

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS,

Petitioner,

v.

GEORGE WALKER BUSH,

President of the United States,

et al.,

Respondents.

Civil Action No. 02-CV-00299 (CKK)

**STATEMENT OF FACTS IN SUPPORT OF RESPONDENTS' RENEWED RESPONSE
AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH
RESPECT TO PETITIONER'S CHALLENGES TO THE MILITARY COMMISSION**

Respondents hereby submit the following statement of facts in support of respondents' Renewed Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Petitioner's Challenges to the Military Commission:¹

1. On September 11, 2001, the al Qaeda terrorist network launched a coordinated attack on the United States, killing approximately 3,000 persons. Congress responded by passing the Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001) ("AUMF").

2. Pursuant to this authorization and his authority under the Constitution, the President, as Commander in Chief, dispatched United States armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the

¹ Respondents' Response and Motion in not made under Fed. R. Civ. P. 56, but pursuant to habeas corpus practice. Accordingly, a statement of material facts pursuant to Local Civil Rule 7(h) is not required. This statement of facts, however, is submitted for the Court's convenience.

course of that campaign the United States and its allies have captured thousands of individuals overseas, many of whom are foreign nationals.

3. Recent headlines make clear that the war against al Qaeda and its supporters continues to rage both in and outside of Afghanistan. See, e.g., Kevin Sullivan, Al Qaeda's No. 2 Blames Blair, Issues Warning, Wa. Post, Aug. 5, 2005, at A1; Daniel Cooney (AP), U.S., Afghan Troops Launch Major Offensive, Wa. Post, Aug. 14, 2005, at A17; Steve Coll and Susan B. Glasser, Terrorists Turn to the Web as a Base of Operations, Wa. Post, Aug. 7, 2005, at A1; Ellen Knickmeyer, 14 Marines Die in Huge Explosion in Western Iraq, Wa. Post, Aug. 4, 2005, at A1; Jonathan S. Landay, A Difficult Road in Afghanistan, Philadelphia Inquirer, Aug. 13, 2005, at A1; Craig S. Smith, The Struggle for Iraq, N.Y. Times, at A7. See also Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law (dkt. no. 82) at 16-17 & nn.17-18.

4. The Military, consistent with settled historical practice in times of war, has determined that many of the individuals captured in the hostilities with al Qaeda and its supporters should be detained during the conflict as enemy combatants. Approximately 500 of the foreign nationals designated for detention as enemy combatants are being held by the U.S. Department of Defense ("DoD") at the United States Naval Base at Guantanamo Bay, Cuba.

5. Petitioner is among those being so detained as enemy combatants. See Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner David M. Hicks (dkt. no. 83).

6. A Combatant Status Review Tribunal of the Department of Defense determined that petitioner is properly classified as an enemy combatant and is a member of or affiliated with

al Qaeda. Id.

7. In November 2001, the President issued an order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (“Military Order”).

8. The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for Military Commissions. See Department of Defense Directive No. 5105.70, Feb. 10, 2004 (available at <http://www.defenselink.mil/news/Apr2004/d20040408dir.pdf>) (hereinafter “DoDD 5105.70”). The Secretary designated John D. Altenburg, Jr., a respondent in this action, to serve as the Appointing Authority.

9. The Appointing Authority has many responsibilities, including the authority to appoint military commissions to try individuals subject to the Military Order. DoDD 5105.70 § 4.

10. Under the authority of the Secretary of Defense, various orders and instructions applicable to military commissions have been issued. See, e.g., Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003) (“MCO No. 1”) (Military Commission Orders are available at: http://www.defenselink.mil/news/Aug2004/commissions_orders.html); Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, 32 C.F.R. §§ 11.6(c)(6); (b)(3), (c)(7); (b)(5) (“MCI No. 2”); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, (“MCI No. 9”) (Military Commission Instructions are available at: http://www.defenselink.mil/news/Aug2004/commissions_instructions.html).

11. The military commissions that the Appointing Authority establishes have jurisdiction over individuals subject to the Military Order who are “[a]lleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.” MCO No. 1 § 9.3(a).

The members of the Review Panel that took office in September 2004 and are responsible for review of records of military commission trials under MCO No. 1 include former Attorney General and U.S. Court of Appeals Judge Griffin Bell, Judge Edward G. Biester, and William T. Coleman, Jr., and Justice Frank Williams. See http://www.defenselink.mil/news/Sep2004/n09222004_2004092207.html.

12. Petitioner was initially captured in Afghanistan in late 2001 by Northern Alliance forces and was subsequently transferred to the control of United States forces. See Second Amended Petition (dkt. no. 77) (“petition”) ¶ 21.

13. Petitioner was transferred to Guantanamo Bay in January 2002. Id. ¶ 22.

14. Pursuant to the Military Order, on July 3, 2003, the President designated petitioner for trial by military commission, upon determining that there was reason to believe that Hicks was a member of al Qaeda or otherwise involved in terrorism against the United States. See Petition ¶ 26 & Ex. 1.

15. On November 28, 2003, the Chief Defense Counsel detailed Major Michael Mori as petitioner’s defense counsel. Id. ¶ 27. Subsequently, Mr. Joshua Dratel joined Major Mori as civilian co-counsel, and Mr. Stephen Kenny of Australia joined the defense team as a foreign attorney consultant. Id.

16. On June 9, 2004, the Appointing Authority approved charges against petitioner,

and the charges were referred to the Military Commission on June 25, 2004. Id. ¶ 29.

17. Petitioner is charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. See Petition Ex. 2 (“Charge”).

18. The conspiracy charge alleges that from January to December, 2001, petitioner “knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with . . . members and associates of the al Qaida organization . . . to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.” Charge ¶ 19.

