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Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantánamo Bay

Ellen Yaroshefsky*

David Hicks, an Australian citizen, was detained in Afghanistan in December of 2001 and brought to Guantánamo Bay (Gitmo) in January of 2002. He was denied access to military and civilian lawyers for nearly two years, but eventually was permitted to have counsel only because the government believed that a lawyer would help secure a guilty plea,¹ and David agreed not to discuss the conditions of his captivity.² Eventually, more than five years later, and as a consequence of an international political campaign, he was charged and pleaded guilty to material support of terrorism for his association with al Qaeda operatives in Afghanistan. He was the first Guantánamo detainee to have his case presented to a military commission. He obtained an agreed-upon lenient sentence, served an additional six months, and was returned to Australia. He is now out of custody with

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1. Interview with Joshua Dratel, President, Joshua L. Dratel, P.C., in N.Y., N.Y. (Jun. 2007).

2. Raymond Bonner, *Australian Parents Have New Hope for U.S.-Detained Son*, N.Y. TIMES, Jan. 19, 2004, at A8. For a thorough analysis of the proceedings against Hicks, see LEX LASRY, THE UNITED STATES V. DAVID MATTHEW HICKS: FINAL REPORT OF THE INDEPENDENT OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA (2004), available at <http://www.lawcouncil.asn.au/shared/2440377524.pdf>.

restrictions that remain in force for one year from the date of sentence; the most notable restriction is that he will not speak publicly about the conditions of confinement.

This essay describes the remarkable lawyering on behalf of David Hicks and demonstrates that zealous and strategic advocacy in the face of severe constraints can result in a successful resolution, even in a fundamentally unfair system. Operating within a structure of ad hoc procedures designed to produce guilty verdicts (termed a “rigged system” by many observers³), Hicks’ lawyers engaged in advocacy using a carefully coordinated legal, political, and media strategy that remained fine-tuned as the legal and political landscape shifted. Despite their firm and continual stance that the system was unauthorized by law and fundamentally unjust, Hicks’s lawyers successfully maneuvered that system for their client’s benefit. This essay focuses upon Hicks’s most visible and publicly touted attorney, Major Michael “Dan” Mori of the Marine Corps.⁴

Military lawyers are not typically perceived as being among the “brave band” of lawyers and others who go to the edge of the law for a “cause.”⁵ Yet, in this and many other cases, military lawyers were often at the edge of the law because zealous representation of their clients demanded such action.⁶ Their jobs

3. Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT’L SECURITY L. & POL’Y 375 (2005).

4. Hicks was represented by a number of military and civilian lawyers at various stages during the five years of his confinement. U.S. Military lawyers included Jeffery D. Lippert (2003-2005), and Rebecca Snyder (2006-2007). Australian attorneys include Steve Kenny (2003-2005), David McLeod and Michael Griffin (2006-2008). Joshua Dratel, discussed throughout this essay, was, along with Mori, a principal strategist and zealous advocate throughout the representation.

5. Lawyers for the Center for Constitutional Rights filed the first legal challenge to the Guantánamo detentions when it was highly unpopular to do so. See, e.g., CAUSE LAWYERS AND SOCIAL MOVEMENTS 54-55 (Austin Sarat & Stuart A. Scheingold eds., 2006); AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998); Adam Liptak & Michael Janofsky, *Scrappy Group of Lawyers Shows Way for Big Firms*, N.Y. TIMES, June 30, 2004, at A14; Philip Shenon, *Suit To Be Filed on Behalf of Three Detainees in Cuba*, N.Y. TIMES, Feb. 19, 2002, at A11.

6. Before 2003, military lawyers were summarily fired for refusing to comply with the conditions imposed upon their representation of Guantánamo prisoners. See, e.g., James Meek, *US Fires Guantánamo Defence Team*, THE GUARDIAN, Dec. 3, 2003,

forced them to confront profound ethical dilemmas, rarely confronted by their civilian counterparts. While lawyers in all terrorism-related cases face significant challenges in their ability to represent their clients diligently, competently and zealously, the limitations on representation before military commissions after 9/11 are unparalleled in United States history.⁷ Under such a military commission system, Mori and other military lawyers were often unable to obtain evidence or share it with their clients. They were subject to a panoply of other restrictions that would be unthinkable in a typical court martial or case or courtroom in the United States.⁸

<http://www.guardian.co.uk/world/2003/dec/03/Guantánamo.usa>. See also Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law in Guantánamo: Should Lawyers Be Permitted To Violate the Law?*, 37 HOFSTRA L. REV. (forthcoming 2008) (discussing representation at Guantánamo by Lieutenant Commander Charles Swift, Lieutenant Commander Matthew Diaz, and Major Michael Mori).

7. There is an expanding literature about challenges to ethical lawyering in terrorism cases in federal courts, courts martial, and military commissions. See generally Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81 (2003-2004); Joshua L. Dratel, *Sword or Shield? The Government's Selective Use of Its Declassification Authority for Tactical Advantage in Criminal Prosecutions*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 171 (2006); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003); Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynn Stewart*, 44 S. TEX. L. REV. 31 (2002); Ellen Yaroshefsky, *Introduction to Symposium, Secret Evidence and the Courts in the Age of National Security*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2006). See also David Luban, "The Vindication of Michael Mori," *Balkinization*, <http://balkin.blogspot.com/2007/04/vindication-of-major-mori.html> (April 1, 2007) (last visited May 15, 2008) (discussing the conflict of interest that arises when military defense lawyers are threatened with prosecution); Ben Wizner, "A Tailor-Made Guilty Plea," *ACLU Blog*, <http://blog.aclu.org/index.php?archives/159-A-Tailor-Made-Guilty-Plea.html> (March 27, 2007) (last visited May 15, 2008) (discussing Hicks defense attorney Josh Dratel's refusal to sign a commitment for compliance with the Guantánamo Military Commissions' rules). See also *United States v. Reid*, 214 F. Supp. 2d 84 (D. Mass. 2002) (striking down requirement that defense lawyers sign onto SAM's as a precondition for access to their client); *Saudi Convicted in Embassy Bombing Sues*, WASH. POST, May 9, 2002 (on the monitoring of attorney-client communications in over a dozen cases). For a riveting account of GTMO lawyering, see generally CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* (2007).

8. One "glaring condition" of the military commissions noted by the

These commissions were so fundamentally flawed that in June 2006 the Supreme Court would find in its landmark *Hamdan v. Rumsfeld* decision that they were both in violation of the Uniform Military Code of Justice and Article 3 of the Geneva Conventions.⁹ It found that specific flaws of structure and procedure included the admissibility of hearsay and other evidence gained through coercion, and the fact that the defendant could be barred from hearing all evidence against him or even be barred from his own trial. The Court found that the [commissions] were not “regularly constituted courts” as understood by the Geneva Conventions.¹⁰

In 2003, a team of lawyers including Mori believed the military commissions to be fundamentally flawed, but they could not be assured of vindication by a court. It would be three years before the commissions would be struck down by the U.S. Supreme Court and replaced by yet another roundly criticized system. The Hicks team had a client to represent with the goal of his return to his native country.

This essay traces the lawyering of Major Mori and the Hicks team beginning in 2003, when it was an uphill struggle even to secure a hearing. It necessarily details, in chronological order, the defense team’s legal, political, and media strategy in confronting a government that claimed, as it still does today, that it could

Supreme Court in its *Hamdan v. Rumsfeld* decision is that “[t]he accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’” *Hamdan v. Rumsfeld*, 548 U.S. 577, 614 (2006). See also Reply to Opposition to Petition for Rehearing app. at iv, *Al Odah v. United States*, 127 S. Ct. 3067 (2007) (No. 06-1196) [hereinafter Abraham] (Declaration of Stephen Abraham), available at <http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf>.

