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)

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO "STAY" MILITARY COMMISSION PROCEEDINGS

Respondents hereby oppose petitioner's motion to "stay" military commission proceedings. See Petitioner David M. Hicks's Motion to Stay Military Commission Proceedings (dkt. no. 194) ("Pet's Mot."). While petitioner tries to characterize the relief he seeks as a stay, in reality he asks the Court to enjoin his military commission proceeding. Pet's Mot. at 3. Petitioner fails to meet the standards for this extraordinary remedy, however. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998). Accordingly, the Court should deny petitioner's request to enjoin his military commission.

ARGUMENT

Petitioner's motion should be denied because he fails to satisfy the standards for a preliminary injunction. It is well established that courts should grant preliminary injunctions only sparingly because they are extraordinary forms of judicial relief. See Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969); Moore v. Summers, 113 F. Supp. 2d 5, 17 (D.D.C. 2000). As the Supreme Court has stated, "It frequently is observed that a preliminary injunction is an

extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek, 520 U.S. at 972 (emphasis added) (citation and quotation marks omitted).

In assessing whether to grant preliminary injunctive relief a court must consider four factors: (1) whether the movant is substantially likely to succeed on the merits; (2) whether the movant would suffer irreparable injury if the injunction were not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the public interest would be furthered by the injunction. See Mova Pharm., 140 F.3d at 1066 (citation omitted). These factors "interrelate on a sliding scale and must be balanced against each other." Barton v. Dist. of Columbia, 131 F. Supp. 2d 236, 241 (D.D.C. 2001). Thus, a weak showing on one or more factors requires an especially strong showing on the remaining factors. See id. at 241-42; Sociedad Anonima Vina Santa Rita v. U.S. Dep't of Treasury, 193 F. Supp. 2d 6, 13-14 (D.D.C. 2001). In this case, the preliminary injunction standards have not been met with respect to the extraordinary relief petitioner seeks.

A. An Injunction Would Substantially Injure Respondents and Be Contrary to the Public Interest.

Of primary concern in considering petitioner's request for injunctive relief in the unique context of this case is the inescapable fact that the requested injunction would result in substantial injury to respondents and be contrary to the public interest. See Mova Pharm., 140 F.3d at 1066. Despite petitioner's dismissive reference to an injunction halting petitioner's military commission proceedings "not prejudic[ing] the government," Pet's Mot. at 11, such an injunction would result in substantial harms. Petitioner's requested relief is especially extraordinary and drastic because it is not, as petitioner would have the Court believe, merely

equivalent to the Court staying its own hand in ongoing judicial proceedings; but rather, it seeks to restrain the military from going forward with proceedings meant to address accused violations of the laws of war by an enemy fighter during a time of ongoing military conflict.[1] The requested injunction, therefore, would force upon the Executive further and lengthy delays in carrying out an important aspect of the war effort, one grounded and confirmed in historical and judicial precedent, including the D.C. Circuit's decision in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

Thus, an injunction would also undermine the separation of powers of the three branches of the United States government. As explained at greater length in respondents' briefing on the military commission issues in this case, the President's power to establish and utilize military commissions is long-standing, and both Congress and the Judiciary historically have approved the Executive's use of military commissions during wartime. See, e.g., 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 Process (dkt. no. 174) ("Ren. Resp.") at 20. Additionally, in Hamdan, 415 F.3d 33, the D.C. Circuit confirmed the President's power to establish and utilize military commissions in the current ongoing war against al Qaeda and the Taliban.[2] A decision by the Court to enjoin the military commission from proceeding with

[1] Thus, petitioner's appeals to concepts of mere "judicial economy," Pet's Mot. at 11-12, are inapposite.

