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## One day in the life of David Hicks

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Michael Mori *In the Company of Cowards: Bush, Howard and Injustice at Guantanamo*, Melbourne, Penguin Viking Books, 2014 (292 pp). ISBN 978-0670-077854 (paperback) RRP \$29.99.

Ivan Denisovich Shukhov was a Russian everyman, condemned after escaping from a German prisoner of war camp to the horrors of the Soviet gulags, that *matryoshka* (doll within a doll) prison system, where one prison sat within another which sat within a prison society at large (Solzhenitsyn 2009/1965). Solzhenitsyn's Western Cold War readership was naturally appalled at this picture of judicial despotism and prisoner abuse. As if the *Shoah* had not revealed enough of human depravity, as if George Orwell's *Nineteen Eighty-Four* had not seared Western political consciousness further with a picture of a prison society that destroyed the individual, body and soul (Orwell 2011/1950); now a Russian author, someone who had lived through and survived such a system, gave substance in a work of fiction to the rumour of the brutality and deprivation to be found in the Soviet Union.

A generation later, further episodes of juridical despotism and prisoner abuse would announce themselves to the world. First revealed were the deeds of Saddam Hussein's Ba'athist regime at Baghdad's Abu Ghraib Prison during the 1990s (Hersh 2004, p. 1). Then, in 2003, with the Western conquerors' colours barely dry and the blood just scraped from the walls and floors, the deeds of Saddam's vanquishers in the very same prison were exposed (Hersh 2004, pp. 1–15). The following year allegations emerged of dungeons and torture chambers in Fallujah, Iraq, used by US military personnel (Human Rights Watch 2005). In the wake of these events, few anticipated that a citizen of one of the United States' closest allies would be caught up in these human rights abuses by those who after all had raised their war standards in the defence of human rights. Few anticipated that further additions to these sorry stories of human rights abuses would be made in a remote corner of the New World at Guantanamo Bay, Cuba by those who after all had raised their war standards in the defence of human rights.

### DAVID HICKS, DEFENDANT; MICHAEL MORI, ATTORNEY FOR THE DEFENCE

In his book, *In the Company of Cowards: Bush, Howard and Injustice at Guantanamo*, Michael Mori describes Australian prisoner David Hicks' experiences of detention and interrogation at the US military base at Guantanamo Bay (Gitmo or GTMO) from 2002 until 2007 and Mori's own efforts to represent Hicks as his US Department of Defense appointed defence counsel before the US government's newly re-created military commissions. David Hicks, a less than angelic everyman, had sought adventure, first in Kosovo at the end of the Balkan Wars in 1999, then in Pakistan and Afghanistan. He was then swept away by the West's global war on terrorism; he was certainly unfortunate to be in Kabul as the United States responded to the 11 September 2001 attacks (Hicks 2010). Just as Solzhenitsyn's works reminded his Cold War readers of the powerful threats to individual freedom, so does Mori's book provide a timely and unambiguous reminder that our deeply engrained sensibility relating to individual freedom sometimes fails.

Mori's brief was initially to defend Hicks against charges concerning his activities in Afghanistan and elsewhere prior to his capture in Kabul by the Northern Alliance in 2001. These matters were to be considered by the so-called 'military commissions' created by the George W. Bush administration (2001–09) to try the so-called 'unlawful enemy combatants', or 'illegal combatants', terrorists, or 'the worst of the worst', in the Bush argot. These considerations may well have resulted in an extended prison term for David

Hicks had Mori been less assiduous. Indeed, Mori's diligence in complying with the spirit of the liberal jurisprudential values more generally and with the US Military Code more specifically, took him around the world, seeking evidence of Hicks' activities in Kosovo, Pakistan and Afghanistan, as well as from Hicks' intimate circle of family and friends in Adelaide, South Australia. It also brought Mori into contact with many of the finest legal minds in the United States, Australia and Europe, who were willing to contribute their time and talents *pro bono* for Hicks' defence. In time, Mori's brief evolved to improving Hicks' living conditions at Gitmo, then ultimately to negotiating a final plea bargain and his transfer from Guantanamo Bay to a prison in Adelaide, with a residual prison sentence.

Three themes dominate Mori's book: the problematic constitutionality of the military commissions and the charges against Hicks that were laid under their authority; the matter of the treatment of David Hicks by the military authorities, including allegations of prisoner abuse; and the response by the conservative Australian federal government of Prime Minister John Howard (1996–2007) to Hicks' predicament, especially in the light of the ease with which other governments were able to secure the release of their nationals incarcerated with Hicks at Guantanamo Bay.

