NATIONAL FORUM ON THE WAR ON TERRORISM AND THE RULE OF LAW

10 NOVEMBER 2003

NSW PARLIAMENT HOUSE

"THE HICKS TRIAL" by Stephen Kenny, Solicitor for David Hicks

"Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty or safety"

Benjamin Franklin (1759)

INTRODUCTION

As all who are attending this Conference would know, David Hicks is an Australian Citizen who was born and grew up in Adelaide South Australia.

As far as his family are aware, in early-2001 after pursuing his interest in the Islamic Religion at an Islamic College in Pakistan, David entered Afghanistan and his family believes associated with the Taliban Army.

His journey to that stage is in itself an interesting and fascinating story but beyond the scope of my discussion today.

According to newspaper reports, David was detained at a northern alliance roadblock in northern Afghanistan on 9 December 2001. He was not armed at the time and nor was he captured on a battlefield. None of the approximately 9 people who were travelling with him at that time were detained.

Following his capture he was interrogated by US Military and ASIO and the Australian Federal Police.

On the 12th of January 2002 he was moved to the United States Naval Base at Guantanamo Bay, Cuba and imprisoned in a 6 foot by 8 foot wire cage.

In May 2002, David was transferred to the newly built Camp Delta which consisted of cells constructed within shipping containers.

After a further interview by ASIO and Australian Federal Police, the Australian Federal Police informed his family that he now "*had a room of his own*", that he had 3 culturally appropriate meals a day and "*regular exercise*".

We now know that the regular exercise consists of two 15 minutes exercise periods per week.

In David's last letter to his family dated 1/9/03 which has been "*cleared by US Forces*" and sent by the Red Cross he states that "*I have been moved to another location on the Island, separated from the population. Now I only see MP's*".

Our interpretation of this is that he has been moved into solitary confinement as it is our understanding that his guards are forbidden to talk to him.

Another concern of his family is that he is having weight loss problems and says his weight fluctuates between a 160 to 130 pounds. My interpretation on this and medical advice is that this could well be related to the stress that he is currently suffering.

In his letter he enquired as to what had happened to his lawyer. Clearly his father's messages concerning work we are undertaking on his behalf is not getting through to him.

We also note from his earlier letters that he was "*interrogated constantly"* by US Authorities and we believe ASIO have interrogated him on at last 5 occasions for an unknown number of days but our estimate is in the order of 10. In a letter in May 2002, David advised that he had asked for a lawyer but was told he was "*not entitled to that*". Further he says that he was advised that he would "*get home sooner*" if "*he cooperated with them*". David has also stated he has cooperated with the authorities for this reason.

I should say however that the Australian Federal Police have specifically denied making any such promise.

Another matter of concern is that shortly after we publicly spoke out saying we would take action on David's behalf, the United States Officials made various allegations against David. These allegations included statements that he threatened to kill an

American and that he had slipped his hands out of his handcuffs on the way to Guantanamo Bay.

David has apparently become aware of these allegations and in a letter to his family he has denied them. Further, he states that his interrogators "*admitted that the story was a lie*" and he went on to say that "*the Australians* (ASIO and the AFP) *said they would tell the media it's crap*".

No official comment has been made by American or Australian Officials in relation to the allegations and my letters to the American Ambassador in Australia on this point have gone unanswered.

We have requested copies of records of interviews with David from Australian Authorities however they have not been supplied due to "*Reasons of National Security*".

LEGAL ACTION IN THE UNITED STATES

On the 19th of February 2002, with the assistance of lawyers acting on a pro bono basis in the United States, a Petition for the Writ of Habeas Corpus was lodged in the United States District Court on behalf of David and two British detainees. The Petition named George W Bush and members of the US Military as respondents. Further actions were further lodged seeking access to David and a right to inform David that such an action was being brought on his behalf.

The United States Government subsequently moved to dismiss the Petition.

On the 30th of July 2002, the District Court Judge dismissed our Petition on the basis that the US Military Base at Guantanamo Bay Cuba was outside the sovereign territory of the United States and consequently beyond the jurisdiction of the United States Courts.[1]

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[1] The United States occupies Guantanamo Bay under a lease entered into with the Cuban Government in 1903. Agreement between the United States and Cuba for the lease of lands for …… and naval stations, February.16-23, 1903, US-Cuba, art. iii, T.S. 418. The lease provides:

> *"While on the one hand the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over [the Military Base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire … for the public*

In the Ruling, the Court held that the case of *Johnson v. Eisentrager* 33 US 763 (1950) was the *"controlling case and Bar's consideration of the merits"* of our Petition.