[2] Indeed, an injunction against the military commission proceedings here, in effect, would inappropriately fail to pay heed to the decision of this Circuit as established in Hamdan. Hamdan represents the applicable pronouncement of the D.C. Circuit that should be implemented with respect to the question of whether an affirmative injunction against respondents should issue.

petitioner's case would be an intrusion by the Judiciary into the realm of the Executive and would hurt the public interest in the separation of powers. And in doing so, it would further delay and constrain the Executive's ability to carry out a significant aspect of the war against al Qaeda and its supporters.[3]

Furthermore, as a practical matter, the government has devoted an enormous amount of time and resources to preparing for petitioner's military commission motions hearing and trial, much of which would be lost if the Court grants an injunction. A prosecution team has spent months preparing for petitioner's trial, including coordinating with other United States and foreign government personnel and civilian witnesses. In addition, considerable resources have been expended arranging for dozens of witnesses to be present for the military commission. The military commission members and the Appointing Authority and his staff have also been making preparations for the trial. On November 8, 2005, Appointing Authority personnel and the Clerk of Court for Military Commission departed for Guantanamo Bay. Approximately 52 individuals, including Appointing Authority staff, defense counsel, prosecution team, court reporters, the Presiding Officer, and the assistant to the Presiding Officer, are scheduled to depart for Guantanamo Bay on November 15, 2005. Military aircraft has been scheduled for the trip down and back. Currently, approximately 30 members of the press are scheduled to fly down and attend the November 18, 2005 motion session, and much of the related cost is being borne by the

[3] As to petitioner's assertion that the "public has clamored for more scrutiny" of Guantanamo Bay, Pet's Mot. at 12, the government has made extensive efforts to open petitioner's military commission proceedings to journalists, which will provide the public with an unprecedented window into why detainees such as petitioner have been detained and are being tried.

government. Further, security personnel and others at Guantanamo Bay have planned for and are conducting rehearsals to accommodate this hearing.

Additionally, the Department of Defense has charged eight other detainees, five of whom who were charged this week, including other habeas petitioners. See DoD Press release: Military Commission Charges Approved (Nov. 7, 2005) (available at http://www.defenselink.mil/releases/2005/nr20051107-5078.html). An injunction, therefore, would not only disrupt petitioner's military commission proceeding, but could ultimately lead to the disruption of the other commission proceedings.

In these ways, an injunction would be contrary to the strong public interest in petitioner's military commission proceedings going forward and would substantially injure respondents.

B. Petitioner Would Not Suffer Irreparable Injury If an Injunction Is Not Granted.

Petitioner also has not shown that he will suffer irreparable harm if this Court does not enjoin his military commission proceedings. A party seeking preliminary injunctive relief must demonstrate irreparable injury because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm." CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). If the movant does not show irreparable injury, "that alone is sufficient" for a district court to deny preliminary injunctive relief. Id. Further, in this Circuit, injury is irreparable only if it is "both certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). This requires that the alleged harm "be actual and not theoretical" and "'of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'" Id. at 674 (quoting Ashland Oil,

Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)) (emphasis in original).

Here, petitioner first argues that the Court should proceed to a decision on issues in this case not involving those specifically addressed in Hamdan and further claims he will suffer harm if the military commission goes forward prior to the Court's decision on such matters. See Pet's Mot. at 3. With respect to such claims, however, petitioner cannot show irreparable harm.

Implicit in the principles of Wisconsin Gas is the requirement that the movant substantiate any claim that irreparable injury is "likely" to occur. 758 F.2d at 674. Bare allegations of what is likely to occur are of no value since the Court must decide "whether the harm will in fact occur." Id. (emphasis in original). The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Id.

With respect to his post-Hamdan arguments against the military commission, petitioner is unable to prove either that harm has occurred in the past or is certain to occur in the near future. As respondents have explained at greater length in their two post-Hamdan briefs, each of petitioner's arguments concerns not whether petitioner may be properly tried by military commission but, rather, the procedures involved in such a trial. As such, under Hamdan, these claims are properly subject to abstention. See Hamdan, 415 F.3d at 36-37. Petitioner makes no allegation that the military commission has made biased rulings against him in the past, and he only offers speculative allegations of harm that might occur in the future. Pet's Mot. at 7-9. Among other things, petitioner's allegations are based merely on conjecture as to potential

evidentiary, merits, or other rulings by the military commission. Further, each of petitioner's claims is baseless on the merits.