9. 548 U.S. 577, 577. The ruling states that Hamdan’s military commission “lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions.” *Id.* at 567.

10. Lieutenant Colonel Stephen Abraham, a Judge Advocate General officer who had submitted a declaration in a previous suit in 2002, stated that, in [their proceedings], “[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence.” Abraham, *supra* note 8, at vi. Moreover, Lt. Colonel Abraham noted that there was pressure from above to reach an “enemy combatant” verdict in the tribunals, which were often composed of personnel with limited or no intelligence experience. *Id.* at vii.

indefinitely hold detainees without access to a hearing or trial; and it addresses the ethics issues these lawyers confronted in ultimately securing an extremely favorable resolution for David Hicks.

THE BACKGROUND OF THE CASE

David Hicks, a twenty-four year old Australian national, had a fairly mundane background and history for a man described by President George W. Bush's administration as among "the worst of the worst."¹¹ Born and raised in Adelaide, Australia, Hicks would later be described as a "wanderlust in search of a purpose."¹² He did poorly in school and got expelled for trouble with drinking and drugs. He drifted around Australia, working a number of jobs, including stints as a kangaroo skinner and a hand on cattle ranches. He tried to join the Australian army but was rejected. After fathering two children with an aboriginal woman, he set off to travel the world.¹³ He went to Japan where he did very little except watch television. One of the ironies of his circumstances was that the only English language television station was CNN International which covered extensively the Balkan wars between the Serbs and Kosovars. This was the first time that David Hicks became interested in international affairs and his own brand of heroism:

I just had something inside that said I had to go and do that, like a spur of the moment sort of thing. . . . I found out there was one group . . . training in northern Albania.

11. Katty Kay, *No Fast Track at Guantánamo Bay*, BBC NEWS, Jan. 11, 2003, <http://news.bbc.co.uk/2/hi/americas/2648547.stm> (quote attributed generally to U.S. officials); *Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says*, N.Y. TIMES, Oct. 23, 2002, at A14; Neil A. Lewis & Eric Schmitt, *Cuba Detentions May Last Years*, NYTIMES.COM, Feb. 13, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9A06E5D8113AF930A25751C0A9629C8B63&scp=1&sq=cuba+detentions+may+last+years&st=nyt>). An admiral quoted in a Defense Department press release said, "They are the worst of the worst, and if let out in the street, they will go back to the proclivity of trying to kill Americans and others." Linda D. Kozaryn, *U.S. Gains Custody of More Detainees*, DEFENSELINK, Jan. 28, 2002, <http://www.defenselink.mil/news/newsarticle.aspx?id=43813>.

12. Raymond Bonner, *Australia Terrorism Detainee Leaves Prison*, N.Y. TIMES, Dec. 29, 2007, at A7.

13. *Id.*

They were going into Kosovo and I realised that maybe, at a wild guess, I could go there and try it and I did it. To me that was doing the impossible.¹⁴

In 1999 Hicks went to Albania, joined the Kosovo Liberation Army (KLA) and completed their basic military training.¹⁵ By the time Hicks got to Albania, the war was nearly over and he was sent home when the peace accord was in place. When he returned to Australia, he began to investigate and later convert to Islam. He soon left Australia for Pakistan with names of contacts to travel around Asia.¹⁶ Traveling to Afghanistan, he was invited to attend an Al Qaeda training camp. Beginning in January of 2001, he trained at various Al Qaeda camps. He spouted anti-U.S. rhetoric, supporting the Taliban. He claimed he met Osama bin Laden more than twenty times.¹⁷ He left Afghanistan on September 9, 2001, went to Pakistan to visit a friend, and watched the 9/11 attacks on television.¹⁸ He had no advance knowledge of the 9/11 attacks.¹⁹ He later told the Australian Federal Police, "It's not Islam, is it? It's like the opposite of what I was . . . wanted to do. Meant to help the people, stop oppression. And they did the opposite."²⁰

On September 12, 2001, Hicks decided to return to Afghanistan. He later said that he wanted to gather his belongings. "It might sound stupid, but I've got lots of nice Islamic clothes I'd been saving. There's lots of money in them with stuff I could have had home." Had he not gone back, he says, "I would have lost my Islam."²¹

Once in Afghanistan, Hicks joined Al Qaeda forces in the Kandahar airport. He was given an automatic rifle and, in

14. Debbie Whitmont, *The Case of David Hicks*, AUSTL. BROAD. CORP., Oct. 31, 2005, <http://www.abc.net.au/4corners/content/2005/s1494795.htm>.

15. See LASRY, *supra* note 2, ¶ 6.51 (these facts—stipulated to by the prosecution and defense—were the basis for David Hicks's ultimate guilty plea).

16. *David Hicks: Nothing but an Echo*, CLARK CMTY NETWORK, Jan. 22, 2007, <http://securingamerica.com/ccn/node/10638> [hereinafter *Nothing but an Echo*].

17. He later told Australian federal police that he was "just trying to make himself sound important by boasting." *Id.*

18. See LASRY, *supra* note 2, ¶ 9.4.

19. *Id.*

20. Whitmont, *supra* note 14.

21. *Id.*

October 2001, sent to guard a Taliban tank.²² After moving to other locations with Al Qaeda forces, he decided to leave the country for Pakistan when the United States closed the borders. He sold his weapons to pay for a taxi to Pakistan.²³ He was picked up by the Northern Alliance²⁴ which sold him to the United States for several thousand dollars.²⁵

Hicks was held on a Navy ship and then blindfolded and taken by chopper to an unknown place for interrogation. He claimed that he was brutally beaten and tortured.²⁶ In January 2002, he was brought to Guantánamo Bay, where the United States claimed that he and others could be held indefinitely without charge.²⁷ His treatment was severe, but less so than other detainees—David was white, Australian, and spoke English.²⁸ He became the first plaintiff in what ultimately became the landmark case of *Rasul v. Bush*, which established that Guantánamo detainees had the right to judicial review of their detention.²⁹

In December, 2003, nearly two years after his capture, Hicks was referred for a military commission. The authorities believed that Hicks would plead guilty, thereby legitimating the commissions.³⁰ They permitted him access to counsel solely for the purpose of entry of a guilty plea.³¹

22. LASRY, *supra* note 2, ¶ 6.64.

23. *Id.*

24. *Id.* at ¶¶ 46-49.

25. Bonner, *supra* note 12.

26. "New Evidence" Backs Hicks's Torture Claim, AUSTL. BROAD. CORP., Oct. 31, 2005, <http://www.abc.net.au/news/newsitems/200510/s1494779.htm> (citing August 5, 2004 affidavit filed by David Hicks's attorneys).

27. LASRY, *supra* note 2, at 3, 5 (citing the United States government's position in *Rasul v. Bush*, 542 U.S. 466,466 (2004)).

28. Whitmont, *supra* note 14.

29. Hicks was represented by the Center for Constitutional Rights and its cooperating attorney, Joseph Margulies. See *supra* note 4 and accompanying text.

