IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba Respondents.	Civ. Act. No. 1:02-cv-00299-CKK

PETITIONER'S BRIEF SHOWING CAUSE
WHY THIS CASE SHOULD NOT BE HELD IN ABEYANCE

On November 18, 2004, this court ordered the parties to make written submissions explaining why this case should not be held in abeyance pending final resolution of all appeals in *Hamdan v. Rumsfeld*, 04-CV-1519 JR, __ F. Supp. 2d __, 2004 WL 2504508 (D.D.C. Nov. 8, 2004). As explained below, the Court should proceed to adjudicate this case because Respondents have offered no assurance that they will refrain from "trying" Hicks by military commission prior to the resolution by the Court of Mr. Hicks's challenges to the validity of that trial. Only by allowing this case to go forward can the Court ensure that it will have an opportunity to evaluate whether the commission should proceed.

Prior to the *Hamdan* decision, Mr. Hicks's trial before the military commission was scheduled to begin on March 15, 2005. After *Hamdan*, Mr. Hicks moved for an indefinite continuance. That continuance has not been granted. Instead, in a letter to counsel, the Presiding Officer stated: "There are no sessions scheduled in *U.S. v. Hicks* until 15 March 2005. Absent direction from the Appointing Authority and/or a Federal Court change, I will not schedule any proceedings prior to 15 March 2005." Letter from Peter E. Brownback III to Counsel in United States v. Hicks of 11/11/04. However, the Presiding Officer continued: "I have not directed or authorized counsel to cease preparation for trial. I have not cancelled any of the provisions of the discovery order in this case. I do state that, unless there is a change in circumstances, the Commission will not meet to conduct business—including ruling on motions—and there will be no sessions until 15 March 2005." *Id.* Thus, the commission may meet, and Mr. Hicks's trial may well begin, in March 2005. Indeed, it may begin even earlier if ordered by the Appointing Authority or if *Hamdan* is reversed.

There is no assurance that *Hamdan* will be resolved sufficiently in advance of March 15, 2005 to allow this Court time to accommodate the necessary supplementary briefing, to hear oral argument, and to render a decision before Mr. Hicks will be "tried" by the very commission under scrutiny in this case. On the contrary, under the expedited schedule set by the D.C. Circuit, briefing will continue through January 10, 2005. Argument has not been scheduled, and it is unclear how soon after argument a decision will be rendered. In short, it is unlikely that a decision will be rendered before February, if not later. And, of course, whatever the D.C. Circuit does, the losing party is likely to seek *certiorari*. Indeed, Mr. Hamdan has already filed a petition for *certiorari* to the United States Supreme Court which, if granted, would result in extraordinary consideration by the high court that would surely last well past March 15, 2005.

Thus, there will be no final decision in *Hamdan* prior to March 15, 2005, and it is unlikely there will even be a D.C. Circuit decision until shortly before then.

This is critical for two reasons. First, it leaves open the possibility that Respondents may proceed to try Mr. Hicks using procedures already declared illegal in *Hamdan*. They may try him before the D.C. Circuit has rendered its decision, which, of course, would not be possible if this Court continued this proceeding and held the military commissions unlawful. And, if the D.C. Circuit affirms and the government seeks *certiorari*, Respondents may try Mr. Hicks before this Court has time to restart these proceedings and issue a decision declaring the proceedings illegal.

Second, a decision to hold these proceedings in abeyance leaves open the possibility that Respondents may proceed to try Mr. Hicks before a military commission that is illegal for reasons not addressed in *Hamdan*. One potential result of the *Hamdan* appeal is that the D.C. Circuit reverses Judge Robertson's decision that the procedures used in the commissions are unlawful under the Uniform Code of Military Justice and the Geneva Conventions, but agrees with Judge Robertson that courts should not abstain from adjudicating challenges to military commissions prior to commission trials. Under this scenario, this court could—and should—resolve the remaining challenges to the commission process before Mr. Hicks is tried. Yet if this Court holds this case in abeyance pending resolution of *Hamdan*, it may not have that opportunity. Respondents may try Mr. Hicks rapidly after such a D.C. Circuit decision, leaving this Court insufficient time to complete these proceedings and render a decision. That would effectively render the appellate decision against abeyance a nullity.

The remaining challenges to military commissions are serious ones. Mr. Hicks has explained that military commissions do not have jurisdiction to try him because the "offenses"

with which he is charged are not violations of the law of war at all, but rather crimes made up after the fact. He has also explained that the commissions have no jurisdiction because they were not authorized by Congress. He has further shown that the Presidential Order establishing the commissions violates the Equal Protection Clause because the commissions can only be used to try non-citizens, not citizens charged with identical offenses. And he has explained that the procedural defects of the commissions violate not only the UCMJ and Geneva Conventions, as Judge Robertson concluded in *Hamdan*, but also the Due Process Clause.[1] None of these issues was resolved in *Hamdan*.

