

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS,

Petitioner,

v.

GEORGE W. BUSH, President of the United
States, *et al.*,

Respondents.

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Civ. Act. No. 1:02-cv-00299-CKK

**REPLY IN SUPPORT OF PETITIONER DAVID M. HICKS'S MOTION FOR LEAVE
TO FILE HIS SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS
AND FOR INJUNCTIVE AND OTHER RELIEF**

Petitioner respectfully submits this Reply in Support of Petitioner David M. Hicks's Motion for Leave to File His Second Amended Petition for Writ of Habeas Corpus and for Injunctive and Other Relief. Respondents stated they have no objection to the filing of a Second Amended Petition by Hicks, but instead they seek to evade their obligation to reply to that petition within the time required by law.¹ Respondents seek to justify their unwillingness to meet this clear obligation by reference to an alternate schedule of proceedings that they themselves have proposed to Senior Judge Joyce Hens Green. Because the underlying rationale for the alternate schedule does not apply to Hicks, and because further delay will substantially prejudice Hicks, Respondents' request to defer a response should be denied.

BACKGROUND

¹ Respondents have made no objection to the submission by Hicks of a Second Amended Petition. *See* Respondents' Resp. to Petitioner's Mot. for Leave to File His Second Am. Petition for Writ of Habeas Corpus and for Injunctive and Other Relief ("Respondents' Resp.") ¶ 1 (9/13/2004).

Hicks has been unlawfully detained at Guantanamo Bay by Respondents for over two and a half years. On August 31, 2004, Hicks requested leave to file a Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory, and Other Relief (“Second Am. Petition”), to which Respondents have now consented. This Court should therefore promptly grant that motion. It should also grant Petitioners’ request that Respondents be required to answer within the time allotted by law.

Petitioner attached to his motion his Second Amended Petition, alleging, *inter alia*: that the military commission before which Hicks’s case is scheduled to be heard is invalid and improperly constituted under the United States Constitution and other provisions of law; that Hicks’s detention violates the United States Constitution, the Geneva Conventions, the Uniform Code of Military Justice, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, various provisions of the United States Code, and other provisions of law; and that the Combatant Status Review Tribunal (“CSRT”) process that has been established contravenes the United States Constitution, recent decisions of the United States Supreme Court, including *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 1233 (2004), and other provisions of law.

Insofar as it alleges illegal conduct by the United States and its officers with respect to a detention at Guantanamo Bay, Hicks’s Petition arguably resembles thirteen other applications for habeas relief pending in this jurisdiction; for that reason, the task of coordinating the proceedings in all fourteen cases has been delegated to Judge Green by the Court’s Calendar and Case Management Committee. However, in critical respects, Hicks’s situation is fundamentally different from the majority of the detainees in the other cases being coordinated by Judge Green. Unlike the other detainees who are being held as enemy combatants subject to assessment before

the Combatant Status Review Tribunals (CSRTs), Hicks has been charged with criminal offenses; criminal proceedings against him are already underway, and a “trial” before a military commission is set to occur in January. Respondents’ blanket proposal covering the scheduling in all of those other cases ignores these fundamental differences, and would result in substantial prejudice to Hicks, who faces the imminent prospect of an unlawful trial.

Judge Green convened all counsel for the parties in all of her Guantanamo Bay cases on August 23 and 27, 2004. In the wake of the latter conference, Respondents proposed to Judge Green a schedule for their return of answers to the petitions in all fourteen cases, including Hicks’s case. *See* Letter from Deputy Ass’t. Att’y. Gen. Thomas R. Lee, 8/31/2004, appended to Respondents’ Resp., *supra* note 1, as Ex. A. By that schedule, Respondents have sought to avoid submitting answers in the cases being coordinated by Judge Green -- including this one -- for another six weeks. *See id.* It is by reference to this, their own proposed schedule, that Respondents now seek to dodge their obligation to return a prompt answer to Hicks’s Petition. But the generic explanations Respondents offer do not apply to Hicks.

ARGUMENT

1. Respondents Have Three Days To Return An Answer To Hicks’s Petition.

In response to applications for writs of habeas corpus under 28 U.S.C. § 2241, an answer “shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.” 28 U.S.C. § 2243.² In the absence of an order from this court recognizing good cause for extending Respondents’ time to respond, Petitioner Hicks is entitled to a prompt answer.