30. Interview of Maj. Michael Dan Mori, United States Marine Corps, in N.Y., N.Y. (May 3, 2007).

31. See *infra* note 39.

LAWYERING IN THE "LEGAL BLACK HOLE"³²

Major Michael Dan Mori of the U.S. Marine Corps is a now-celebrated military officer who was detailed to represent David Hicks.³³ In June 2003 Mori returned from his station in Hawaii to do so. Hicks was also represented by FAC (Foreign Attorney Consultant) Australian attorney Steve Kenny.³⁴

Mori entered the case in a "court martial mindset."³⁵ He expected that rules and procedures would be fair and that he would be able to obtain the facts and apply the law as he had been trained in the JAG corps to understand it. He was sorely surprised as he got into the commission system. The entire structure of the military commissions was, as he put it, "set up with a vested interest in convictions."³⁶ There was no independent judge; hearsay was permitted, as was evidence

32. The press uses this term extensively. See, e.g., *Editorial: A Legal Black Hole; Guantánamo Detainees Deserve Habeas Relief*, L.A. TIMES, May 1, 2007; *Editorial: Black Hole: By Stripping Detainees of Legal Rights, U.S. Has Created a Judicial Conundrum*, HOUSTON CHRONICLE, June 8, 2007.

33. This was Mori's sole assignment for nearly four years until the case was resolved. Mori traveled to Bosnia, Afghanistan, and Australia nearly ten times to conduct investigations and engage in other activities on behalf of Hicks.

34. The FAC's were essentially Australian equivalents of military Judge Advocate General (JAG) officers and were allowed to "consult" with Hicks, subject to the U.S. Defense Department's rules on security restrictions. For the Defense Department's outline of these rules, see Press Release, United States Department of Defense, *U.S. and Australia announce agreements on Guantánamo Detainees* (Nov. 25 2003), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=5818>. The types of pressures and constraints imposed on Hicks's American lawyers were echoed, if not amplified, for their Australian counterparts. Australian attorneys McLeod and Griffin, who replaced Kenny in 2005, had to sign lengthy agreements with the U.S. military including a provision saying that they would be extradited to the U.S. for prosecution if they were found to be violating commission rules on classified information. Kenny had signed a similar document in 2003, but was able to get the extradition clause taken out. McLeod said of the agreement, "I've never seen anything like it. It goes on for pages. It was very intimidating but the problem was, if you didn't agree to sign it, you weren't going to get access to David Hicks." Fenella Souter, *Keep Quiet or Face Extradition to the U.S.: Hicks Lawyers Made To Sign Gag Order*, SYDNEY MORNING HERALD, Sept. 23, 2006, <http://www.smh.com.au/news/world/keep-quiet-or-face-extradition-to-us-hicks-lawyers-made-to-sign-gag-order/2006/09/22/1158431897922.html>.

35. Mori Interview, *supra* note 30.

36. *Id.*

obtained under coercion. Attorney client conversations could be monitored.³⁷ As Mori said:

Stepping into it, I thought I was going to be involved in courts martial. I have plenty of experience dealing with court martials and that's the laws we would be using. Unfortunately what I found out [was] that we were in something different, something completely made up and resurrected from 1492.³⁸

As many lawyers recognized, "basically there were no rules. They made them up as they went along."³⁹ The highly respected Independent Observer for the Law Council of Australia, who was a former justice on the Supreme Court of Victoria, would later call these "ad hoc" procedures and term the ultimate proceedings "shambolic."⁴⁰ Critical flaws included: (1) a person could be convicted based on secret evidence and summary evidence; (2) "evidence" could be based on rank hearsay (e.g., interrogators reading statements from other detainees whether obtained through abuse, coercion or torture) and without any defense access to those witnesses; (3) military officers were the judges and juries and the rules for who served on the judicial panels were arbitrary; (4) judges on the panel other than the presiding judge need not be lawyers; (5) civilian counsel could not readily gain access to the accused, witnesses, and evidence; (6) attorney client discussions could be monitored; and (7) counsel was restricted from speaking to the press.⁴¹

Representation before such a body presented the most profound of ethical dilemmas. How could a lawyer represent anyone in such a system? This was a front burner issue for the criminal defense bar, particularly just after March 2002 when the procedures for the operation of the commissions were established

37. *Id.*

38. Transcript from an interview with Maj. Mori on *Enough Rope*, with Andrew Denton, Australian Broadcasting Corporation, (Aug. 14 2006) available at <http://www.abc.net.au/tv/enoughrope/transcripts/s1709428.htm>.

39. Interview with attorney Joshua L. Dratel, in N. Y., N.Y. (Jun. & Nov. 2007) and Interview with attorney Joshua L. Dratel, in Washington, D.C. (Oct. 2007) [hereinafter Dratel Interviews].

40. LASRY, *supra* note 2, ¶ 5.64.

41. See Dratel Interview, *supra* note 39; Hamdan v. Rumsfeld, 548 U.S. 577, 614. See also Abraham, *supra* note 8; note 42, below.

by the Secretary of Defense.⁴² Significantly, in August 2003, the National Association of Criminal Defense Lawyers (NACDL) issued an Ethics Opinion declaring that it was unethical for a civilian lawyer to represent a detainee before the commissions with procedures that deny fundamental due process.⁴³ Mori, however, was detailed to represent Hicks. Mori and Steve Kenny visited him in December 2003. The appointing authority permitted this attorney client meeting solely for the purpose of discussing a plea bargain and imposed restrictions on Mori's ability to speak about the case with the media. Despite the press's intense interest in the Hicks case, Mori did not make public statements. He was cautious.⁴⁴

Mori had no experience in cases involving the law of war. He sought assistance. Shortly after this first Guantánamo visit, civilian defense attorney, Joshua Dratel, joined the Hicks defense team.⁴⁵ Dratel, then co-chair of the NACDL committee on military tribunals, was a highly respected civilian criminal defense lawyer who had handled the "embassy bombing" case in New York and marshaled expertise on terrorism cases.⁴⁶ He had previously obtained security clearance and thus, was readily available to consult with Hicks.⁴⁷

The government attempted to impose restrictions on Dratel's representation of Hicks—the precise terms that led to the NACDL Ethics Opinion that it was unethical to represent Gitmo detainees.

42. See Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9 (2008). The military commissions were created by Presidential Order on Nov. 13, 2001. See Press Release, The White House, President Issues Military Order (Nov. 13, 2001) available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. See also Williams Michael, Jr. & Joseph Margulies, *Trying Terrorists Before Military Commissions*, 59 BENCH & B. MINN. 20 (Feb. 2002).

43. Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Op. 03-04 (Aug. 2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$file/ethics_op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$file/ethics_op_03-04.pdf). See Cheh, *supra* note 3; see also Lasry, *supra* note 2.

44. Mori Interview, *supra* note 30.

45. "Civilian defense counsel" are private lawyers who apply to and must be approved by the Office of Military Commissions Chief Defense Counsel to defend detainees (along with military counsel) in the commissions.

46. See *U.S. v. Bin Laden*, 160 F. Supp. 2d 670 (S.D.N.Y. 2001).

47. Dratel Interview, *supra* note 39.

It presented Dratel with an affidavit that required him to acknowledge that his attorney-client consultations could be monitored, that all of his work on the case had to be completed at Guantánamo, and that the defense team would not include consultants. Dratel refused to sign. The government then negotiated the terms of the affidavit. Two days later, it withdrew nearly all conditions. The government backed down because it wanted Dratel to consult Hicks so the guilty plea could be secured.⁴⁸

Dratel and Mori visited Hicks on January 9, 2004.⁴⁹ No doubt, this case was unique and could not be treated like any other criminal case where a lawyer seeks to discuss disposition of criminal charges. On the one hand, the lawyers believed that a plea bargain might, as the government hoped, provide some legitimacy to the commission system and Hicks's detention.⁵⁰ They were loathe to serve as justification for this system. On the other hand, they were zealous advocates for an individual client, and as any zealous defense lawyer in a criminal case, had to discuss the potential benefit of a plea bargain.⁵¹ The lawyers acknowledged this classic potential conflict, discussed it, and then proceeded to discuss plea bargaining with Hicks. Of course, as

48. *Id.* The affidavit, known as Annex B, also contained a condition that defense counsel acknowledged that he would not be present during a hearing on the use of classified information. Dratel ultimately signed an affidavit that indicated that he could challenge his lack of presence at such a hearing.

