

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS,)	
Petitioner,)	
)	
v.)	Civil Action No. 02-CV-00299 (CKK)
)	
GEORGE WALKER BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	

**RESPONDENTS' RESPONSE TO PETITIONER'S "NOTICE OF SUPPLEMENTAL
AUTHORITY"**

The Notice of Supplemental Authority of Petitioner David M. Hicks Regarding Respondents Amendments to Military Commission Order No. 1 (dkt. no. 187) ("Pet's Notice") follows the pattern of petitioner's two other post-Hamdan v. Rumsfeld briefs by cloaking attacks on military commission procedures in the language of challenges to the commission's authority to try petitioner. Once again, petitioner mainly challenges how rather than whether he may be tried by a military commission. See Hamdan v. Rumsfeld, 415 F.3d 33, 42 (D.C. Cir. 2005) (holding that an argument about "how the commission may try" petitioner is "by no stretch a jurisdictional argument" and is a proper subject for abstention). Petitioner's technique is made particularly clear in this Notice because the amendments to Military Commission Order No. 1, which concern, inter alia, the roles of the Presiding Officer and other members of the commission and the use of classified information at trial, directly relate to military commission procedures, not the military commission's authority to try petitioner. See Military Commission Order No. 1 (Aug. 31, 2005) ("Revised MCO No. 1") (Military Commission Orders are available at http://www.defenselink.mil/news/Aug2004/commissions_orders.html). Respondents' and

petitioner's previous briefs have already addressed these issues at length.

While petitioner mainly repeats his previous arguments in his Notice, he raises the novel but equally incorrect argument that the amendment to MCO No. 1 adjusting the roles of the Presiding Officer and other members of military commissions, "contravenes the President's Military Order ("PMO")," Pet's Notice at 4, which requires orders and instructions implementing the PMO to provide for, inter alia, "a full and fair trial, with the military commission sitting as the triers of both fact and law." See Detention Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, § 4(c)(2), 66 Fed. Reg. 57,833 (Nov. 13, 2001). Petitioner refers to the PMO, but ignores its meaning. The PMO requires only that "the military commission," as a whole, tries both fact and law. The amended MCO is consistent with the PMO because the Presiding Officer rules "upon all questions of law," Revised MCO No. 1, § 4A(5)(a), and the other members of the Commission determine "the findings [of fact] and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer." Id., § 4A(6). Thus, under the Revised MCO No. 1, the military commission, consistent with the PMO, continues to sit as the triers of both fact and law. Cf. PMO § 4(c)(3) (permitting questions of admission of evidence to be decided by presiding officer or by a majority of the commission).

Additionally, respondents bring to this Court's attention that on September 23, 2005, the Military Commission's Presiding Officer, based upon the duty to provide a full, fair, and expeditious trial, set November 18, 2005, for an initial session to resolve motions and any other

matters deemed appropriate by the Presiding Officer.¹ See U.S. v. Hicks, Docketing of First Session (Sept. 23, 2005) (“Docketing of First Session”) (attached as Exhibit A). A date for trial has still not been set, but would come some time after the November 18, 2005 initial motions hearing.

Dated: September 28, 2005

Respectfully submitted,

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¹ The Presiding Officer took into account defense counsels’ prior commitments, which counsel asserted would affect their ability to adequately prepare for a hearing, in scheduling the initial motion session for November rather than October. Docketing of First Session at 1.

EXHIBIT A

e. Civilian counsel often set their trial and personal calendars in ways not common in military practice, especially in the way they arrange their personal vacation time with judges before whom they regularly appear.

f. No counsel on the case knew when stays might be lifted on this case, and the parties directed to proceed, until 21 September 2005.

g. Starting proceedings on 28 November 2005 as requested by the defense would be an almost impossible task to perform and would unnecessarily delay the proceedings. Thanksgiving comes on 24 November and counsel, support personnel, and others would be likely to encounter insurmountable travel delays. In this regard, I also take note that the normal travel to Guantanamo involves a Saturday flight from NAS Jacksonville. Finally on this point, Thanksgiving is also a traditional American Holiday - said to be the heaviest traveled period of the year - and a 28 November session would prevent many, to include those single military members serving in Cuba needed to support Commission sessions, to enjoy this holiday.

h. While holding the initial session on 17 October might be reasonable to some observers, it might be viewed as unreasonable, and thereby not practical, to others - especially those who appreciate the intricacies and timing of a motions schedule, the need to consider and answer filings of opposing counsel, and the unique nature of many of the issues before the Commission.

i. Modifying the motions schedule in this case to provide more time to prepare and answer filings will enhance the Commission's ability to provide a full and fair trial, and ensure that the issues are properly resolved.

j. The duty to hold a full and fair trial as directed by the President outweighs the other duties imposed upon the Presiding Officer by order and directive.

3. Therefore,

a. The initial session of this case will be held at 1000, 18 November 2005.

b. I will devise, and the Assistant will issue, a revised motions schedule.

IT IS SO ORDERED:

Peter E. Brownback, III
Colonel, JA, USA
Presiding Officer