² Although Respondents are correct in noting that the Rules Governing Section 2254 Cases in the United States District Courts “may be applied at the discretion of the United States district court” to cases not arising under § 2254. *Id.*, Rule 1(b), they have presented no legitimate basis for a departure from the applicable rules in this case.

2. Hicks Is In A Fundamentally Different Situation From The Other Detainees Subject to Coordination by Judge Green.

In proposing to Judge Green that all of the Guantanamo cases before her should be subject to the same schedule, Respondents have overlooked the fact that Hicks's situation differs from those of the other detainees in at least two fundamental respects.

First, some pretrial proceedings prejudicial to Hicks already have begun, and other commission actions will likely occur in the coming weeks. Hicks is scheduled to be "tried" before a military commission in January, 2005, which is not true of the other detainees whose habeas petitions are being coordinated by Judge Green. The primary issues in Hicks's habeas petition concern the legality of the commission process. Given the fact that proceedings are already underway, and the January trial date, there is significant urgency with respect to resolution of those issues.³

Moreover, the issues raised here are entirely separate from those concerning the legality of the CSRT procedure. For example, the amended petition explains that the President has no authority to establish military commissions to try crimes committed in Afghanistan. It further explains that even in instances where the President has such authority, commissions are statutorily precluded from trying "crimes" such as those with which Hicks is charged that are not crimes under the laws of war or otherwise authorized by Congress to be tried by military commissions. The government's general defense of the CSRT process has nothing to do with these separation of powers issues.

³ Notably, Respondents do not offer to ameliorate the prejudice to Hicks that will result from further delay of an answer by, for example, agreeing to suspend or stay further commission proceedings while Respondents delay their answer. Accordingly, if Respondents intend to proceed with the commission process against Hicks, they fairly should be required to promptly proceed with the adjudication of the lawfulness of those proceedings.

Second, unlike the CSRT cases, in which the parties are awaiting the government's factual returns, Respondents clearly are already in possession of sufficient information to respond to Hicks's Petition, which they have claimed is not the case with respect to the other detainees whose cases Judge Green is coordinating. In those other cases, Respondents claim to be inhibited in answering detainees' Petitions until the CSRT process has allowed them to gather "the complete factual basis for detention in each of these cases." Respondents' Resp. at 3. As far as Hicks is concerned, on the other hand, the complete factual basis for his detention is clearly already known to Respondents; that purported basis was laid out in the Charge Sheet entered against Hicks by the United States Department of Defense. *See* Second Am. Petition, Ex. 2. Accordingly, the reasons supporting the government's extended alternate schedule before Judge Green simply do not apply in this case. Respondents therefore should be required to answer now. Because of the clear prejudice to Hicks that will flow from proceedings by the unlawful commission, his Petition should proceed to an adjudication on its merits without further delay.

3. To The Extent There May Be Common Issues Among All Of Judge Green's Cases, Responding To Hicks's Petition Now Will Not Undermine Coordination.

It is conceivable that there could be discrete issues common to Hicks's Petition and the petitions presented in the other cases being coordinated by Judge Green. However, a prompt answer by Respondents to Hicks's Petition will hardly "undermine the timely resolution" of any of those cases, as Respondents have suggested. Respondents' Resp. at 3. To the extent the parties or the Court identify common issues appropriate for coordinated action with the other cases, those matters may be referred for consideration where appropriate. In making any such determination, however, this Court should consider the issues as they arise, and not by a blanket

referral of Hicks' undeniably different case. And in so doing, this Court should weigh the possible prejudice to Hicks before ordering coordination that could lead to inordinate delay.⁴

CONCLUSION

For the foregoing reasons, Petitioners' request that Respondents be required to answer in accordance with law should be granted, along with their motion for leave to file their Second Amended Petition.

Dated: September 16, 2004
Washington, D.C.

Respectfully submitted,
DAVID M. HICKS

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⁴ For example, the other cases may be further delayed if briefing related to counsel access in those cases is coordinated; counsel access is not a relevant issue to Hicks, because the terms of his access to counsel have already been finalized.

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