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**Regardless of alleged crimes, Hicks deserves basic rights**  
**Professor Don Rothwell**  
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PRESIDENT BUSH made some significant concessions earlier this month regarding the status of Guantanamo Bay detainees. While the United States has in the past only been prepared to apply the minimum standards required under the Geneva Conventions, there is now an acceptance that the rights and privileges guaranteed under the conventions apply.

This opens the door for both the US and Australia in dealing with David Hicks. Ever since his detention in Afghanistan in late 2001, the Australian Government has apparently been indifferent to Hicks's plight. Notwithstanding the initial refusal of the US Government to apply the Geneva Conventions, the conditions under which Guantanamo detainees have been held, and the extraordinary trial procedures under the proposed military commissions, the Australian Government has generally been supportive of the US and even suggested that what was occurring was perfectly legal.

However, the June ruling by the US Supreme Court in Hamden has totally undermined the legality of that approach. The military commissions were adjudged as contrary to both US and international law and the Bush Administration is now scrambling to devise an alternative.

What then are the possible scenarios they may eventuate for Hicks? The first is that a new trial procedure is established, consistent with US and international law, under which new charges are laid and Hicks is eventually convicted. Hicks's US counsel, US Marine Major Michael Mori, seems comfortable with that outcome providing the process permits for a fair trial similar to that provided by a US court martial.

If Hicks was to be convicted, then two outcomes seem certain.

The first is that he would not be subject to the death penalty. The recently arrived US ambassador to Australia, Robert McCallum, made that clear during his first Canberra press conference. The second is that Hicks would be eligible for return to Australia under a prisoner transfer agreement which would allow him to serve part of whatever jail term he faced in Australia.

Of course, the other option is that the revised trial procedure, like the first, runs afoul of the US courts and is struck down. By the time the various appeals were heard and final rulings issued by the US Supreme Court, this could be another few years of Hicks's life spent at Guantanamo.

Even if Hicks were found not guilty of any charges brought against him, this would not automatically result in his release.

No matter what interpretation is placed on the circumstances of his original detention in Afghanistan, the US would seem within its rights to continue to maintain that Hicks is a prisoner of war who can continue to be detained until the end of hostilities.

While that is a position consistent with the Geneva Conventions, and one which has been advanced by Mr McCallum, at present it is difficult to foresee when a formal cessation of hostilities with terrorist forces will occur.

Under this scenario, Hicks could possibly face indefinite detention as a POW.

However, given Hicks's allegiance with the Taliban, the better view is that he would be subject to release upon the cessation of hostilities in Afghanistan.

As recent events have highlighted, there remain ongoing coalition military operations throughout Afghanistan to rid the country of Taliban, Australian forces being actively engaged in that process.

Unless the US was prepared to permit his early release, and there is certainly precedent for this even in POW cases from past conflicts, then Hicks could still be facing more time at Guantanamo.

Of course, some Guantanamo detainees have been released, including many from European countries, and the Australian, Mamdouh Habib.

However, almost without exception, the released detainees had not been charged under the military commission system, were no longer considered useful for intelligence gathering, or were from countries which actively challenged the legitimacy of their detention.

Hicks does not fall within one of these exceptions. With Hicks's de facto POW status now effectively confirmed, there is the potential for Australia to request his transfer back home.

As both a party to the Geneva Conventions and also the Afghan conflict, there is nothing under international law which would bar such a transfer, the effect of which would not be dissimilar to the transfer of civilian prisoners. Ultimately, if the US cannot devise a legitimate trial process for Hicks, his return to Australia as a POW is one option which the Howard Government could legitimately pursue. It would allow it to maintain its tough stance on terrorists, but also acknowledge that in the case of Australian citizens, humanitarian considerations apply which justify their return to Australia.

Such a government position would also address the anomaly which would arise if Australians duly convicted of drug crimes in Indonesia and sentenced to jail terms were able to return to Australia under a prisoner transfer agreement while Hicks, convicted of no crime and perhaps having even been found not guilty of crimes before a US court, continued to be held at Guantanamo.

No matter what David Hicks is alleged to have done, as an Australian citizen he remains entitled to the protection of the law and of the Australian Government.

Donald R. Rothwell is Professor of International Law, at the ANU College of Law.