## THE PROBLEMATIC BASIS OF THE LEGAL PROCEEDINGS

The problematic nature of the military commissions established by the Bush Administration is the dominant theme of Mori's memoir. According to Mori, under Military Commission Order no. 1:

Rumsfeld [Secretary of Defense at the time] would create the rules of the Military Commissions and select an Appointing Authority (AA), who would approve charges, select the presiding officer and other members of the commission, and approve plea agreements. To sit on the commission, prospective members had to be military officers (pp. 29–30).

In addition, the accused could be excluded if classified material were presented in evidence. It was evident to Mori and many others from the beginning that the Bush Administration already had at its disposal the military system of courts martial as well as the civilian system of criminal courts. It only gradually entered Mori's thinking that the Bush Administration wanted a judicial process that it could control from the beginning to the end in order to evade the uncertain outcomes provided by the existing two judicial systems. In other words, Mori came to believe that the main role of the military commission was to avoid the difficult issue of the burden of proof beyond a reasonable doubt for criminal cases and the issue of the Geneva Convention rights of prisoners of war under military law. Similarly, he only gradually became aware that the Bush Administration wanted to keep from public attention issues of questionable methods of interrogation and prisoner abuse, and moreover, to obtain the maximum political benefit. As well, Mori notes that this fabricated jurisprudence allowed for the creation of new crimes and their application to previous events that were not criminal at the time. As he observes:

My understanding of the Military Commissions' history, rationale and main purpose would take several years to come together. Looking back, it was an education of slowly unfolding puzzlement. I began as a military lawyer looking for a new opportunity. I went through periods of questioning and disbelief, as if what I was learning were things that could not possibly be true, or as if I had awoken at some time in the past. Finally, I arrived at a somewhat jaded disillusionment. But that would take some time (p. 26).

That said, Mori was quick to realise that the structure and procedures of the military commissions involved significant departures from those of courts martial and civilian criminal courts, most notably in their free reliance on hearsay, the ability to preclude evidence for the accused, the targeting of foreign citizens, as well as the lack of appeal to any court, whether international, American or foreign. The only appeal lay within the Department of Defense, with the Secretary of Defense or the President as the final arbiter. For Mori, the

worst feature of the military commissions was that:

if a motion arose that could result in a charge being dismissed, the commission had to send it to the Appointing Authority for a decision. It meant that the person who approved charges against an accused would then be in a position to rule on any legal challenge to the charges he had approved (p. 30).

The review panel set up for the military commissions, intended to mimic an appellate court, proved to be a case of crony justice, since each member “was connected in some way with Rumsfeld personally or with the creation of the Military Commissions, and one had publicly stated that the detainees didn’t deserve protection under international law” (p. 149). The later revisions to the system of military commissions under the *Military Commissions Act* (2006), Mori notes, were largely cosmetic.

Throughout the period of his representation of David Hicks, Mori was in some ways as shackled by the authorities as Hicks in the manner in which he could pursue Hicks’ defence. The defence had far fewer resources than the prosecution, while the ground rules of the trial did not provide for fairness and equity, not to mention legality. There were, moreover, many professional and security restrictions on what Mori could reveal to the public, and he himself was subjected to a number of personal and professional pressures. While Hicks has now escaped most of the shackles of his confinement, Mori remains subject to many rules concerning what he can say in a memoir of these events. Thus, this book reveals Mori’s natural inclination to abide by the spirit and the letter of the rules of both his profession and his former employer—a consummate professional from the beginning to the end. In his words,

I loved the law, and wholly believed that whoever the defendants were and whatever they had been accused of, they were entitled to proper representation and due process. I believed, as an article of faith, in the words of Dr. R. John Pritchard, who wrote in the *Military Law Review* in 1995, ‘For any lawyer, the issue of due process ought to be the main concern: it defines the strength or weakness of these proceedings. Due process stands apart from the substantive issues of the trial’. Due process, the inherent fairness of the system, is what stands between us and authoritarian or corrupt regimes. That was my overriding principle (p. 24).

Mori observes that the President’s Military Order, which established the military commissions, ‘had thrown out our country’s basic rules and procedures, and empowered Rumsfeld or his successors to be judge, jury, executioner *and* appellate court’ (p. 29). He adds that ‘the US government simply did not trust its own legal system or the form of justice created by the Constitution, or even, fundamentally, the American form of government that balances power between the judicial and executive branches’ (p. 148). In sum, ‘Bush’s opting for the sluggish Military Commissions was at best incompetence, and at worst, a deliberate political decision to pervert justice’ (p. x).

## **ALLEGATIONS OF ABUSE OF PRISONER DAVID HICKS**

Shortly afterwards, these problems of abstract jurisprudence would metamorphose into the more practical matter of restrictions on Mori’s professional relationship with his new client, David Hicks. His greatest shock would come when his review of Hicks’s statement revealed that ‘Hicks had not blown up anything, planted any bomb or even hurt anyone. I wasn’t getting any terrorist, let alone one of “the worst of the worst,” one of those responsible for 9/11’. He thought, in fact, that he had been professionally short-changed (pp. 45–46). This feeling was reinforced when the other detainee defence teams later discovered that many of the prosecutors had comparable concerns about the military commissions (pp. 178–182). After these initial shocks, much of Mori’s narrative describes the delays, the procedural changes, the charges that lack substance in either fact or law, in which the truly despicable would have seemed merely buffoonish had the consequences not been so dire as to force the prisoner David Hicks to the limit of his existence.

