

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DAVID M. HICKS,

Petitioner,

v.

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

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, all sued in their
individual and official capacities.

**PETITIONER'S MOTION TO LIFT THE STAY OF PROCEEDINGS AND
RESUME LITIGATION OF RESPONDENTS' MOTION TO DISMISS AND
PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Petitioner David M. Hicks, by his attorneys, respectfully requests that this Court lift the stay imposed by the Court's orders of December 15, 2004 (Document No. 143), and April 21, 2005 (Document No. 170), and permit proceedings to resume in this Court on his now three-year-old habeas petition. That would include resumption of litigation on pending motions: the Respondents' Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process (Document No. 88) ("Motion to Dismiss") and the Petitioner's Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M.

Hicks's Cross-Motion for Partial Summary Judgment (Document Nos. 102/103) ("Motion for Partial Summary Judgment"). In support of this motion, Petitioner states as follows:

1. Petitioner David M. Hicks is an Australian national who has been unlawfully detained by Respondents at the United States Naval Station, Guantanamo Bay, Cuba ("Guantanamo Bay"), for more than three years. On February 19, 2002, while in the custody of Respondents at Guantanamo Bay, Hicks filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Subsequently, on March 18, 2002, Hicks filed his First Amended Petition (Document No. 25). On September 28, 2004, Hicks filed his Second Amended Petition (Document No. 77).

2. Hicks is one of the hundreds of detainees currently held at Guantanamo Bay as alleged enemy combatants, but one of only four detainees actually charged with certain "offenses" and designated for trial by military commission. The proceedings in this Court currently concern the Respondents' Motion to Dismiss and Hicks's Motion for Partial Summary Judgment addressing his challenge to the legality of the military commission process. Hicks has separately challenged the legality of the Combatant Status Review Tribunal ("CSRT") process that led to his designation as an alleged enemy combatant. On January 31, 2005, with respect to that challenge, Judge Joyce Hens Green concluded "that the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that petitioners are 'enemy combatants' subject to indefinite detention violate the petitioners' rights to due process of law." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 445 (D.D.C. 2005). That order was subsequently certified for appeal pursuant to 28 U.S.C. § 1292(b) and is currently pending before the D.C. Circuit.

3. On October 14, 2004, Respondents filed their Motion to Dismiss with respect to Hicks's challenge to the military commission process. This motion has been fully briefed,

including Hicks's response (Document No. 102/103) and Respondents' reply (Document No. 120).

4. On November 1, 2004, in conjunction with his response to Respondents' Motion to Dismiss, Hicks filed his Motion for Partial Summary Judgment (Document No. 102/103).

5. On November 15, 2004, Respondents filed their Response to Petitioner's Motion for Partial Summary Judgment (Document No. 120) ("Summary Judgment Response").

6. Pursuant to Local Civil Rule 7(d), Hicks is entitled to file, and indeed anticipates filing, a reply memorandum in response to the Respondents' Summary Judgment Response. He has not filed that memorandum because this case has been held in abeyance.

7. On November 18, 2004, this Court entered an Order to Show Cause Regarding Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process (Document No. 123) ("Order to Show Cause"). The Order to Show Cause recognized that certain claims and defenses raised by both parties in relation to the Respondents' Motion to Dismiss were similar to those recently resolved by Judge James Robertson in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), which was then subsequently appealed to the D.C. Circuit. Accordingly, the Order to Show Cause directed the parties in this case to file written submissions on or before November 29, 2004, to show cause why the Motion to Dismiss should not be held in abeyance pending final resolution of all appeals in *Hamdan v. Rumsfeld*.

8. On November 29, 2004, Respondents filed their Response to Order to Show Cause Regarding Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process (Document No. 130), in which they advocated a stay of proceedings in this Court on the ground that any decision by this Court on the military commission issues would need to be reevaluated in light of any subsequent decision by the D.C. Circuit in *Hamdan*, insofar as both cases involved some similar issues regarding the legality of

military commissions. Moreover, the Respondents suggested that, with an expedited briefing schedule in the *Hamdan* appeal, there would remain adequate time for this Court to address any other military commission issues not resolved by *Hamdan* after the D.C. Circuit rendered its decision.

9. On November 29, 2004, Hicks filed his Brief Showing Cause Why This Case Should Not Be Held in Abeyance (Document No. 131). In opposing a stay of proceedings in this Court, Hicks noted that several critical issues raised in this case were not involved in the *Hamdan* decision. Hicks 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, an issue not addressed in *Hamdan*. He added that the Presidential Order establishing the commissions violates the Equal Protection Clause because, pursuant to the Order’s terms, only non-citizens may be tried by military commissions; citizens are required to be tried by a different process, even if the offenses with which they are charged are identical. Finally, he explained that the procedural defects of the commissions violate not only the UCMJ and Geneva Conventions, but also the Due Process Clause. None of these issues was addressed by Judge Robertson in the *Hamdan* case.

10. Moreover, Hicks’s opposition brief anticipated the possibility of the very situation that now presents itself, as Respondents hasten to resume military commission proceedings in the wake of the *Hamdan* decision before this Court has an opportunity to address those issues not involved in *Hamdan* that render the military commission process illegal. In his opposition, Hicks addressed the possibility that eventually unfolded — that the D.C. Circuit might uphold the district court’s determination that courts should not abstain from adjudicating challenges to military commissions prior to commission trials, but reverse the District Court’s decision that the procedures used in the commissions are unlawful under the UCMJ and Geneva Conventions. Hicks noted that,

under this scenario, the Respondents might move to try Hicks rapidly after such a decision, leaving this Court insufficient time to complete these proceedings and resolve the challenges to the military commission process raised by Hicks but not addressed in *Hamdan*, thus effectively rendering the appellate decision against abstention a nullity. That is precisely what Respondents now apparently intend to do.