49. Dratel Interview, *supra* note 39. Dratel was the first civilian lawyer permitted access to a client at Guantánamo Bay.

50. The government, expecting that a plea bargain with terms prohibiting Hicks from talking about conditions of his confinement, hoped this information would not become public knowledge. Dratel Interview, *supra* note 39. See p.492 *infra* regarding conditions of Hick's ultimate plea bargain.

51. This potential conflict between the lawyer's representation of an individual client and the lawyer's personal and political goals—often termed “cause lawyering”—was hardly unique. Criminal defense lawyers confront such potential conflicts in many settings. It is amplified in the Guantánamo cases where the system is viewed as, and ultimately adjudged to be, fundamentally unfair. See SARAT & SCHEINGOLD, *supra* note 5; Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantánamo Bay*, 30 FORDHAM. INT'L L.J. 491, 491 (2007); Margaret Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1195 (2005); MODEL RULES OF PROF'L CONDUCT R. 1.7. Ultimately there was no conflict of interest. See p.495 *infra*.

there were no existing criminal charges, there could not be a full discussion of disposition until the charges were concretized which they expected would be in April 2004. Hicks and the lawyers soon realized that a guilty plea was not an appropriate resolution, as there appeared to be no options to secure release within the military commission system, nor could the lawyers wait for the resolution of the civil cases that challenged the legality of the military commissions.⁵² "It would take years," Mori later said, "and David would still languish at Guantánamo subject to abuse that is now well documented."⁵³

With no meaningful recourse in the military commissions, Hicks' legal team shifted their focus to the broader political context. They strategized that the route to securing Hicks's release would be primarily through the court of public opinion. They would, of course, continue to zealously advocate in the commissions and in the United States courts, but they knew that the Hicks case had to be brought to the Australian people, as well. Only they could put pressure on their government to acknowledge the necessity for a meaningful legal process that conformed to requirements of law.⁵⁴

It was daunting to overcome the public's perception of David Hicks because there was a strong and loud sentiment in Australia

52. Dratel Interview, *supra* note 39.

53. Mori Interview, *supra* note 30. Mori's assessment was borne out by events. Despite Supreme Court rulings in *Rasul v. Bush*, 452 U.S. 466, and *Hamdan v. Rumsfeld*, 548 U.S. 557, many Guantánamo detainees still languish without ability to appear in fair proceedings. See, e.g., David Bowker & David Kaye, *Guantánamo by the Numbers*, N.Y. TIMES, Nov. 10, 2007, at A15 (noting that as of publication, over three hundred detainees remained at the camp, and not a single one had gone to trial); William Glaberson, *U.S. Mulls New Status Hearings for Guantánamo Inmates*, N.Y. TIMES, Oct. 15, 2007, at A16 (placing number of detainees at 330). In early February of 2008, the government announced military commission charges against six "high value" detainees. See William Glaberson, *6 at Guantánamo Said To Face Trial in 9/11 Case*, N.Y. TIMES, Feb. 9, 2008, at A1. It has since dropped the case of one, Mohammed al-Qahtani, without explanation. Qahtani's military lawyer suspects this is because the evidence that would have been used against him was "derived by torture." William Glaberson, *Case Against 9/11 Detainee Is Dismissed*, N.Y. TIMES, May 14, 2008. The proceedings in Qahtani's case clearly demonstrate the "heads I win, tails you lose" logic of the military commissions: The fact that he is not being tried means simply that Qahtani can continue to expect indefinite detention at Guantánamo.

54. LASRY, *supra* note 2, at 16-17.

that Hicks was a dangerous and high-level terrorist.⁵⁵ Ultimately the blame for this sentiment was put on the United States' release of a photo of Hicks with a rocket launcher that implied that he was at a terrorist training camp. There was widespread and consistent publication of this photo in Australia. In fact, the photo was from his 1999 training with NATO allies in Albania. As Mori stated:

Unfortunately the photo makes it appear as if he is firing a rocket launcher. If they showed the whole picture, you'd see there is nothing in it, it's just the tube. I have my pictures in my military books, I'm holding my machine gun on my waist, and everybody's has got their buddy picture.⁵⁶

Media perception of Hicks had to be reversed.

Mori, who had only spoken to the media once before in his career, decided that such public comment was essential to zealous representation of his client. He discussed the idea of media commentary with military colleagues. He was nervous. Up to that point, no military lawyer had publicly criticized the military commissions. They said "are you sure that you want to do this?"⁵⁷ But Mori reasoned that the government itself had made his client a media case,⁵⁸ and that Hicks therefore had to be defended in the media—particularly because there was no actual court in which to do so.⁵⁹

55. See *id.* at ¶¶ [6.51-52].

56. *Enough Rope with Andrew Denton* (ABC television broadcast Aug. 14, 2006) (transcript available at <http://www.abc.net.au/tv/enoughrope/transcripts/s1709428.htm>).

57. Mori Interview, *supra* note 30.

58. Through frequent press releases and public statements, as in the case of Jose Padilla, government officials had made David Hicks a household name; the popular media and the Defense Department itself simply referred to him as the "Australian Taliban." See *Australian-Taliban To Be Handed over to U.S. Military*, CNN.COM, Dec. 14, 2001, <http://archives.cnn.com/2001/WORLD/asiapcf/auspac/12/14/ret.australia.taliban/>; Kathleen T. Rhem, *Military Commission Proceedings To Resume for 'Australian Taliban,'* DEFENSELINK, Sept. 21, 2005, <http://www.defenselink.mil/news/newsarticle.aspx?id=17250>.

59. During 2004, the appointing authority slowly shifted its views on military counsel's ability to exercise First Amendment rights and to speak to the press. Initially, the legal affairs officer expressed skepticism about any statements to the press. Then Mori obtained permission to give his opinion

Mori carefully reviewed the Supreme Court's opinion in *Gentile v. State Bar of Nevada*.⁶⁰ *Gentile* and subsequent ethics rules that protect lawyers from discipline when the public statements about a pending case are made to overcome the prejudicial effect of publicity not initiated by the lawyer. He and others with whom he consulted believed that Mori's press statements were necessary to overcome the severe prejudice caused by the government's release of numerous statements and the resulting articles.⁶¹

The defense launched a three-country media strategy in Australia, Great Britain, and the United States, including a frontal attack on the system that would be used to try Hicks. Mori traveled to Australia numerous times in early 2004 and proceeded to speak out strongly against the legal regime in Guantánamo Bay. He believed that it was essential for Australians to understand the Guantánamo system that its government supported. His March 2004 trip made him a "minor celebrity."⁶² A self-described apolitical person, he said of the tribunals, "It offends my understanding of what justice is that's been ingrained in me by the Marine Corps and by my legal training."⁶³

In April 2004, he surprised an audience of Oxford University students with his candor when he spoke out, along with military lawyers Lieutenant Commander Swift and Major Mark Bridges, and denounced the tribunals. He told them that "the system is not set up to produce even the appearance of a fair trial," and declared that they were "kangaroo courts."⁶⁴ He argued that Hicks should be tried in conformity with international legal standards, or else returned to Australia.⁶⁵ Mori also spoke at public rallies in Australia. His statements and speeches harshly criticizing the

on the rules and procedures of the military commissions but was not permitted to make more specific comments about Guantánamo or the Hicks case. As the Hicks case began to receive significant media attention, these restrictions were relaxed. See Mori Interview, *supra* note 30.