The *Eisentrager* case involved a Petition for a Writ of Habeas Corpus filed by German nationals who had been captured in China and charged with espionage against the United States at the end of World War II. They were captured after the surrender of Germany but before the surrender of Japan.

The German nationals were tried and convicted by a United States Military Commission sitting in China with the express permission of the Chinese Government and subsequently imprisoned in Germany.

In its opinion, the Supreme Court found that a Court was unable to extend the Writ of Habeas Corpus to the German nationals as they were being held outside the sovereign territory of the United States.

Our subsequent Appeal to the District Court Appeals Court failed and we have now sought the leave of the Supreme Court of the United States to appeal that Decision. The outcome of the Application for Leave, if not known by the time this paper is presented, is expected shortly.

I believe that that action will be seriously considered by the United States Supreme Court as it involves important issues of civil liberty which the Court has in the past been willing to safeguard.

In the matter of *Ex parte: Quirian*, 371 US 1, 19 (1942) the Court made it clear that "*the duty … rests on the Courts, in times of war as well as times of peace, to preserve unimpaired the constitutional safeguards of civil liberty*". You may recall that 1942 was the year that the Japanese attacked Pearl Harbour.

The view of the United States Supreme Court had not changed in 1947 when it stated:

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purpose of the United States any land or other property therein by purchase or by extent of eminent domain with full compensation to the owners thereof." (Rasul v Bush, Civil Action No. 02-299 (unreported)30th July 2002 page 23).

> *"The concept that the Bill of Rights and other Constitutional Protections against arbitrary Governments are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine that if allowed to flourish would destroy the benefits of a written Constitution and undermine the basis of our Government".*
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> *Reid v. Covert, 354 US 1 14 (1957)*

THE US GROUNDS FOR DETENTION OF DAVID HICKS

Until July of this year, the United States Government maintained that David Hicks was detained under "*the President's authority as Commander in Chief under the Laws and Usages of War*".[2]

The United States claim that "*where the hostilities that led to their capture remained ongoing, the Courts have no jurisdiction, and no judicially manageable standards, to evaluate or second guess the conduct of the President and the Military. These questions are constitutionally committed to the Executive Branch".*[3]

In July this year, David Hicks was formally made an individual subject of the Military Order of President Bush of the 13th November 2001 relating to "*The detention treatment and trial of certain non-citizens in the war against terrorism*".

It is this Military Order that is determining the procedure for his trial.

It is worthwhile examining that Order in some detail.

Section 2 states that an individual may be made subject to the Order if the President has "*reason to believe that the individual is <u>or was</u> a member of an organisation known as Al Qaida or had conspired to commit or has committed terrorist acts"* and that *"it is in the interest of the United States that such an individual be subject to this Order".*

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[2] See page 8, Respondent's motion to dismiss Petitioner's first amended Petition for Writ of Habeas Corpus *Russell v. Bush* Civil Action No.02-0299 (CKK).
[3] Id at page 3.

Once a person is detained under the Order, they may be brought before a Military Tribunal for trial but there is no requirement that they be brought before the Military Tribunal at any particular time or indeed at all.

At a Military Tribunal the usual Rules of Evidence won't apply. Section 4(c)(3) of the President's Order states that such evidence can be admitted as in the opinion of the Presiding Officer who have a "*probative value to a reasonable person*". (We will look shortly at this point in more further detail).

A person detained under this Order may have a Military Lawyer appointed to represent them.

Conviction only requires a two third majority vote of the Members present at the time of the vote as does sentencing.

The most significant part of the President's Order is Clause 8 of Section 4(c). That clause states: That at the conclusion of trial:

> *"Submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defence if so designated by me for that purpose"*.

Essentially this means that President Bush or the Secretary of Defence will personally make a final determination in relation to those held in Guantanamo Bay.

The purported extent of the Order is revealed in Section 7(b)(2) which states that:

> *"The individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual's behalf in:*
>
> *(1) any Court of the United States, or any state thereof;*
>
> *(2) in any Court of any foreign nation, or;*
>
> *(3) any international Tribunal"*.

