IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW
[Assigned to Panel 2]

DAVID M. HICKS,	)	CMCR Case No. 13-004
	)	
Appellant,	)	Tried at Guantánamo Bay, Cuba,
v.	)	on 26 & 30 March 2007, before a
	)	Military Commission convened by
UNITED STATES OF AMERICA,	)	Hon. Susan J. Crawford
	)	
Appellee.	)	Presiding Military Judge
	)	Colonel Ralph H. Kohlmann, USMC

TO THE HONORABLE, THE JUDGES OF
THE COURT OF MILITARY COMMISSION REVIEW

OPPOSITION TO THE GOVERNMENT'S MOTION TO STAY
OR IN THE ALTERNATIVE TO MODIFY THE BRIEFING SCHEDULE

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David Hicks, by and through his undersigned counsel, respectfully submits this opposition to the government's motion to stay or, in the alternative, to modify the briefing schedule entered by the Court on November 6, 2013. The motion should be denied.

PRELIMINARY STATEMENT

This is not a complicated appeal. David Hicks pled guilty before a military commission to a single charge of providing material support for terrorism and his sentence has not expired. Although Mr. Hicks signed a waiver form at the time of his sentencing, he did not file a waiver of his appellate rights "within 10 days after" the Convening Authority's action on his sentence – a statutory requirement necessary to divest this Court of appellate jurisdiction under the Military Commissions Act, 10 U.S.C. § 950c(b)(3) – a dispositive fact the government does not dispute. The expiration of the 10-day period following the Convening Authority's action triggered this Court's automatic, mandatory review of Mr. Hicks's conviction. 10 U.S.C. §§ 950c(a), 950f(c).

The D.C. Circuit subsequently held in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*"), that material support is not, and was not at the time of Mr. Hicks's alleged offense, an international war crime. The mandate has issued and the government did not seek Supreme Court review. *Hamdan II* is final and binds this Court. As the government conceded, *Hamdan II* "eliminates military commission jurisdiction over . . . material support charges brought in all of the military commission cases to date that have resulted in convictions." Pet'n of the United States for Reh'g En Banc at 2, 14, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Mar. 5, 2013). There is nothing left for this Court to do but vacate Mr. Hicks's conviction. A summary disposition is appropriate because the merits of the case are clear and no benefit will be gained from further briefing and argument of the issues presented.

The government has not challenged this Court's jurisdiction to vacate Mr. Hicks's conviction based on *Hamdan II*, and plainly cannot because it is undisputed that Mr. Hicks did not waive his appellate rights as prescribed by 10 U.S.C. § 950c(b)(3). But even if this Court were to disregard the statutory requirements and conclude *sua sponte* that Mr. Hicks had validly waived his appeal rights, it would still be required to review Mr. Hicks's conviction because he contends that his guilty plea proceedings – including his pretrial agreement and purported waiver – were not knowing and voluntary, and are therefore void. Again, the government has not challenged this Court's jurisdiction to review the merits of this issue regardless of any waiver.

Accordingly, on November 6, 2013, the Court entered an order setting an expedited briefing schedule for the appeal. The order directs the government to "address the Court's authority to consider this appeal" and whatever else it deems pertinent. The government's brief is due December 5, 2013, and Mr. Hicks has five days to reply. The government did not object to the briefing schedule, and indeed moved to extend the time for its response to Mr. Hicks's motion to attach so that it would be filed concurrently with its merits brief on December 5th.

Now, nearly three weeks later, the government moves to stay this case indefinitely or modify the current briefing schedule based on a briefing order entered by a different panel in a different case, *Omar Khadr v. United States*, CMCR Case No. 13-005. The government's motion is a transparent attempt to obfuscate and delay for as long as possible this Court's inevitable order vacating Mr. Hicks's conviction. It should be denied for several reasons.

ARGUMENT

I. EVEN IF THE COURT HAS JURISDICTION TO STAY THIS CASE, THE GOVERNMENT HAS FAILED TO ADDRESS, LET ALONE SATISFY, THE REQUIREMENTS FOR A STAY, AND A STAY WOULD SERVE NO PURPOSE OTHER THAN UNNECESSARY, HARMFUL DELAY

The government asks the Court to stay this case "until the mandate issues in *Bahlul v. United States*, No. 11-1324 (D.C. Cir., argued Sept. 30, 2013), because resolution of the issues raised in that case will significantly affect – and will likely be determinative of – the issues Hicks raises in this case." Gvt. Mot. for Stay at 1. The government asserts that the issue of whether material support is an offense triable by military commission is "currently pending *en banc* review in *Bahlul* . . . and the United States has challenged the *Hamdan II* panel's reasoning, on which Hicks now relies." *Id.* at 3. Thus, the government argues, "[b]ecause the resolution of this issue in *Bahlul* will surely affect the issues Hicks raises here, and will require another round of briefing once the mandate issues in *Bahlul*, the Court should decline to hazard a guess about the outcome of *Bahlul* and should instead stay this appeal until the mandate issues in that case." *Id.* at 6. These claims are meritless.