60. 501 U.S. 1030 (1991); See MODEL RULES OF PROF'L CONDUCT R. 3.6.

61. Mori Interview, *supra* note 30; Dratel Interview, *supra* note 39.

62. Neil A. Lewis, *Military's Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

63. Raymond Bonner, *Marine Defends Guantánamo Detainee, and Surprises Australians*, N.Y. TIMES, Mar. 28, 2004, at 13.

64. Neil A. Lewis, *Military Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

65. *Id.*

tribunals rattled his superiors.⁶⁶ He still confined his comments to the lack of fundamental fairness in the commission process, however, and was careful not to discuss conditions of confinement or the specific facts of the Hicks case.

The defense worked closely with the human rights community in Australia. Geoff Robertson, one of Australia's highest profile human rights lawyers, challenged the Howard government for not demanding the release of an Australian citizen and said that it could face war crimes for "willfully depriving a prisoner of war of the right of a fair and regular trial."⁶⁷

Despite the media attention, the Australian government would not heed any requests that it should demand a fair legal process or the return of its citizen. Prime Minister Howard's rationale was that they could not bring him home because there was no crime that he could be charged with in Australia. The Howard government believed that the Bush administration had the situation "under control."⁶⁸

By spring 2004, Mori had become a minor celebrity in Australia. He visited regularly and his interviews appeared frequently. One reporter for a major national television network said that news accounts "compared Major Mori to Tom Cruise, who played a valiant military defense lawyer at Guantánamo in the film 'A Few Good Men.'" The Aussies loved him. "Mori has come to represent everything about Americans that Aussies love to admire."⁶⁹

In the United States Mori took reporters to the Lincoln Memorial in Washington D.C. to talk about the Hicks case. Though Mori's statements were confined to criticism of the commissions, his public stance and participation in rallies were angering his superiors.

April through June 2004 were watershed months for Hicks and Gitmo detainees. In April 2004, after the Supreme Court heard oral arguments in *Rasul v. Bush*, the government decided to permit habeas corpus lawyers into Guantánamo and leaked

66. Mori Interview, *supra* note 30.

67. Geoffrey Robertson, *In Thrall to the Bush Lawyers*, THE AGE, Aug. 17, 2006, <http://www.theage.com.au/news/opinion/in-thrall-to-the-bush-lawyers/2006/08/16/1155407878903.html> (last visited Apr. 2, 2008).

68. Dratel Interview, *supra* note 39.

69. *Nothing but an Echo*, *supra* note 16.

information about the conditions under which the detainees were held.⁷⁰ The Abu Ghraib scandal was front-page news and led to subsequent allegations and investigations of abuses in military prisons.⁷¹ In June of 2004, the Supreme Court decided *Rasul v. Bush*, declaring that detainees had the right to judicial review, and the infamous "Torture Memo" was leaked to the press.⁷² Slowly Dratel and Mori began to speak more openly with the press about the facts of Hicks's confinement and his case.

In June 2004 official charges were finally filed against Hicks. These charges were unknown to the law of war and "inherently flawed."⁷³ First, even though Hicks was an Australian who owed no formal allegiance to the United States, he was charged with "aiding the enemy." He was also charged with the crime of conspiracy—which the Supreme Court noted in the *Hamdan* case was "not a recognized violation of a law of war"⁷⁴—and of attempted murder by an unprivileged belligerent.⁷⁵

Hicks was arraigned on the charges in August 2004 and preliminary motions were argued in October 2004. The day after arguments on the Hicks motions, the entire proceeding was stayed as a consequence of the District Court's ruling in *Hamdan v. Rumsfeld* that the military commission were violative of the Uniform Code of Military Justice.⁷⁶ Once again, Hicks had no legal recourse in the military commissions.

Relying upon *Hamdan*, the defense filed an amended complaint in federal court and in the military commissions attacking the structure and procedures of the commissions. These cases were stayed pending resolution of the *Hamdan* case. The Howard government, publicly criticized for its position in the Hicks case, said that the defense lawyers bore responsibility for

70. Dratel Interview, *supra* note 39.

71. Thom Shanker & Jacques Steinberg, *The Struggle for Iraq: Captives; Bush Voices 'Disgust' at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, at A1.

72. *Rasul v. Bush*, 542 U.S. 466 (2004); Dana Priest, *Justice Dept. Memo Says Torture 'May Be Justified'*, WASHINGTONPOST.COM, June 13, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>; *The Military Archipelago*, N.Y. TIMES, May 7, 2004, at A30.

73. LASRY, *supra* note 2, ¶ 4.1.

74. *Hamdan v. Rumsfeld*, 548 U.S. 557, 563.

75. LASRY, *supra* note 2, ¶ 4.1.

76. 344 F. Supp. 2d 152 (D.D.C. 2004).

the delay.⁷⁷

By this time, however, the public perception of Howard's criticisms of the Hicks team had shifted. This resulted, in part, from comments from Lex Lasry, the prominent Australian lawyer who had attended the October 2004 preliminary hearings as an independent observer and representative of the Law Council of Australia. Upon his return to Australia, he roundly condemned the proceedings.⁷⁸ This provided impetus for the involvement of the established legal community.⁷⁹

The case had now become of widespread concern to the Australians as the public became increasingly knowledgeable about Hicks's case. With the shift in public perception and the pressure on the Howard government to utilize its "moral authority" to insure that the government's "integrity was not compromised by its support of [the military commission] process," the lawyers could now hopefully engage in behind the scenes negotiations with the government.⁸⁰ David McLeod and Michael Griffin, military reserve lawyers with private practices, became Australian counsel to the Hicks case.⁸¹

While pursuing negotiations in Australia and with legal proceedings stayed in the United States, the defense turned to the British legal system. During one GTMO meeting with Mori and Griffin, the lawyers learned that Hicks's grandparents were British citizens. Britain had recently changed its laws so that Hicks could now obtain British citizenship based upon his lineage. During 2005, the legal team secured the services of solicitors and barristers in London to file for Hicks's citizenship. The British government had demanded and successfully secured the release of nine of its citizens from Gitmo, and the legal team hoped that

77. LASRY, *supra* note 2, ¶ 3.38. The independent examiner concluded that this was "nonsense and demonstrates why Australia's moral authority has been compromised by the attitude of the Australian government." *Id.* at ¶ 3.38.

78. *Hicks Trial 'Shambolic,'* THE AGE, June 24, 2007, <http://www.theage.com.au/news/national/hicks-trial-shambolic/2007/07/24/118504308874.html?page=fullpage#contentSwap1>. Lasry's basic biography is available on the University of Sydney's website. <http://www.econ.usyd.edu.au/event/55.html>.

79. Dratel Interview, *supra* note 39.

80. *Id.*

81. These lawyers replaced Steve Kenny. *See supra* note 34.

when Hicks obtained citizenship, it would do so for him.⁸²

In December 2005, the British High Court, over the government's objection, ordered that Hicks should be registered as a British citizen.⁸³ The British Home Office appealed numerous times, and the High Court finally ordered that it would not allow additional appeals.⁸⁴ The Home Office complied and "secretly" made Hicks a citizen while in his cell at Guantánamo.⁸⁵ The next day the British Home Secretary personally revoked citizenship.⁸⁶ The defense then filed a legal action that was never resolved.⁸⁷ The Hicks citizenship issue led to increased awareness of the Hicks case in Britain, and exacerbated public concern in Australia.