In all of this Mori says that once he finally met Hicks and observed his very poor physical and mental condition, his overriding concern was to bring about improvements in Hicks' living conditions. Any given day in the life of David Hicks at Guantanamo Bay Military Prison was as wretched as that of prisoner Shukhov in Solzhenitsyn's story. Hicks' original MRE (the military's Meals Ready to Eat) rations were 'replaced with atrocious stuff', whose 'smell was unbearable' (p. 77); in short, Hicks 'was not getting quality food, sunlight or proper exercise' (p. 78) and was living in constant solitary confinement. Mori felt obliged to provide Hicks with food at his own expense, when he could.

Allegations of prisoner abuse had to be pursued. Mori notes that these allegations were eventually rejected by the US Department of Defense's own investigation team's report, though he observes that 'Even a cursory review of the investigation revealed ample substantiating and corroborative evidence' (p. 176). Generally, Hicks 'was in a highly institutionalised and isolated state, which left him more focused on his immediate needs than the bigger picture' of his legal defence (p. 77). Some improvements were achieved with occasional setbacks. Mori stresses that he was careful to work through the system, as odious and unhelpful as it was.

Mori was aware that, despite his best efforts, Hicks continued to be in a poor way, psychologically and physically. He complained of back and stomach pain, remained significantly undernourished and underweight, received too little exercise or sunlight, and was still incarcerated in a highly restricted solitary confinement. The unpredictability of processes in both the external civilian courts and the military commissions meant that Hicks had no idea when he could contemplate his future with any degree of certainty; win, lose or draw—a situation which kept his morale at a low ebb. After a series of mixed legal successes in late 2005, which had the net effect of extending Hicks' incarceration, Mori observes that:

I always found it strange to sit with him and relate the details of these complex legal arguments. They had such a direct impact on him, but at the same time he was uninvolved and probably bewildered. So much activity was happening on his behalf every day outside GTMO, but for him, it was just another day in his cell (p. 192).

Mori sought to expedite Hicks' release with an Alford plea (which that allows the defendant to be convicted without pleading guilty) as he did not think that Hicks would survive incarceration in the soon to be completed Camp 5, a high-tech prison Mori describes as 'a dark, cold warren of bare cement walls, narrow corridors and tiny cells and interrogation rooms ... high-tech and based on the US maximum-security prisons' (p. 202). Vice President Dick Cheney's shadow lengthened over David Hicks. Some did not survive Guantanamo Bay, some (25) attempted suicide, with Hicks himself eventually contemplating, then planning, his own demise, while many others simply went mad (pp. 205–206). Eventually on 19 May 2007, after a long struggle by his American, Australian and European friends and supporters, David Hicks, under the tightest security was released into the care of Australian authorities at the airfield at Guantanamo Bay.

## THE RESPONSE OF THE AUSTRALIAN GOVERNMENT

Mori's third theme concerns the apparent indifference of the Australian government to the situation of one of its nationals. Other governments, no less allies of the United States than Australia, had made quite determined efforts from very early in the piece to secure the transfer of their nationals to their countries of origin. Indeed, one naturalised US citizen who turned up at GTMO facing comparable charges to those of Hicks, Yaser Hamdi, was obliged to renounce his citizenship and to resume his former Saudi Arabian citizenship to secure his release and thereby keep himself out of the US civilian judicial system. Hicks was obliged to pursue British citizenship to regain his freedom. In all, by early 2007, some 385 foreign nationals had been repatriated (p. 245).

In the final analysis, nothing more than electoral considerations appear to have motivated the Howard

Government to play along with the Bush judicial shell game. Prime Minister Howard was unwilling to avail himself of his often proclaimed 'special relationship' with President Bush to secure Hicks' transfer to Australia for trial or release. One man without wealth, influence or education, indeed, a suburban larrikin with a desire to scale the world's highest mountains, was voiceless in the face of the vengeful mob. Mori asks rhetorically if someone from one of Australia's well-to-do suburbs would have been treated with the same callous disregard (p. 186). Only when Australian public opinion began to turn in 2007 and to question the Bush and Howard political agendas did the Howard Government make more than token efforts to secure Hicks' release. By then, even the Americans seemed to be pleased to see the end of the Club Gitmo vacation in hell for David Hicks.

