

**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.

**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
PETITIONER’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Rule 56.1 of the Local Civil Rules of the United States District Court for the District of Columbia, Petitioner David M. Hicks (hereinafter, “Hicks”), by his attorneys, hereby submits his Statement of Undisputed Material Facts in Support of Petitioner’s Cross-Motion for Partial Summary Judgment. In support of his motion, Hicks states as follows:

Current Status

1. The instant action was commenced with Hicks’s petition for writ of habeas corpus on February 19, 2002. (DOCKET # 1.) With leave of the Court, Hicks’ filing of a second amended petition for writ of habeas corpus was granted on September 28, 2004. (DOCKET # 2.)

2. Hicks was born August 7, 1975, in Adelaide, Australia. He is a citizen of Australia. (Second Am. Pet. ¶ 8; Charge Sheet ¶ 1, Second Am. Pet. Ex. 2.)

3. Hicks is currently detained at Guantanamo Bay, Cuba (“Guantanamo Bay”), under the control and custody of the United States military. He was originally taken into the custody of the United States military in or about November 2001. He has remained in United States military custody continuously since that date. (Second Am. Pet. ¶¶ 1, 2; Resp. Br. at 3.)

Hicks’ Capture and Transfer

4. On or about October 7, 2001, the United States commenced air strikes against Taliban and “*al Qaeda*” targets within Afghanistan, and followed these attacks with ground operations on October 19, 2001. The United States was supported by the Northern Alliance, a group of armed and organized Afghan opponents of the Taliban. Also contributing to the campaign against the Taliban were military delegations from other nations (the “Coalition Forces”). (Second Am. Pet. ¶ 19; Resp. Br. at 2-3.)

5. During the campaign, the Northern Alliance took into custody a number of persons allegedly associated with the Taliban and/or al Qaeda. Among those prisoners was Hicks, an Australian national. (Second Am. Pet. ¶ 21; Resp. Br. at 8.)

6. At the time of his apprehension, Hicks was not engaged in combat against the United States or any of its allies. (Second Am. Pet. ¶ 21.)

7. Within ninety days of the commencement of military strikes, the United States, the Northern Alliance, and the Coalition Forces defeated the Taliban and occupied all or parts of Afghanistan. (Second Am. Pet. ¶ 21.)

8. On December 17, 2001, the Northern Alliance transferred custody of Hicks to the United States. (First Am. Pet. ¶ 27.) Hicks was confined for several weeks on U.S. Navy vessels, where he was questioned by military or intelligence personnel. (Second Am. Pet. ¶ 22.)

9. In January 2002, Hicks was transported by U.S. aircraft to Guantanamo Bay. He was placed in a special facility reserved for alien detainees denominated “enemy combatants.” (Second Am. Pet. ¶ 1, 22.)

10. Hicks was subjected to intensive interrogation while at Guantanamo Bay. (Hicks Aff., Hicks Br. Ex. 1; Composite Statement ¶¶ 120, 305, Second Am. Pet. Ex. 3.)

11. Hicks has asserted his status to be that of a prisoner of war, entitling him to determination of his status by a competent tribunal pursuant to Article 5 of the Geneva Convention (III), Article 10 of the Uniform Code of Military Justice (“UCMJ”), and Army Reg. 190-8 § 1-6. (Hicks Aff.)

12. Hicks was not brought before a tribunal to determine his status until September 2004, when a Combatant Status Review Tribunal (CSRT) assessed whether he was an “enemy combatant” but not whether he was a privileged or unprivileged combatant. Hicks was not permitted counsel at the CSRT, and any information he provided to the CSRT could have been used against him in the military commission process. (Second Am. Pet. at 87, 90, 104.)

13. On July 3, 2003, Respondents declared Hicks eligible for “trial” before a military commission on criminal charges punishable by up to life imprisonment. (Second Am. Pet. ¶ 26; Resp. Br. at 8; Mori Aff. Ex. D and E, Second Am. Pet. Ex. 1; Military Commission Order of Referral, Second Am. Pet. Ex. 7.)

The Military Commission Process

14. The military commission in question was established by Presidential Military Order on November 13, 2001 (the “PMO”) and will sit in Guantanamo Bay. (*See* Presidential Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001), Second Am. Pet. Ex. 2.)

15. After issuance of the PMO, the General Counsel of the Department of Defense (“DOD”) established by order the “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.” (*See* Gen. Counsel, Dep’t of Defense, Military Commission Order No. 1 (“MCO No. 1”) (March 21, 2002), Second Am. Pet. Ex. 5.) Further orders established that the Executive Branch would serve as prosecutor, judge, jury and reviewing court. Pursuant to the orders, the Secretary of Defense designates an Appointing Authority, who in turn appoints individuals to serve on the commissions. (*See* MCO No. 1, ¶¶ 2, 4(A)(1)). The Secretary of Defense has chosen Mr. John Altenberg, a civilian as the Appointing Authority. The commission decides questions of both law and fact, although only the presiding officer is required to have legal experience. (PMO § 4(c)(2); MCO No. 1, ¶ 4(A)(3), (4).) A review panel appointed by the Secretary of Defense, and then the Secretary himself or the President, reviews the determinations of the commission. (MCO No. 1, ¶ 6(H)(4).) Only non-citizens are to be tried before the commissions. *See* PMO generally. Conviction by the commission requires only a two-thirds vote. (PMO § (4)(c)(6)-(7).) Moreover, after the Appointing Authority dismissed two members for cause, the commission before which Hicks is to appear now only has three members (thus, requiring only two votes for conviction). (Hicks Br. at 43.)

