idea what the government has in store because *it* does not know. It is all completely and hopelessly *ad hoc*, which I would not have believed when I first became involved, but which now has been revealed as just part of a rather distressing pattern in more areas of this administration's operations than just Guantánamo and these military commissions.

Here is another example: we are going to Guantánamo for Monday's proceedings, and by "we," I mean almost one hundred people—military personnel, media, NGO representatives. However, the regulations that govern my participation in the commission have yet to be written and will not be completed by Monday. There are no regulations yet for dozens and dozens of aspects of the commissions that are integral to any criminal justice system that considers itself legitimate, or merits characterization as such.

Yet we are moving forward in the absence of governing regulations for virtually the entirety of the commission process. The reason is the political situation in Australia. The Australian people, the Australian legal community, and members of the Australian government, both majority and opposition, have expressed such strong displeasure with the Australian government's abandonment of David to these unfair and unjust commissions, and have campaigned for David's release after more than five years of purgatory, to the point where David's predicament has become an authentic issue in this year's federal elections in Australia.

The Australian public and legal community, and some politicians there, have realized that the allegations against David have evolved from him being "the worst of the worst" according to the Secretary of Defense, and a "murderer" according to the President, to the first three charges in the prior commissions, none of which involved murder or any violent conduct. In the new commission, the allegations have been reduced to two charges sworn by the prosecutor, with only one approved by the convening authority for referral to a commission. And that charge, which again does not allege any violence on David's part, was not even a crime at the time David allegedly committed it.

Consequently, navigating the commission process for David is very difficult because there is no predictability. There is no way to develop a strategy that you can have confidence will be consistent or applicable from day to day, month to month, or year to year. Major Mori and I have been at this for more than three years now,

and there has not been any fundamental or meaningful improvement.

Obviously, our objective remains to get David out of Guantánamo. Another irony in facing the commission process is that David is among the “lucky” ones because he could be convicted tomorrow and sent back to Australia promptly, and perhaps freed as soon as he arrived there.¹² Yet there are 300–400 others who have no time horizon at all, and no possibility for any adjudication for their situation. That is extraordinary and untenable. While that is obviously one of the fundamental problems of the Guantánamo situation, and these military commissions, the government seeks to deflect criticism by accusing *us*, the defense lawyers, of delaying the commissions. The irony is that had we gone forward with the first commissions, David would probably have been back in Australia by now, and not subject to these new commissions.

We challenged the initial commissions, and continue to challenge these replacement versions, because they are unfair and do not offer a legitimate criminal justice system that is capable of making an accurate and fair determination of who is a war criminal and who is not, and who did something that is worth punishing.

Finally, there is the question of how *much* punishment is appropriate for the particular type of conduct these detainees may have committed, assuming they committed any at all? Those convicted of serious crimes in ordinary U.S. courts serve less time than the Guantánamo detainees, many of whom have been confined at Guantánamo for more than five years without any opportunity to defend themselves or have their cases heard¹³ except to appear before a kangaroo court, the Combatant Status Review Tribunals.¹⁴

¹² On March 31, 2007, Hicks became the first Guantánamo detainee to be convicted (by plea of guilty) under the U.S. military commission system implemented pursuant to the MCA. Although sentenced to seven years imprisonment, the terms of his plea bargain required only an additional two months of imprisonment at Guantánamo Bay (and repatriation to Australia within 60 days), and seven more months' imprisonment in Australia. Hicks was flown back to Australia on May 20, 2006, to serve out the remainder of that sentence. He was released from Australian custody December 29, 2007.

¹³ Amnesty International, *United States of America: Justice Delayed and Justice Denied? Trials Under the Military Commissions Act* (Mar. 22, 2006), available at <http://web.amnesty.org/library/index/engAMR510442007>.

¹⁴ Combatant Status Review Tribunal hearings began on July 30, 2004. The hearings were set up by the Defense Department following the Supreme Court's rulings in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, which affirmed the rights of Guantánamo detainees to challenge their detentions. See also Human Rights First, *Human Rights First Analyzes DOD's Combatant Status Review Tribunals*, available at http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm.

The government presents to you as your “personal representative,”¹⁵ a military official who is not even a lawyer, with whom the detainee does not enjoy an attorney–client privilege, and who is functionally incapable of assisting a detainee in presenting his account of events. Such is the tribunal Khalid Shaikh Mohammed¹⁶ appeared before. All of these problems create multiple issues for us as lawyers that we navigate day-by-day, and will continue to do so on David’s behalf until we succeed in getting him home to Australia.¹⁷ Thank you very much.

¹⁵ *Id.*

¹⁶ Former member of al Qaeda and captured in March 2003 by Pakistani police. For a number of years, Mohammed’s whereabouts were unknown until it was revealed that in late 2006 he had been moved to Guantánamo Bay. In March 2007, he confessed in a closed hearing of the Combatant Status Review Tribunal to orchestrating September 11th, the Richard Reid shoe bomb incident, the Bali nightclub bombing, and the 1993 bombing of the World Trade Center. See Jonathan Karl, ‘High-Value’ Detainees Transferred to Guantánamo, <http://abcnews.go.com/International/story?id=2400470>.

¹⁷ See *supra* note 1.