11. On December 13, 2004, Respondents filed a Notice of Recent Issuances advising the Court that “the Appointing Authority for Military Commissions has issued a formal written directive that any trial in David M. Hicks’ military commission case . . . shall be held in abeyance pending the outcome of the appeal in *Hamdan*.”

12. In light of Respondents’ representation that military commission proceedings would be held in abeyance voluntarily, this Court subsequently stayed proceedings on the Respondents’ Motion to Dismiss and Hicks’s Motion for Partial Summary Judgment in orders dated December 15, 2004, and April 21, 2005 (Documents No. 143 and 170), pending a ruling by the D.C. Circuit in the *Hamdan* appeal.

13. On July 15, 2005, the D.C. Circuit decided *Hamdan v. Rumsfeld*, No. 04-5393, 2005 WL 1653046 (D.C. Cir. July 15, 2005), reversing the District Court’s decision and permitting the military commission in that case to go forward. The D.C. Circuit did not address most of the critical issues on which Hicks’s summary judgment motion were predicated, which were not presented by Judge Robertson’s decision, as explained in paragraph 7 above.

14. In the wake of the *Hamdan* decision, Respondent Rumsfeld has publicly stated that military commission proceedings against two Guantanamo detainees will resume “as soon as possible.” See Neil A. Lewis, *Detainee Trials to Resume Soon, Rumsfeld Says*, N.Y. Times, July 19, 2005, at A14. Other unnamed Pentagon officials have specifically identified Hicks as one of the two

detainees referenced by Rumsfeld, and they have indicated that military commission proceedings may resume as soon as fifty days after the D.C. Circuit's ruling on July 15, 2005. *Id.*

15. Therefore, there is a need for this case to resume immediately. There is certainly no longer an argument that this Court should wait until after completion of commission proceedings. In deciding *Hamdan*, the D.C. Circuit expressly rejected the Respondents' arguments that it should abstain from exercising jurisdiction over Hamdan's habeas petition, finding "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 2005 WL 1653046, at *1-*2. Thus it is clear that Hicks has a right to have his challenges heard now, by this Court, before military commission proceedings resume.

16. In light of the D.C. Circuit's recent ruling in *Hamdan* and in light of Respondents' expressed intention to resume military commission proceedings almost immediately (within 50 days), Hicks respectfully requests that this Court lift the stay with regard to proceedings on Respondents' Motion to Dismiss and Hicks's Motion for Partial Summary Judgment and resume proceedings on these motions with a rapid briefing schedule.

17. Although Hicks would be content to resume the briefing process where it left off at the time when proceedings were originally stayed — by simply filing his reply to the Respondents' Summary Judgment Response — Respondents are likely to want to address the *Hamdan* decision. Hicks therefore proposes that the Court permit the Respondents to submit a short brief addressing the *Hamdan* decision before Hicks submits his Reply to the Respondents' Summary Judgment Response, which will then also be able to address Respondents' position on the effects of *Hamdan*. Hicks believes that this additional briefing should be conducted on a rapid schedule to allow time for this Court to render its decision on the motions pending before resumption of any

military commission proceedings.

18. Accordingly, Hicks proposes the following briefing schedule: The Respondents will file a short brief addressing the impact of the *Hamdan* decision one week after this Court enters an order resuming proceedings in this case. Hicks will file his reply addressing both Respondents' Summary Judgment Response and their brief on the impact of *Hamdan*, one week later.

19. Hicks's counsel has contacted the Respondents' counsel in an effort to obtain consent to this motion to lift the stay and set a briefing schedule. But Respondents stated that they opposed the motion. They seemingly desire to keep the stay of the habeas proceedings in place while they prepare to quickly resume military commission proceedings, obtaining through procedural gamut the abstention to which they are not entitled.

WHEREFORE, Hicks respectfully requests that this Court enter an order lifting the stay imposed by the Court's orders of December 15, 2004 (Document No. 143), and April 21, 2005 (Document No. 170), and permitting proceedings on the Respondents' Motion to Dismiss and the Petitioner's Motion for Partial Summary Judgment to go forward with a rapid briefing schedule.

Dated: July 22, 2005

Respectfully submitted,
David M. Hicks

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BRICE A. GYURISKO, Commander, Joint
Detention Operations Group, Joint Task,
Guantanamo Bay, Cuba

Respondents, all sued in their
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ORDER

Having considered Petitioner's Motion to Lift the Stay of Proceedings and Resume Litigation of Respondents' Motion to Dismiss and Petitioner's Motion for Partial Summary Judgment, it is hereby

ORDERED that Petitioner's Motion is GRANTED. The stay imposed by the Court's orders of December 15, 2004 (Document No. 143), and April 21, 2005 (Document No. 170) shall be lifted. Respondents shall file and serve their brief addressing the impact on this case of the decision in *Hamdan v. Rumsfeld*, No. 04-5393, 2005 WL 1653046 (D.C. Cir. July 15, 2005), one week after entry of this Order. Petitioner shall file and serve his reply addressing the Respondents' Summary

Judgment Response (Document No. 120) and the Respondents' brief on the impact of *Hamdan v. Rumsfeld* one week later.

Dated: _____

COLLEEN KOLLAR-KOTELLY
United States District Judge