It is important that this Court resolve these challenges before any commission trial of Mr. Hicks. If Mr. Hicks is required to stand trial, he will be forced to decide whether to testify in his own defense. If he does so and the commissions are subsequently invalidated, the government likely will attempt to use anything he said in the commission proceedings at a subsequent trial (assuming the government attempts to recharge him and try him before a different tribunal such as a court martial or a regular court). In addition, the government will have had the advantage of a dry run that it will be able to use to its advantage in a subsequent trial.

Finally, and most fundamentally, the consequence of abatement may be to delay Mr. Hicks's release. As this Court is well aware, Mr. Hicks is also challenging the government's authority to hold him as an enemy combatant pursuant to the CSRT process. If he prevails on that challenge, the government's sole basis for holding Mr. Hicks will be the charges it has leveled against Mr. Hicks through the commission process. By delaying a determination as to

[1] Hicks has also explained that the government's three-year delay in trying him violates his right to a speedy trial. In *Hamdan*, Judge Robertson addressed this speedy trial challenge, explaining that it could be adjudicated after commission proceedings, a position with which Hicks disagrees.

whether those charges (or the commissions more generally) are unlawful, abeyance would delay issuance of a decision that could result in Mr. Hicks's release.

Nonetheless, Mr. Hicks informed Respondents that he was willing to accede to a stipulation on abeyance in this case if Respondents were willing to agree not to try Mr. Hicks until this Court had time to adjudicate his challenges after resolution of *Hamdan*. The government indicated it could not agree to such a stipulation, however, but that it would agree to a stipulation for abeyance until the end of January or beginning of February with briefing on further abeyance at that time. But Petitioner could not agree to this, as it is extremely unlikely there will be a resolution of *Hamdan* before then. Thus, abeyance until early January or February would leave this Court faced with the same abeyance question it is faced with today but less time to consider Hicks's challenges to the military commissions before any further commission proceedings on March 15.

Given the importance of continued proceedings to Mr. Hicks, and the government's unwillingness to agree to postpone any trial until these proceedings are resolved, this Court should not hold this case in abeyance. While a district court has an inherent power to manage its docket, *see Landis v. American Water Works & Electric Co.*, 299 U.S. 248 (1936), that power should rarely be used to delay consideration of a habeas petition. The very notion of abeyance is in tension with the purpose of the writ itself. For habeas corpus is intended to afford a "'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Fay v. Noia*, 372 U.S. 391, 400 (1963) (quoting *Sec'y of State for Home Affairs v. O'Brien* [1923] A.C. 603, 609 (H.L.)). Indeed, "the function of the Great Writ would be eviscerated" by routine delay, especially where such delay is not voluntary. *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990).

The Ninth Circuit addressed the question of when habeas proceedings may be delayed pending resolution of another case – and when they may not – in *Yong v. INS*, 208 F.3d 1116 (9th Cir. 2000). In that case, a district court judge deferred consideration of a habeas petition pending resolution of an appeal that raised the same legal issues. The circuit court found that "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy." *Id.* at 1120. While it conceded that a short delay might be appropriate when the same court is considering a parallel case (e.g., a panel awaiting an en banc decision of a common question), *id.*, the court held that an indefinite delay "terminat[ing] upon the resolution of the [other case]" amounted to an abuse of discretion. *Id.* at 1119 (internal quotation marks omitted). Other circuits have reached similar conclusions. *See, e.g.*, *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970) (holding that a district court judge was "without authority to defer action in petitioner's habeas corpus case . . . to await a ruling by the Supreme Court"); *cf. Johnson v. Rogers*, 917 F.2d 1283 (10th Cir. 1990) (issuing a writ of mandamus where a district court's backlog had delayed prompt consideration of a habeas petition).

Whether or not this Court has discretion to hold this case in abeyance, it should refrain from exercising that discretion, and should instead allow this case to proceed. Considerations of judicial economy cannot outbalance a person's liberty interests, particularly when their deprivation is as complete as that which may befall Mr. Hicks. Moreover, in addition to prolonging Petitioner's confinement and frustrating the purpose of his petition, a stay "threatens to create the perception that courts are more concerned with efficient trial management than with the vindication of constitutional rights." *Yong*, 208 F.3d at 1120. These costs to the Petitioner and the court outweigh any benefit to be gained through abeyance.

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Respectfully submitted,
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