19. The general allegations in support of the conspiracy charge regarding al Qaeda state that “[b]etween 1989 and 2001, al Qaida established training camps . . . in Afghanistan . . . and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.” Charge ¶ 14. It also alleges that “[i]n February of 1998, Usama Bin Laden . . . and others under the banner of the ‘International Islamic Front for Jihad on the Jews and Crusaders,’ issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military” Id. ¶ 16. It further alleges that “[s]ince 1989, members and associates of al Qaida . . . have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.” Id. ¶ 18.

20. As for Hicks’ role in the conspiracy, the charge alleges that in January, 2001, Hicks traveled to Afghanistan to attend al Qaeda terrorist training camps and participated in

various aspects of al Qaeda training throughout 2001. Id. ¶¶ 20.a-i.

21. The charge further alleges that Hicks, while he was in Pakistan, learned of the attacks of September 11, 2001, and returned to Afghanistan to re-join his al Qaeda associates. Id. ¶ 20.j. The charge concludes by alleging that Hicks, armed with an AK-47, ammunition, and grenades, then participated in al Qaeda operations directed against United States and other Coalition forces. Id. ¶¶ 20.k-m.

22. Hicks is also charged with attempted murder by an unprivileged belligerent. That charge alleges that Hicks attempted to murder by small arms fire and other means “American, British, Canadian, Australian, Afghan, and other Coalition forces while he did not enjoy combatant immunity.” Id. ¶ 21.

23. Hicks is charged with aiding the enemy for his activities in 2001. Id. ¶ 22.

24. The initial hearing in the Commission was held on August 25, 2004. A motions hearing occurred on November 1, 2004, and trial was formally scheduled to commence on January 10, 2005. In those proceedings, petitioner filed eighteen motions and two written objections in the case, presenting many of the same claims found in his petition. Petitioner’s motions included: motions to dismiss for denial of a speedy trial; an equal protection challenge; a jurisdictional venue challenge; failure to allege criminal offenses; and a challenge to the Appointing Authority’s legal authority. Copies of relevant motions are available at www.defenselink.mil/news/Dec2004/commissions_motions_hicks.html.

25. On December 10, 2004, before a ruling on any of the motions and prior to the scheduled trial, the Appointing Authority for Military Commissions issued a formal written directive holding the Hicks military commission trial in abeyance pending the outcome of the

D.C. Circuit appeal in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir.). See Notice of Recent Issuances (dkt. no. 142).

Petitioner's military commission trial remains in abeyance with proceedings contemplated to resume soon, with trial not to begin earlier than the first week of October 2005.

26. On February 19, 2002, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, which he amended on March 18, 2002 (dkt. no. 25), challenging petitioner's detention as an enemy combatant.

27. After remand of the case as a result of the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004), on September 27, 2004, this Court granted petitioner leave to file his Second Amended Petition for Writ of Habeas Corpus and for Injunctive and other Relief (dkt. no. 77), which, contains additional claims challenging the legality of petitioner's upcoming trial by military commission.

28. Separate briefing then occurred on military commission issues and on Hicks' detention as an enemy combatant. With regard to the military commission issues, respondents filed Respondents' Response and Motion to Dismiss or For Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process Contained in Petitioner's Second Amended Petition for Writ of Habeas Corpus Complaint for Injunctive, Declaratory, and Other Relief (dkt. no. 88), petitioner responded with his Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks's Cross-Motion for Partial Summary Judgment (dkt. no. 102), and respondents subsequently filed their Response to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks' Cross-Motion for Partial Summary Judgment (dkt. no. 120). Before a reply was filed by

petitioner, proceedings on the military commission issues were stayed, as described in the text. See Order (dkt. no. 143); Order (dkt. no. 170).

29. The Court stayed proceedings on the military commission issues in light of the Appointing Authority's stay of petitioner's military commission trial pending the appeal in Hamdan. See Order (dkt. no. 143); Order (dkt. no. 170) (noting that although "this case was transferred to Judge Joyce Hens Green for ruling on two earlier motions, the Court specifically declined to transfer the Government's Motion to Dismiss [on military commission issues], and did not subsequently transfer Petitioner's Motion for Partial Summary Judgment."'). Petition ¶ 44.

On August 5, 2005, the Court lifted the stay in this case with respect to military commission issues and established a briefing schedule.

30. Respondents' motion regarding enemy combatant issues was decided by Judge Joyce Hens Green, see In re Guantanamo Bay Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), and the matter is currently on appeal along with Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (Leon, J.) (dismissing challenges by Guantanamo Bay petitioners detained as enemy combatants), with oral argument scheduled for September 8, 2005.

31. In the interim, Judge Green has stayed proceedings related to the enemy combatant issue in the case pending appeal. See Order Granting in Part and Denying in Part Respondents' Motion for Certification of January 31, 2005 Orders and for Stay (dkt. no. 162). On July 15, 2005, the D.C. Circuit decided Hamdan v. Rumsfeld, 2005 WL 1653046 (D.C. Cir.). On August 8, 2005, Hamdan's counsel filed a petition for certiorari with the Supreme Court. See Hamdan v. Rumsfeld, 2005 WL 1653046 (D.C. Cir.), petition for cert. filed, (U.S. Aug. 8, 2005)

(No. 05-184). Hamdan has also filed a motion requesting the D.C. Circuit to stay its mandate in the case. As previously indicated to the Court, respondents intend to go forward with military commission proceedings relative to petitioner Hicks pending the ultimate resolution of Hamdan.

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Respectfully submitted,

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