In the summer of 2005, the D.C. Circuit reversed the district

82. *U.K. Guantánamo Four To Be Released*, BBC NEWS, Dec. 8, 2007, http://news.bbc.co.uk/2/hi/uk_news/7133760.stm. For a BBC News comprehensive timeline, see <http://news.bbc.co.uk/2/hi/americas/6241991.stm> (five British detainees released on March 19, 2004). See also *'Delight' at Release of Guantánamo Men*, BBC NEWS, Mar. 11, 2004, http://news.bbc.co.uk/2/hi/uk_news/3500156.stm (detailing release of the "Tipton Three"—which included Rasul—and two others); Jane Holroyd, *Government 'Pushed' for Hicks Trial*, THE AGE, Sept. 27, 2005, <http://www.theage.com.au/news/world/father-welcomes-david-hicks-trialdate/2005/09/27/1127586827641.html> (the Australian Foreign affairs minister, Alexander Downey, claimed that the attorneys were trying to "circumvent" justice by attempting to gain a British passport for Hicks).

83. See Annabel Crabb, *Hicks Wins Citizenship Fight*, SYDNEY MORNING HERALD, May 7, 2006, <http://www.smh.com.au/news/world/court-puts-hicks-back-on-track-for-british-citizenship/2006/05/06/1146335967064.html> [hereinafter Crabb, *Hicks Wins*]; Annabel Crabb, *Law Strips Hicks of UK Citizenship in Hours*, SYDNEY MORNING HERALD, Aug. 20, 2006, <http://www.smh.com.au/news/world/law-strips-hicks-of-uk-citizenship-in-hours/2006/08/19/1155408075077.html> [hereinafter Crabb, *Law Strips Hicks*].

84. Crabb, *Hicks Wins*, *supra* note 83.

85. *Id.*

86. Jeannie Shawl, *Gitmo Detainee Stripped of UK Citizenship One Day After Request Granted*, JURIST, Aug. 19, 2006, <http://64.41.216.61/paperchase/2006/08/gitmo-detainee-hicks-stripped-of-uk.php> (noting that the citizenship-stripping was pursuant to the Immigration, Asylum and Nationality Act of 2006 which allows the secretary to "deprive a person of citizenship if the Secretary of State is satisfied that deprivation is conducive to the public good." See Immigration, Asylum and Nationality Act 2006, S. 56 (1), available at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060013_en_1#56).

87. Upon defense motion, the court ordered a hearing on the issue of whether Hicks had been tortured. The hearing was never held because of the resolution of Hicks's case in the military commission. Dratel Interview, *supra* note 39 (motions on file).

court in *Hamdan* thus permitting the resumption of the military commissions.⁸⁸ The hope faded for a negotiated return of Hicks to Australia, and the Howard government pressed for a hearing date.⁸⁹ First scheduled for September 2005, the date was adjourned until November 2005, with the Howard government maintaining that the defense lawyers were responsible for the delay.⁹⁰ The proceedings were soon stayed again when the United States Supreme Court then granted certiorari in *Hamdan*.

During 2006, the Australian public clamored for the Howard government to press for Hicks's return.⁹¹ There were rallies throughout the country and regular press accounts of Hick's unlawful detention. Events had progressed to the extent that Dratel and Mori, in an April 2006 trip to Australia, had meetings to discuss the rules and conditions for a transfer agreement if Hicks was returned to Australia. The defense team also engaged lawyers who began a legal action in Australia to order Hicks returned.⁹²

In June 2006, the historic *Hamdan* decision, which declared the military commissions to be violative of the Geneva Conventions and the Uniform Code of Military Justice, nullified the military commission proceedings against Hicks. The Military Commissions Act of 2006 (MCA) was passed in response to *Hamdan*.⁹³

Mori remained on the offensive in the media, attacking the structure and proceedings established under the new MCA. In

88. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005).

89. Holroyd, *supra* note 80.

90. LASRY, *supra* note 2, ¶ 3.38.

91. See, for example, *Seven Out of Ten Australians Want Hicks Home*, CANABERRA TIMES, Dec. 14, 2006; *Free-Hicks Rallies Roll On*, DAILY TELEGRAPH, Dec. 11, 2006; *Australians Believe Hicks Should Get Fair Trial Now*, TOWNSVILLE BULLETIN, Sept. 16, 2006. In November of 2006, the Upper House of the Australian Senate passed a motion urging the government to intervene in Hicks's case. *Senate Wants Hicks Home*, DAILY TELEGRAPH, Nov. 10, 2006. The sheer volume of coverage received by Hicks in 2006 is also worth noting: A search of Australian newspapers in which Hicks' name appeared in headlines reveals 408 hits for that year, with entire articles devoted to minute developments in the status of his case, his physical condition, and even his father's nomination for "Father of the Year."

92. A hearing on that case was schedule for May 2007 and became moot upon the resolution of Hicks' case in the military commission. Dratel Interview, *supra* note 39 (motions on file).

93. 10 U.S.C. §§ 948a-950w (2007).

August 2006, he went on a lecture tour in Australia on behalf of Hicks, attending a rally in Adelaide and leading a march to the office of the Australian Foreign Minister. He charged the Bush administration with creating another illegal system that violated Hicks's rights and reiterated that the new military commission system—like the old one—was “rigged for convictions only.”⁹⁴ Speaking at an almost sold-out event organized by the Australian Lawyers' Alliance at the Brisbane Convention Center, Mori noted that “providing information to the public and elected officials had to become part of defending [Hicks].”⁹⁵ “I'm sure some ministers in the Australian Government would just like us to go away quietly and let David get done over by an unfair system,” Mori remarked, “but that wouldn't be doing justice to an Australian citizen.”⁹⁶

Howard's approval ratings continue to decline. Especially when joined with the issue of the Iraq war, Hicks's case seemed to symbolize the Howard government's willingness to acquiesce to American demands—a vulnerability particularly noted in Australia's 2007 elections that linked him to the increasingly unpopular President Bush.⁹⁷ In Australia in November 2006, Mori attended the signing of the Fremantle Declaration, a “declaration demanding the Commonwealth take action to ensure Guantánamo Bay detainee David Hicks is immediately brought to trial.”⁹⁸ All attorneys general of the States and territories of

94. *Hicks' Lawyer to Meet with Ministers in Canberra*, AUSTRALIAN ASSOCIATED PRESS, Aug. 13, 2006.

95. *Stealing a March: Hicks' Lawyer Pounds PR Trail To Win Over Hearts and Minds*, COURIER MAIL, November 14, 2006.

96. *Id.*

97. Steve Lewis, *Newspoll: Rudd Gains Ground on Howard*, THE AUSTRALIAN, Jan. 23, 2007, <http://www.theaustralian.news.com.au/story/0,20867,21102080-601,00.html> (“[a]s John Howard prepares to freshen up his ministry, voters have also criticised the Government's handling of the war in Iraq, with more than 70 percent saying it will influence their vote. The Government's handling of terror suspect David Hicks has also been denounced by voters . . .” *Id.*); Nick Bryant, *Howard Faces Election Year Battle*, BBC NEWS, Feb. 15, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6361361.stm> (noting “one of the main effects of the row over Iraq has been to bind Mr. Howard even closer to George W. Bush, a U.S. president deeply unpopular in many quarters of the Australian electorate. Whether it is his reluctance to engineer the quick release of David Hicks, an Australian imprisoned for five years without trial at Guantánamo Bay, or his shared stance with the Bush administration over Kyoto, Mr. Howard would appear to be on the wrong side of public opinion.”).

98. *A-Gs Demand Immediate Action on Hicks Trial*, AUSTL. BROAD. NEWS

Australia attended with the pointed exception of the Federal Attorney General, Philip Ruddock, who refused to attend. His absence was highlighted in the press.⁹⁹

In February 2007 the charges were dismissed and two new charges were sworn against Hicks: (1) Attempted murder in violation of the law of war; and (2) providing material support for terrorism. The Convening Authority for the Military Commissions referred only the material support for terrorism charge for trial.¹⁰⁰ This charge was not available under the old military commissions, but was introduced in the MCA of 2006.