In addition, while petitioner also continues to press challenges that were at issue in Hamdan, his arguments as to irreparable harm with respect to such claims are primarily theoretical in nature, as opposed to practical or certain. While the conceptual harm of being subject to a military commission proceeding when the commission, in petitioner's view, lacks jurisdiction may support an argument against court abstention on the jurisdictional issues, the calculus for irreparable harm justifying a court affirmatively enjoining military commission proceedings in the face of a D.C. Circuit decision authorizing such proceedings, should be more practical in nature. Here, petitioner's arguments as to practical harms do not warrant a conclusion that petitioner will suffer great, if any, irreparable harm if his military commission proceedings move forward. Petitioner's arguments that a military commission trial would give the prosecution a "free look" at his defense and that a conviction would hurt his reputation, Pet's Mot. at 9, fail to consider that the commission might acquit him or resolve some of his claims in his favor, and it also discounts petitioner's prior protestations of delay in the start of military commission proceedings. See Revised Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks's Cross-Motion for Partial Summary Judgment at 70-76 (dkt. no. 178); Petitioner David M. Hicks's Opposition to Respondents' Motion to Dismiss and Reply Brief in Support of His Motion for Partial Summary Judgment at 44-46 (dkt. no. 183). And, as discussed above, petitioner's assertions as to partiality within the commission process, Pet's Mot. at 8-9, are simply premature.

In these ways, petitioner has not demonstrated that he would suffer irreparable injury if an injunction is not granted.

C. Petitioner is Not Substantially Likely to Succeed on the Merits.

Because the public interest and substantial injury factors tip decidedly in respondents' favor and because petitioner's showing with respect to irreparable harm is decidedly thin, petitioner bears the burden of demonstrating a very strong likelihood of success on the merits of his claims. See Barton, 131 F. Supp. 2d at 241-42. Indeed, "[i]t is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits." Id. at 242 (citing Benten v. Kessler, 505 U.S. 1084, 1085 (1992)) (emphasis added).

Petitioner has failed to meet this burden. For all of the reasons explained in 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 Process (dkt. no. 174), and Respondents' Opposition to Petitioner's Revised Brief in Support of Petitioner's Cross-Motion for Partial Summary Judgment (dkt. no. 180) ("Resp. Opp."), as well as those set forth in the D.C. Circuit's decision in Hamdan, respondents, rather than petitioner, are likely to prevail on the challenges to the military commissions. See Pet's Mot. at 5.

Further, contrary to petitioner's assertions, the Supreme Court's decision to grant certiorari in Hamdan does not mean that petitioner in this case automatically enjoys a sufficient likelihood of success to overcome his weak showing on the other factors to justify a preliminary injunction. The Supreme Court's granting of certiorari signifies that at least four justices voted to grant certiorari. But as Justice Rehnquist said for the Court in Ross v. Moffitt, 417 U.S. 600, 616-17 (1974), "[t]his Court's review . . . is discretionary and depends on numerous factors other

than the perceived correctness of the judgment we are asked to review." For example, certiorari may be granted because of, inter alia, the importance or uniqueness of the constitutional, factual, federal jurisdictional, or procedural issues in a case or other factors. See Robert L. Stern, et al., SUPREME COURT PRACTICE 243-255 (8th ed. 2002).

Thus, while four Justices vote for certiorari, there are any number of ways the case could be resolved by the Supreme Court. For example, even those Justices voting for certiorari can ultimately end up voting to affirm a case, or a decision could issue on narrow grounds, such as abstention, that would not permit petitioner in this case to prevail. Accordingly, the Supreme Court's decision to grant certiorari in Hamdan does not lead to an inevitable conclusion that petitioner in the instant case has the necessary likelihood of success to warrant a preliminary injunction, especially in light of the other factors involved in justifying such an injunction.

CONCLUSION

For the reasons stated above, petitioner's request for an injunction halting the Executive from going forward with proceedings meant to address accused violations of the laws of war by an enemy fighter during a time of ongoing military conflict – proceedings supported by historical and judicial precedent and congressional approval, as well as the D.C. Circuit's decision in Hamdan – should be denied.

Dated: November 10, 2005

Respectfully submitted,

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