Mori's insight concerning the Howard Government's view of David Hicks' incarceration is quite striking. For John Howard, David Hicks was no more than a 'barnacle', an issue 'which really aggravated sections of the electorate for no long-term policy gain and where no important principles were at stake' (Howard 2010, p. 634). In the light of what was known at the time about Hicks' situation, this was a deplorable piece of political calculus. In his autobiography, former Prime Minister Howard asserts that 'Most Australians suspected that Hicks was at least guilty of the things to which he ultimately pleaded guilty. They had little sympathy for him, but he should have his day in court' (p. 634). Howard also takes at face value Hicks' Alford guilty plea (p. 634).

In 2013, the process of appeal to the United States Court of Military Commission Review was initiated by Stephen Kenny, who resumed his role as David Hicks' legal representative, to have the 2007 decision overturned (David M. Hicks v. United States of America 2013). Hicks' faith in the legal process was rewarded when this court set aside his 2007 conviction on 18 February 2015 (David M. Hicks v. United States of America 2015). David Hicks had regained his name but not the lost years of his life. The current conservative federal government led by Tony Abbott (2013–), however, remains unrepentant. The federal Attorney General, George Brandis, responded to the US government's quashing of David Hicks' conviction with the remark that: 'The type of activities that Mr Hicks has admitted to, including training with al-Qaeda and other terrorist organisations in Afghanistan, would likely now fall within the scope of Australian terrorism laws' (Brandis 2015).

## A CONCLUSION WITHOUT CLOSURE

Sadly, the story does not end there. David Hicks has, to a degree, regained his freedom, though not his reputation. He will never be free to travel without provoking the interest of the authorities. A large part of his life, his health and his spirit remains on the interrogator's floor at Guantanamo Bay. Many prisoners remain at Gitmo, their lives no less shattered. Meanwhile, a new generation of adventurers have sought the illusory prizes of war, the grisly reputation of a warrior-hero, no less than the savage simplicity of martyrdom in the pursuit of the restoration of a long obsolete political order.

While the US government has been much criticised for the interrogation methods of its military and secret service and for its denial of *habeas corpus*, judicial despotism, prisoner abuse and the denial of human rights remain critical problems elsewhere (Kirby, Biserko & Darusman 2014). As the struggle against one form of tyranny continues, the debate concerning the appropriate means and intensity of the necessary response will undoubtedly evolve further. Learning from earlier policy failure is clearly critical.

Michael Mori's fine, lucid and compassionate account of his Sisyphean brief to defend a young, foreign adventurer, David Hicks, against arbitrary charges in an arbitrary judicial system, to improve his deplorable living conditions and to rouse the conscience of a nation on behalf of his client is as remarkable as it is compelling. The voices of the defence team resonate with the quixotic quality of their struggles. The buffoonery of the military commissioners and the prosecutors and the many moral compromises of the Howard Government speak for themselves. What is missing, to an extent, is the voice of the accused

himself, David Hicks. He remains something of a shadow in this story, but then he has already said his piece. Also absent is consideration of justice for those detainees still held at Guantanamo Bay Military Base (Human Rights Watch n.d.), who should not be forgotten.

The fallout from judicial despotism and prisoner abuse take different shapes and forms. At the end of his winter's work day spent labouring on a power station on the wind and snow swept steppe:

Shukhov went to sleep fully content. He'd had many strokes of luck that day: they hadn't put him in the cells; they hadn't sent the team to the settlement; he'd pinched a bowl of kasha at dinner; the team-leader had fixed the rates well; he'd built a wall and enjoyed doing it; he'd smuggled that bit of hacksaw-blade through; he'd earned something from Tsezar in the evening; he'd bought that tobacco. And he hadn't fallen ill. He'd got over it.

A day without a dark cloud. Almost a happy day (Solzhenitsyn 2009, pp. 142–143).

Little by little David Hicks has been able to rebuild his life after his release from Guantanamo Bay. He appears to be relatively free of animosity toward those who maltreated him and those who did too little to secure his release. He writes in his memoir that he has 'faith that the present and future governments will do the right thing by me, that truth will win out in the end' (Hicks 2010, p. 414). He adds that:

There are many reasons to be happy. It is wonderful to be married and to share my life with such an amazing person. I am looking forward to building a stronger relationship with my children. There is nothing better than spending time with my family, enjoying a meal together in private or just talking. I am lucky to experience and enjoy the little things that are easily overlooked—warm sunny weather, the happy songs of birds, little lizards running through the undergrowth—these all provide moments of tranquillity (2010, p. 415).

David Hicks is now a free man. Many of his fellow detainees at Guantanamo Bay are also free. Many, however, remain there in detention with little or no recognition of their legal or human rights. It is one thing to create new laws in response to a drastic situation. When these new laws compromise cherished norms and procedures, often themselves established in response to earlier drastic situations to protect basic political freedoms, then government policy needs to be reconsidered.

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