Just as Hicks was about to be arraigned on these new charges, Colonel Morris Davis, the then chief prosecutor for the military commissions, publicly warned that Mori's "politicking" on behalf of Hicks could result in prosecution for his actions under Article 88 of the Uniform Code of Military Justice (UCMJ), which forbids officers from speaking "contemptuous words" about the President, Vice President, or Secretary of Defense.¹⁰¹ Davis claimed, among other things, that "certainly in the U.S. it would not be tolerated having a U.S. marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was one of my prosecutors, they would be held accountable."¹⁰²

ONLINE, Oct. 11, 2006,
<http://www.abc.net.au/news/newsitems/200611/s1785856.htm>.

99. *Id.*

100. See LASRY, *supra* note 2, ¶ 4.5. This charge had two specifications. The first provided that Hicks intentionally provided material support or resources to an international terrorist organization (al Qaeda) which was engaged in hostilities against the United States. The second specification alleged that Hicks provided that support knowing or intending that that it would be used in preparing for or carrying out an act of terrorism. Hicks ultimately pled only to the first specification.

101. Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10. See 10 U.S.C. § 888 (2006) ("Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.").

102. David Nason, *Mori Charges Could Be Laid After Trial*, THE AUSTRALIAN, Mar. 03, 2007, available at <http://www.news.com.au/story/0,23599,21315542-2,00.html>.

While Davis's notion that Mori could have been prosecuted¹⁰³ appears far-fetched—Article 88 has rarely been invoked in military courts-martial, and only in extreme cases¹⁰⁴—Davis's allegations were serious enough to cause Mori to worry that he might be impeding Hicks's case by continuing to represent him.¹⁰⁵

The defense once again went on the offensive. Dratel, in public comment, said that Davis's threats were the "latest example of the corrupt system that will try Hicks."¹⁰⁶ Dratel and Synder filed a motion to disqualify Davis based upon prosecutorial misconduct. They charged:

The curious timing of Col. Davis' initial accusations . . . suggests that Col. Davis made the accusation to chill and hinder Maj. Mori's representation of Mr. Hicks and to derail the defense shortly before the arraignment. These allegations diverted the defense team from preparing for Mr. Hicks' trial, forcing them to focus instead on assessing the potential conflict of interest between Maj. Mori and Mr. Hicks. They also required Maj. Mori to refrain from making public comments on behalf of Mr. Hicks until he could obtain legal advice on the issue.¹⁰⁷

The threat of a court martial of Mori led to press accounts that Hicks's case would be delayed yet again if Mori was recused from representation.

The defense filed numerous motions all the while, negotiating a plea bargain on favorable terms for Hicks. The anticipated plea, of course, would be premised upon a charge that was without

103. See, e.g., Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story> (ironically, Colonel Davis resigned as Chief Prosecutor over the "politicized" nature of the military commission's procedures and subsequently leveled his own criticisms of his former superiors.).

104. See Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW. 1, 2-3 (July 1999). See also Luban, *supra* note 7.

105. Tom Allard, *Hicks Trial at Risk If Mori Taken Off Case*, THE AGE, Mar. 5, 2007, <http://www.theage.com.au/articles/2007/03/04/1172943276209.html>.

106. *Id.*

107. Defense Motion for Appropriate Relief, Prosecutorial Misconduct, 19 March 2007 (on file with author). This was one of eighteen motions that remained unresolved at the time of the Hicks plea. Mori Interview, *supra* note 30.

foundation under the law of war—the very point made by the defense in one of its motions to dismiss. Nine eminent lawyers had provided affidavits to the commission to the effect that there was no such crime as material support for terrorism under the law of war, and that in any case, it was clearly “retrospective in its application to Hicks and was a *recently invented and new war crime*.”¹⁰⁸ Additional arguments provided convincing support that the charge was “brought and prosecuted in violation of international law.”¹⁰⁹

On March 26, 2007, Hicks pled guilty to providing material support for terrorism, notwithstanding the fact that the charge was arguably not sustainable and that the proceedings were held before a body without legal authority and lacking in fundamental due process.¹¹⁰

The proceedings demonstrated the arbitrariness of the process.¹¹¹ Two of Hicks’s three attorneys were dismissed by the Judge at the outset. Rebecca Snyder was dismissed because the Judge claimed that she was not on active duty and therefore could not qualify as military counsel, nor did he interpret the MCA to permit her to remain as civilian counsel.¹¹² The judge would not

108. LASRY, *supra* note 2, ¶4.14 (emphasis added).

109. *Id.* ¶ 4.16.

110. The defense entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) based upon stipulated facts. An *Alford* plea does not require the defendant to state that he is guilty. Rather it permits the entry of a guilty plea with a statement acknowledging that, based upon the particularized facts, the prosecution could prove their case beyond a reasonable doubt. The *Alford* plea avoids the issue of whether an attorney may assist a client in the entry of a guilty plea to a charge it “knows” to be not sustainable under law. Zealous advocacy for a criminal defendant should permit the entry of a guilty plea whether or not the attorney believes the charge is sustainable; however, this is an issue that has not been adequately addressed in legal ethics literature. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS (3d ed. 2004) (arguing that ethics rules are rooted in the moral values expressed in the Bill of Rights, not in moral philosophy.) *Id.* at 8; Steven Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

111. LASRY, *supra* note 2 (calling the procedures “ad hoc”).

112. He also ruled that she could not qualify as civilian counsel and

permit Dratel to appear as counsel unless he would sign a consent agreement to be bound by all rules, including those which were not yet in existence. Dratel's argument that he could not sign a "blank check" but that he would sign an agreement to be bound by "all applicable rules presently in existence" was not acceptable to the Judge.¹¹³ Dratel left the courtroom as Hicks stated, "I am shocked. I just lost another lawyer."¹¹⁴ Mori remained at Hicks's side in the proceedings and ultimately entered a guilty plea in proceedings described by the independent observer as "shambolic."¹¹⁵

The plea agreement, worked out at the highest levels of government without knowledge of the prosecutor,¹¹⁶ provided for a sentence that permitted Hicks to return to Australia to serve only nine remaining months.¹¹⁷ Hicks also agreed to refrain from

suggested she remain as a "consultant." Hicks stated that he wanted her to be his attorney, not a consultant. For a full account of the legal arguments, see LASRY, *supra* note 2, ¶¶ 5.9-5.14.

113. *Id.* ¶¶ 5.15-5.25.

114. *Id.* ¶ 5.24.

115. *Hicks Trial Shambolic*, *supra* note 78.

116. The deal was negotiated between Mori and Susan Crawford, the "top military commission official" and one of Vice President Cheney's former deputies—notably, without prosecutor Morris Davis' input. Josh White, *Australian's Plea Deal Was Negotiated Without Prosecutors*, WASH. POST, Apr. 1, 2007, at A07. Vice President Dick Cheney had visited with Australian Prime Minister John Howard in early 2007, during which they discussed the Hicks case. The visit occurred in the context of wide protests over Hicks's treatment and a promise by Howard to press the issue. See, e.g., *U.S. Vice-President Pledge on Hicks*, BBC NEWS, Feb. 24, 2007, <http://news.bbc.co.uk/1/hi/world/asia-pacific/6392051.stm>; *Cheney Visit Prompts Protests*, SYDNEY MORNING HERALD, Feb. 22, 2007, <http://www.smh.com.au/news/national/cheney-visit-prompts-protests/2007/02/22/1171733922521.html>; James Grubel, *Australia To Press Cheney on Guantánamo Trial for Hicks*, REUTERS, Feb. 19, 2007, <http://www.reuters.com/article/politicsNews/idUSSYD10287820070219>; White, *supra* note 13. One Australian newspaper reports that a deal was directly brokered between Vice President Cheney and Prime Minister Howard during his visit to the country, even though the Australian government denied it. *'Deal' That Freed Hicks*, THE AGE, Oct. 23, 2007, <http://www.theage.com.au/news/national/cheney-howard-deal-freed-hicks/2007/10/23/1192941024047.html>.

