David Hicks will stand trial before a United States military commission in January 2005. Having been detained in Guantanamo Bay (‘Gitmo’ in US military slang) for nearly three years as an ‘enemy combatant’, he will have his day in court to face charges of conspiracy to commit war crimes, attempted murder by an unprivileged belligerent and aiding the enemy. It will not, however, be a court familiar to Australian citizens. Common law rules of evidence will not apply. The counsel appearing for the accused will be assigned from the military. The judgement will be delivered by military personnel. There will be no avenues of appeal to a non-military court. An agreement has been reached between the Australian and US governments that, in the case of Hicks, the death penalty will not be considered and the hearing will be open; it is not known if these concessions will apply to those detainees whose governments have not reached such agreements with the US. Even before the trial process begins, Hicks’ family and lawyers are claiming that he has been subjected to physical and mental abuse while being detained and interrogated. The facts of the alleged abuse are open to debate, what is not is that he was held for more than two and a half years before being charged. Clearly, prosecuting a War on Terror creates rights predicaments beyond even those evidenced in twentieth century guerrilla warfare; the human rights vacuum created at Gitmo is a direct
consequence of the refusal of the current US administration to acknowledge the importance of these dilemmas.

The difficulty in running a war and upholding human rights at the same time cannot be underestimated. Even in ‘good’ wars human rights are often forgotten: Abraham Lincoln suspended habeas corpus during the American Civil War in order that Union forces could freely hold and interrogate suspected Confederate spies; in the Second World War, US forces in the Pacific captured a suspiciously low number of Japanese prisoners. Where Gitmo and the War on Terror take us into new territory is that the battlefield failure to observe the rights of combatants and civilians, a failure that, as in the Pacific War, is largely the result of extreme stress and poor training, has been institutionalised. More than that, the possibility that the rights of the detainees will be only temporarily suspended, as in the US Civil War, is unlikely. Gitmo exemplifies the US administration’s apparent conviction that in the War on Terror the battlefield is everywhere and the conflict has no end.

In the face of these attitudes it is important to remember that the Bush Administration’s point of view is not universal. Evidence that the separation of powers still has teeth came this year in the June decision of the US Supreme Court (Hamdi v. Rumsfeld and, in the Court of Appeals, Rasul v. Bush)\(^1\) that the US Government was constitutionally required to justify the detention of the inmates held without charge in places such as Camp Delta, Guantanamo Bay. The response from the government has been to conduct Combatant Status Review Tribunals, one of which adjudicated on Hicks in September. Around 160 of the current Delta inmates have now had their status reviewed; one inmate has been released as a result. This adds to the earlier releases of 146 detainees and the transfer of 56 to custody within their countries of citizenship. Around 540 people remain in detention. The families of a number of these have retained counsel in the US to continue to bring cases against the government. They are running several actions in attempts to

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invalidate the use of the status review tribunals. The claim is that, in addition to not being impartial, the tribunals are also invalid by virtue of the fact that the detainees are not presented with all the evidence the military holds against them. Thus far there have been no conclusive decisions on these matters, although, at the current time and in the absence of any inclination by the Bush Administration to refer back to the Geneva Conventions, the intercession of the US courts is the best chance inmates have of their cases being heard by institutions other than the US military.

The concerns held by the families of detainees that, in the course of detention and interrogation, the military at Gitmo have abused inmates have been supported by a recent publication from Seymour Hersh, the investigative reporter who exposed the Abu Ghraib prison scandal. Hersh presents evidence that, well before Abu Ghraib, a general acceptance of the necessity to engage in ‘extreme interrogation’ in order to gather anti-terrorist intelligence was in place in Gitmo. He argues that among the techniques deemed appropriate were sleep deprivation, exposure to extreme heat and cold, and the placement of inmates in “stress positions” for long periods of time. Hersh’s findings have been confirmed by several of the released detainees. The US Administration refutes all such claims and also rejects Hersh’s broader argument that there was a linkage between Gitmo and Abu Ghraib through, among other things, the fact that in August 2003 the commander of the detention and interrogation facility at Guantanamo Bay, Major-General Geoffrey Millar, presented to the military officials in charge of prisons in Baghdad a report advocating the benefits of extreme interrogation in extracting intelligence. Another recent investigative book argues that the intelligence gathered at Gitmo has been of little or no benefit to the US’ anti-terrorist operations. This too has been denied by the Bush administration. Conclusively rebutting the administration’s denials on these matters is made difficult by the fact that Gitmo’s detainees are regarded as illegal combatants. They are not afforded the protection of the Geneva Conventions,

2 “Since June, a dozen habeas actions filed on behalf of over sixty detainees from around the world-some of whom have been held for almost three years - are now pending before the court [US Federal Court in Washington DC]. The arguments being heard on Wednesday [13 October 2004] concern a series of motions designed to obtain open access to the petitioners and to implement the ruling of the Supreme Court by forcing the government to explain the bases for the detentions fully and publicly.” US Newswire, 12 October 2004.

including regular examination of their detention conditions by outside observers, and are also held to be exempt from the jurisdiction of the US courts (although, as the recent Supreme Court decision highlights, this latter legal construct is under threat).

The dilemma of Gitmo is that in a conflict with such amorphous conceptual and physical boundaries as the War on Terror it is near impossible to ever be sure of innocence and guilt. That the US military are not entirely wrong about the character of the people detained has been, paradoxically, proved by the actions of several of those they have released. One of these, former Taliban fighter Abdullah Mehsud, was freed from Camp Delta in March 2004 and by October was leading a group of militants. This group is now responsible for kidnapping two Chinese engineers and two Pakistanis near the Afghan-Pakistan border and threatening to kill them unless the six fighters holding the prisoners are allowed free access out of the ring of Pakistani security forces surrounding them. It is unclear whether the detention and intelligence system at Gitmo failed in this case, or whether it had the effect of transforming a proto-terrorist into the full-blown article. In a battle fought as much for the moral high-ground as for military supremacy, one thing is clear: when the US administration makes no attempt to resolve the problem of protecting the rights of combatants then it is already losing.

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