As an initial matter, the government cites no statute, rule or other authority granting this Court subject-matter jurisdiction to delay compliance with binding precedent and to enter an order staying a military commission appeal pending further review in an unrelated case. Although Article III courts have authority to enter orders preserving existing conditions while a higher court rules on jurisdictional questions, that authority derives from the inherent power of the federal courts enshrined in Article III of the Constitution, *i.e.*, the power to say what the law is and to issue remedial orders based on "the necessity of the case," and from the All Writs Act, 28 U.S.C. § 1651(a). *See United States v. United Mine Workers*, 330 U.S. 258, 291 (1947); *In re President and Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000, 1005 (D.C. Cir. 1964); *Belbacha*

v. Bush, 520 F.3d 452, 456 (D.C. Cir. 2008). This Court's limited jurisdiction, however, derives not from the Constitution but from the Military Commissions Act, which says nothing about the power to issue indefinite stay orders. This Court has also notably so far declined to rule on whether it has jurisdiction to enter remedial orders pursuant to the All Writs Act. *See*, *e.g.*, Order, *ACLU v. United States*, CMCR Case No. 13-003 (Mar. 27, 2013). The Court should deny the government's stay request on that basis alone and avoid wading unnecessarily into possible jurisdictional issues not essential to the resolution of this appeal.

The stay should also be denied because the government does not address, let alone satisfy, the high standard for an indefinite stay. In deciding whether to grant a stay pending resolution of an appeal in another case, a court "must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (vacating stay orders). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255; *see Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971) (holding stay order exceeded court's authority) ("Any protracted halting or limitation of plaintiffs' right to maintain their case would require not only a showing of 'need' in terms of protecting the other litigation involved but would also require a balanced finding that such need overrides the injury to the parties being stayed. This consideration is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights."); *see also Belize Soc. Dev. v. Gov't of Belize*, 668 F.3d 724, 732-33 (D.C. Cir. 2012) (district court abused

discretion by staying case pending resolution of foreign case because concerns over judicial economy did not override the "sufficient damage" that would be caused by an undue delay).

Here, the government makes no claim that it would suffer "hardship or inequity" in being required to proceed with this appeal, or that this is one of the "rare circumstances" in which a stay pending review in another case is justified by some urgent need that overrides the "fair possibility" of harm to Mr. Hicks. Indeed, the government overlooks entirely the fact that although Mr. Hicks is no longer detained, his sentence has not expired and he continues to suffer other burdens and disabilities of his conviction, including being labeled a terrorist supporter and war criminal based on his conviction for an offense that was, in fact, not a war crime at the time of his alleged conduct.[1] Given the obvious harm to Mr. Hicks and the absence of any "pressing need" identified by the government, it would be an abuse of discretion for this Court to grant an indefinite stay pending final resolution of *Bahlul*. *See Landis*, 299 U.S. at 255-56 (abuse of discretion to grant indefinite stay absent showing of pressing need); *cf.* CMCR Rule 21(d) (extensions shall not exceed 30 days and must be supported by a "particularized showing of necessity").

The two cases cited by the government in support of a stay pending *en banc* review in *Bahlul* do not require a contrary result. *See* Gvt. Mot. for Stay at 6-7. *In re Smith*, 142 F.3d 832, 834 (5th Cir. 1998), involving an application to the 5th Circuit for permission to file a successive habeas corpus petition, notes in passing that the application was stayed by that court pending its *en banc* review in another case. But the opinion offers no explanation as to whether the stay was voluntary, or, if it was contested, under what circumstances or conditions it was imposed.

[1] *See*, *e.g.*, Farah Farouque & Daniel Flitton, *Breaking Hicks*, The Sydney Morning Herald, Aug. 5, 2011 ("Court froze profits from [Mr. Hicks's] published memoir . . . The very legitimacy of Hicks's conviction by a US military commission will be tested by the case . . . Under the law, a person cannot profit from their literary proceeds arising from a foreign indictable offence.").

