

An address by Major Michael Mori USMC

New South Wales Bar Association, 15 August 2006

By Keith Chapple SC

A capacity crowd gathered in the New South Wales Bar Association Common Room in August to hear an address by Major Michael Mori USMC arranged by the Bar Association with the support of the New South Wales Law Society.

Barristers and solicitors had an opportunity to hear the defence perspective on the case of the well-known Guantanamo Bay detainee David Hicks.

Major Mori joined the Marine Corps in 1983. In 1994 he graduated from the Western New England College School of Law in Springfield, Massachusetts, before being admitted to the Bar in that state.

After various postings in the military legal system he was selected by the United States Department of Defense to act for Hicks in November 2003. On current estimates he could be acting as his lawyer well into 2007.

In 2005 Mori and other military defence lawyer colleagues were awarded the Medal of Liberty Award by the American Civil Liberties Union for their Guantanamo Bay work.

Major Mori's address dealt initially with the American military commission system that is being used to try detainees including Hicks. Military commissions have been used before in the United States to try those who have committed offences against the laws of war. Significantly, one needs to argue that there is a war on terror to allow for their use in these cases.

The military commissions were used as early as 1847 in the Mexican American War and apparently were also proposed for use as late as the Korean War. One example often referred to is the trial of German saboteurs captured in the United States during World War II (see *Ex part Quirin Et Al*, 317 US 1, 63 S Ct 2 (1942)).

The commissions lay dormant until 2001 when it was argued by the US Government that the war on terror involved offences being committed against the laws of war by certain non-US citizens. Once detained by US forces many people including Hicks were declared to be 'enemy combatants' and taken to the facility in Guantanamo Bay to await processing by a military commission.

Mori made a number of points about the process. One was that the procedure that was proposed for conducting the commissions was unfair in itself. For example, evidence was to be given of the results of interrogations of suspects by those involved in the interrogations without the suspect being available for cross-examination and restrictions were to be placed on the conduct of defence lawyers.

Both in his address and in questions from the audience, Major Mori continually contrasted the procedures in a military commission with those in a court martial. Presumably he was proposing that the functions of the court martial be changed in appropriate ways to allow them to deal with charges against a non-US citizen. The virtues of the court martial system he suggested ranged from the quality of the Bench available to production of witnesses for cross-examination and the availability of classified documents to the defence with appropriate censoring of sensitive information.

Once charges were eventually laid against Hicks, Major Mori described a rather tortuous research trail he was forced to make in an attempt to find precedents for the charges. This ranged from research into the records of the International Military Tribunals in Nuremberg set up after World War II to the more recent International Criminal Tribunal proceedings at The Hague. No comparable case could be found.

Major Mori expressed concern about the detention of his client which has involved large amounts of time in solitary confinement, including lengthy spells without natural light. He was at pains to say that as far as he was aware his conferences with his client were not the subject of monitoring but suggested that certain other restrictions did apply to the general lawyer/client relationship.

Since Major Mori's address there have been some developments in the United States regarding proceedings against suspected terrorists.

In June of this year the US Supreme Court ruled that the military commissions violated US and international law.



In October 2006 the *Military Commissions Act 2006* was enacted with wide ranging powers for interrogation of suspects and limited rights available to detainees to challenge the process that holds them in US civil courts.

Despite these restrictions, perhaps it will lead to a new round of defence challenges to the revamped military commissions. At the moment nothing is certain.

One matter that was clear from the address and questions and answers that followed was that the process so far has led to lengthy delays in any resolution of the status of a person in the position of David Hicks. Years have passed without any final determination.

At first, the US Government designated the inmates at Guantanamo Bay as 'enemy combatants' and decided they would be dealt with by a military commission system. That military commission system was found to be invalid and new legislation has been passed, apparently with widespread support from the country's law makers. This legislation allows for a new type of military commission, so it would seem unlikely that an adapted form of court martial as proposed by Major Mori would have any chance of being adopted.

Recent press reports suggest that no further proceedings will occur until at least 2007. The options of Hicks and his lawyers seem to be limited as at present new charges have to be drafted and laid against him.

Where all this ends up in the end is anybody's guess – maybe nowhere.

The most poignant point that Major Mori appeared to be raising with his audience was that perhaps that was always the intended destination.