117. Though Hicks was sentenced to seven years, the plea bargain permitted him to serve only nine remaining months after what had been five years in American custody. He was released on December 29, 2007. *Terror Detainee Back in Australia*, NYTIMES.COM, May 20, 2007, <http://www.nytimes.com/2007/05/20/world/asia/20hicks.html>; Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, NYTIMES.COM, Dec. 29,

speaking to the media for one year and, notably, to make a statement that he “has never been illegally treated,” along with a promise not to file any lawsuits pursuant to his treatment in Guantánamo.¹¹⁸ The “deal helped Australian Prime Minister John Howard, a U.S. ally, avoid a bruising domestic controversy.”¹¹⁹ The case was widely reported in the media. The U.S. Department of Defense issued a press release claiming, “Military commissions are regularly constituted courts, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions.”¹²⁰

The Military Commissions spokeswoman said that the Hicks case showed that Guantánamo commissions offer a “fair, legitimate and transparent forum,”¹²¹ while the *Washington Post* reported that the guilty plea “marks a victory for the Bush administration.”¹²²

Hick’s father’s statement was, perhaps, more representative of the public’s view: Hicks pled guilty, he said, just to “escape the isolated prison.”¹²³ The press reported the dismay of military authorities when the imposed seven year sentence was reduced to nine months in accordance with the plea bargain.¹²⁴

Mori was made an honorary member of the Australian Bar

2007, <http://www.nytimes.com/2007/12/29/world/asia/29hicks.html?n=Top/Reference/Times%20Topics/People/B/Bonner,%20Raymond>.

118. William Glaberson, *Australian To Serve Nine Months in Terrorism Case*, NYTIMES.COM, May 31, 2007, <http://www.nytimes.com/2007/03/31/washington/31gitmo.html?ex=1333080000&en=5a6690d157e5ca31&ei=5124&partner=permalink&exprod=permalink>.

119. Scott Horton, *Military Lawyers and the Gitmo Commissions*, HARPER’S MAG., Oct. 30, 2007, <http://harpers.org/archive/2007/10/hbc-90001549>.

120. *Detainee Convicted of Terrorism Charge at Guantánamo Trial*, U.S. Department of Defense, March 30, 2007 (<http://www.defenselink.mil/releases/release.aspx?releaseid=10678>.)

121. *Some Bumps at Start of War Tribunals at Guantánamo*, N.Y. TIMES, April 1, 2007.

122. Josh White, *Australian’s Guilty Plea Is First at Guantánamo*, WASH. POST, Mar. 27, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/26/AR2007032602439.html>.

123. *Australian Guantánamo Detainee Hicks Sentenced to 9 Months After Plea Deal*, FOXNEWS.COM, Mar. 30, 2007, <http://www.foxnews.com/story/0,2933,262960,00.html>.

124. *Id.*

Association in a ceremony where he was touted for advocacy called "fearless and passionate."¹²⁵ In the past year, he has received numerous awards for dedicated, zealous lawyering.¹²⁶ And while Major Mori avoided prosecution, his zealous advocacy was not rewarded by the military. He was reassigned to a base in San Diego as soon as Hicks left Guantánamo and has been passed over for promotion twice since taking on his case.¹²⁷ In January 2008 he was sent to Iraq.

LAWYERING IN HINDSIGHT

Mori and the defense team undertook a remarkable challenge in what was described by the Australian Law Council's Independent Observer as an "inherently oppressive and coercive system" where "liberty is a bargaining chip that the State may use to avoid accountability and buy impunity."¹²⁸

Recognizing that the case would be resolved in the political arena, a self-described apolitical military lawyer employed a strategy that is often described as "political lawyering" or "cause lawyering."¹²⁹ Engaging in a relatively novel tactic for a military lawyer, Mori extensively utilized the media to overcome negative public perception of his client and promote the need for a fair process. The media strategy assisted the international campaign of human rights organizations and activists. Mori continued his

125. *Honorary Membership for Major Mori*, NEWS.COM.AU, June 29, 2007, <http://www.news.com.au/story/0,23599,21990165-1702,00.html>.

126. *Id.*

127. *Mori Reassigned to 'Top Gun' Marine Base*, AUSTL. BROAD. NEWS ONLINE, May 22, 2007, <http://www.abc.net.au/news/stories/2007/05/22/1929231.htm>.

128. LASRY, *supra* note 2, ¶ 7.3.

129. These terms are defined in varied ways and often used interchangeably. See, e.g., Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996) (deliberate efforts to use law to change society or to alter allocations of power); David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995) (articulating a theory of "moral activism" in which "lawyers have substantial moral responsibilities to parties other than the client."); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493 (1996) (arguing that individual client representation may be "cause lawyering"); Etienne, *supra* note 51 at 1196-97 (defining cause lawyers as those who "use the law as a means of creating social change in addition to a means of helping individual clients.").

highly visible public advocacy even when threatened with prosecution that could have been a disqualifying conflict of interest.

Mori and the defense team successfully coordinated the legal strategy with the political one across three continents as the landscape shifted during five years.¹³⁰ They did so understanding that Hicks's situation presented potential conflicts. While the lawyers necessarily mounted a highly visible campaign to bring Hicks before a tribunal, all the lawyers believed that the military commissions were unlawful and that its processes were fundamentally unfair. They did not want to legitimate those commissions by participation in the process, especially because their client would be the first detainee to participate in a military commission. They correctly could predict that the U.S. government would claim legitimacy and victory by Hicks's participation and guilty plea. Moreover, the lawyers did not believe that the ultimate charge against Hicks was legally valid. Nevertheless, the duty to David Hicks was paramount; the end of his detention and his return to Australia were the goals.

These potential conflicts, present in many criminal cases and notably in those defined as "cause lawyering," did not become actual conflicts. Ultimately, the lawyers's goal was the traditional one for all criminal defendants: resolution of their case on the most favorable terms for their client. That goal was served by the defense team's creative and effective multi-pronged strategy employed for the "cause" of challenging the unlawful regime at Guantánamo Bay and upholding the rule of law. Both "causes" were served by the Hicks guilty plea and sentence. As Dratel said:

From the outset, there was always a tension between what we call "cause lawyering" vs. "client lawyering" and my hope was always that we could serve the client without undermining the cause. . . . As it turned out, we achieved that even in unanticipated ways. We have done as much as we can to demonstrate that it is an invalid

130. Similar strategies have been employed in a wide range of cases. See e.g., Michael D. Davis & Hunter R. Clark, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* 100-12 (1992); Arthur Kinoy, *RIGHTS ON TRIAL* (1983); Michael Ratner, *How We Closed the Guantánamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187 (1998).

system and we hope that was achieved At the same time there was disillusionment from the other side—this is the “worst of the worst” and you are freeing him?” . . . The “Hicks deal” is now a term of art. People say, “I want a Hicks deal.” It robbed the commissions of any authority.¹³¹

In these extraordinary circumstances, the judgment that the case had to be resolved in the political arena required the zealous lawyering undertaken by Mori and the defense team. It was, perhaps, the only way to provide meaningful legal representation at all.

131. Dratel Interview, *supra* note 39.