The Military Tribunal is to have exclusive jurisdiction over people subject to the Order.

THE DETAIL

The detail of David Hick's trial is contained in a number of Military Commission instructions issued by the US Department of Defence in April 2003.

Those Military Commission Orders purport to provide an individual with a "*full and fair trial before a Military Commission*".

Some of the Rules set out are indeed fair and include directions such as "*the accused shall be presumed innocent until proven guilty*"[4] Other parts however cause concern.

Clause 6D(3) of Military Commission Order No. 1 relates to other evidence and states:

> "*Subject to the requirements of 6D(1)* (which repeats the section of the Military Order relating to the admission evidence concerning admissibility), *the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence or scientific or other reports"*.

It appears the plain meaning of this section is that unsworn written statements will be admitted without the makers of those statements being required to give evidence or to be subject to cross-examination. Further, the testimony from prior trials at which the accused was not a part may be tendered as evidence against an accused.

The evidence may also include the admission of certain "*protected information*" without it being shown to the accused.[5]

The accused is of course entitled to Defence Counsel who shall be a Judge Advocate of the United States Armed Forces. The accused may at "*no expense to the United States*" retain the services of an appropriate selected civilian attorney of their own choosing provided that attorney agrees to a number of undertakings.

In addition special concessions have been made for the British and Australian Prisoners "*legal consultant*" from their own country.

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[4] Military Commission Order No. 1 Clause 5(B).
[5] Military Order No. 1 21/3/02 Clause D(5)(b)

It should be realised that such a consultant at this stage is limited to being a consultant to the Military Defence Team and direct contact by the Australian Military Consultant to David "*will be further discussed with US Authorities*".[6]

This means that despite a specific request from David that I act for him, I may never be allowed to speak to him.

My concern of the President's role in this matter is repeated in Military Commission Order No. 1H(6)(2):-

> *"A Military Commission finding as to any charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defence, makes a final decision thereon pursuant to Section 4(C)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order.*
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> *An authenticated finding of not guilty as to a charge shall not be changed to a finding of guilty. Any sentence made final by the action of the President or the Secretary of Defence shall be carried out promptly".*[7]

Given that in all cases except the Australians and the English, a death penalty may apply, this clause is clearly not intended to allow time for any appeals. One should however bear in mind that the Military Order of the President prohibits such appeals in any event.

THE POSITION OF THE AUSTRALIAN GOVERNMENT

What exactly does the Australian Government say about this. Very little it would appear and certainly I have not seen or heard any criticism from the Australian Government about the procedures. Although they have sought a number of changes and guarantees such as that the death penalty shall not apply to David Hicks and Mamdouh Habib, they have as far as I am aware on no occasion sought to ensure that Australian citizens receive a standard of justice equal to that provided to Mr Walker

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[6] Letter of Prime Minister John Howard to Mr John Valder dated 22/8/03

[7] Please note, there is no restriction on the President changing a sentence including imposing the death penalty.

Lind, an American citizen. It appears their position is that they are happy for an Australian citizen to receive a lesser standard of justice.

In a letter to me of the 3rd of October 2003 Mr Robert Cornall, the Secretary of the Attorney-General's Department states that *"the role of the Australian Legal Consultant is still the subject of discussions with the US Authorities"*. What those discussions are I have no idea and nor have I heard further from Mr Cornall on this point.

Mr Cornall, in his letter did state that "*the Consultant would be required not to communicate with news media representatives regarding the case and any other matters relating to Military Commissions unless such communication is approved by the Appointing Authority or the General Secretary of the United States Department of Defence"*.

I, like the President of the United States love "*free speech*". This requirement appears to be deliberately targeted at silencing the lawyers. This restraint also applies to any US Military or civilian lawyer involved in the matter.

WILL DAVID HICKS RECEIVE A FREE AND FAIR TRIAL

Given the limitations of President Bush's Military Order and the Regulations made thereunder for the conduct of the Tribunals, it is clear that David will not receive in Guantanamo Bay what Australians would refer to as a "*fair go*".

In Australia, I believe David would receive a fair trial. If the Australian Government was serious about human rights it would insist on his return to Australia to face trial before a competent Australian Court.

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STEPHEN KENNY