16. The military commission process established by these orders is biased by its lack of judicial independence. Commission members are chosen by the very same entity that has a strong interest in the result. In addition to selection of commission members (MCO No. 1 § 4(A)(1),

(4)), the Appointing Authority also approves and refers charges to the commission on behalf of the Executive Branch (MCO No. 1 § 6(A)(2)), and approves plea agreements (MCO No. 1 § 6(A)(4)). Significantly, the accused has no peremptory challenges against commission members; commission members, who are appointed for two years, and who can be removed by the Appointing Authority if he has “good cause.” (MCO No. 1 § 4(A)(3)).

17. The lack of judicial independence extends to the review process. There is no process by which the accused can file an appeal to federal court. Instead, the Appointing Authority -- who exercises extensive prosecutorial functions (MCO No. 1 § 6(A)(2), (4)) and is removable at will by the Secretary of Defense (MCO No. 1 § 2) -- will decide all interlocutory issues (MCO No. 1 § 4(A)(5)(d)). The Appointing Authority will also conduct the first review of the decision of the military commission after its conclusion, to insure that its proceedings were “administratively complete.” (MCO No. 1 § 6(H)(3).) The Appointing Authority thus serves as an accuser, investigating officer, appointer of judge/jury, and reviewer of the proceedings.

18. The commission review process after the initial review by the Appointing Authority is also biased. The Defense Department has established a review panel consisting of four members appointed by the Secretary of Defense. Although these members have served in important legal roles, they have not been chosen for their impartiality. Two members who have been appointed to the review panel served as appointees on the very panel that crafted the trial procedures. (Stephen J. Fortunato, Jr., *A Court of Cronies*, IN THESE TIMES (June 28, 2004), *available at* http://www.inthesetimes.com/site/main/article/a_court_of_cronies.) One of the members of the panel has stated in a recent opinion-editorial: “It is clear that the September 11 terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War.” (*Id.*) And a fourth member is a close friend of the Secretary of Defense. (*Id.*) Moreover, while the review panel will issue an

opinion in all cases, only at its discretion will it review written submissions by the defense and hear oral arguments. (MCI No. 9 § 4(C)(4) (Dec. 26, 2003), *available at* <http://www.fas.org/irp/doddir/dod/milcominstno9.pdf>.) And because the review panel must issue its ruling within 30 days of receipt of the case (MCO No. 1 at § 6(H)(4)), defense counsel will have almost no time to prepare an appeal and have it included in the review panel's deliberations. Members of the review panel are appointed for a term not exceeding two years, and can be removed for "good cause." (MCI No. 9 § 4(B)(2).)

21. Final review of the commission decision is by the Secretary of Defense himself, or by the President. (MCO No. 1 § 6(H)(5), (6).) There is no procedure for direct appeal to federal court.

22. The bias of the commission process is illustrated by the fact that the executive branch -- which has defined the crimes under which detainees have been charged, appointed the members of the commission, and will review the judgment of the commission -- has already essentially decided that Hicks is guilty of the purported "offense" of unprivileged belligerency. (Dep't of Defense Order No. 651-04, ¶ a, (July 7, 2004), Second Am. Pet. Ex. 8.)

23. The commission process will include the admission of unsworn testimony and confessions obtained through torture. (MCO No. 1, ¶ 6(D)(1),(3)). The commission is permitted to exclude the accused from proceedings, and evidence may be presented in his absence. (MCO No. 1, ¶ 6(B)(3).)

Representation and Charges

23. For nearly two years after he was first detained -- and for five months after he was designated eligible for "trial" before the commission -- Respondents failed to afford Hicks legal representation. (Second Am. Pet. ¶ 28.)

24. On November 28, 2003, Major Michael D. Mori of the United States Marine Corps was, at last, formally detailed to serve as Hicks's military defense counsel. Subsequently, Joshua L. Dratel, Esq., was approved as Hicks's Civilian Defense Counsel, and Stephen Kenny of Australia was approved as his Foreign Attorney Consultant. (Second Am. Pet. ¶ 27; Mori Aff. ¶¶ 2, 10, Second Am. Pet. Ex. 1.)

25. After Hicks was finally allowed visits by counsel, another six months elapsed before any official account was given for his detainment. On June 10, 2004, Hicks was charged with the following "offenses":

Count One: Conspiracy to commit the following offenses: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism

Count Two: Attempted Murder by an Unprivileged Belligerent

Count Three: Aiding the Enemy

(Second Am. Pet. ¶ 29; Resp. Br. at 9-10; Charge Sheet ¶¶19-22.) Subsequently, Hicks was transferred to Camp Echo, where he was placed in solitary confinement. (Second Am. Pet. ¶ 22.; Composite Statement ¶ 305)

26. These "offenses" charged are not part of the laws of war; they were defined for the first time in an order issued by the Department of Defense on April 30, 2003. (MCO No. 2, ¶ 6, Second Am. Pet. Ex. 11.)

27. Hicks's attorneys were ordered to and did appear before the commission on August 25, 2004 to determine a schedule for further proceedings, and to present the indictment. At that appearance, Hicks pleaded "not guilty" to all charges. (DOCKET # 55.)

28. Hicks's "trial" before the commission was scheduled for January 10, 2005.

(Resp. Br. at 9.)

29. On September 17, 2004, Respondents convened a Combatant Status Review Tribunal ("CSRT") which purported to determine whether Hicks could be held as an enemy combatant. The CSRT did not evaluate whether Hicks was a privileged combatant entitled to prisoner of war status or an unprivileged combatant. Hicks did not participate in the CSRT both because of the inadequacy of CSRT procedures and because he was denied counsel and his uncounseled testimony potentially could have been used against him in the criminal proceedings before the commission. (Hicks Br. at 7; Resp. Br. at 11 n.12.)

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Respectfully submitted,
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