Al-Adahi v. Obama, 672 F. Supp. 2d 81 (D.D.C. 2009), simply did not involve a stay pending *en banc* review in another case. Rather, it involved a district court's stay of its own order granting a Guantánamo detainee's habeas petition pending the government's direct appeal to the D.C. Circuit. In granting the stay, the district court applied the ordinary standard for a stay pending appeal and considered whether the government had shown: (1) a likelihood of success on the merits of the appeal; (2) that it would suffer irreparable injury if the stay were denied; (3) that issuance of the stay would not cause substantial harm to other party; and (4) that the public interest would be served by issuance of the stay. *Id.* at 83 (citing cases). The district court weighed these factors and concluded that a stay was warranted. Here, by contrast, the government has not addressed let alone attempted to satisfy any of the relevant factors.

Nor could the government satisfy the requirements for an indefinite stay in this case because each of the relevant factors militates against further delay. In contrast to the actual, palpable harm that Mr. Hicks has suffered and continues to suffer from his material support conviction, the government cannot show that it would suffer any hardship, inequity or irreparable injury absent a stay. Notwithstanding the government's argument to the contrary, whatever the *en banc* decision in *Bahlul* may conclude, it will not fully or substantially resolve the issues in this appeal. Even in the unlikely event that *Bahlul* were to call into question the reasoning of *Hamdan II* and restore material support for terrorism as an offense triable by military commission prior to 2006, this Court would still be required to resolve Mr. Hicks's argument that his conviction should be vacated because his guilty plea was unknowing and involuntary. That issue is not raised in *Bahlul* and will have to be resolved by this Court regardless of what happens in *Bahlul*.

As set forth in Mr. Hicks's opening brief, if this Court enters a summary order vacating his material support conviction the government may seek whatever further review it deems appropriate. If the D.C. Circuit issues an *en banc* decision in *Bahlul* that is favorable to the government, it may raise that issue on further review. But there is nothing rare or exceptional about this appeal that would warrant an indefinite stay outside the ordinary appeals process.

An indefinite stay would also be contrary to the well-settled principle that criminal appeals are ill-suited to delay and must be disposed of expeditiously. *See, e.g.*, *Corey v. United States*, 375 U.S. 169, 172 (1963) (noting "[t]he dominant philosophy embodied in [the rules governing criminal appeals] reflects . . . concerns that criminal appeals be disposed of as expeditiously as the fair and orderly administration of justice may permit"); *Abney v. United States*, 431 U.S. 651, 657 (1977) (noting that requirement of finality for appellate jurisdiction "has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law'"); *DiBella v. United States*, 369 U.S. 121, 124 (1962) (explaining importance of an expeditious criminal proceeding and noting that "undue litigiousness and leaden-footed administration of justice" is "particularly damaging to the conduct of criminal cases").

An indefinite stay would be particularly inappropriate here because *Hamdan II* is now final and binding on this Court, and, as the government itself has conceded, squarely eliminates military commission jurisdiction over the single material support charge at issue in this appeal. *See* Pet'n of the United States for Reh'g En Banc at 2, 14, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Mar. 5, 2013). Indeed, although the government expounds at length about the prior proceedings in *Hamdan II* and the ongoing *en banc* proceedings in *Bahlul*, *see* Gvt. Mot.

for Stay at 4-6, and goes to great lengths to try to distinguish the facts of the three cases cited in Mr. Hicks's appeal brief in support of his request for a summary order vacating his conviction, *see id.* at 8-10, it does not dispute the well-settled principle that *Hamdan II* remains the law of the D.C. Circuit, which binds this Court. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (that court is bound to follow circuit precedent until it is overruled "is fixed law") (quoting *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005)); *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[Lower courts] are obligated to follow controlling circuit precedent until either we, sitting en banc, or the Supreme Court, overrule it. . . . That a [lower court] judge disagrees with circuit precedent does not relieve him of this obligation."). Nor does the government dispute that summary disposition is particularly appropriate to address legal issues and enforce compliance with the decision of a higher court. *See Vietnam Veterans against War/Winter Soldier Org. v. Morton*, 506 F.2d 53, 56 & n.7 (D.C. Cir. 1974).

II. THERE IS NO NEED TO APPLY THE BIFURCATED BRIEFING ORDER ENTERED IN THE LATER-FILED *KHADR* CASE, WHICH WOULD ONLY RESULT IN UNNECESSARY DELAY

As an alternative to its stay request, the government asks the Court to adopt the briefing schedule entered in *Omar Khadr v. United States*, CMCR Case No. 13-005, "so that the United States can coordinate its responses in both cases, and so that threshold jurisdictional issues can be raised and resolved." Gvt. Mot. for Stay at 11. The government's request should be rejected.

The government's desire to coordinate its litigation positions in this case and the *Khadr* case is not an appropriate issue for the Court to consider or address. The *Hicks* and *Khadr* cases involve different factual and legal issues, are assigned to different panels of this Court, and are not consolidated or coordinated in any fashion. If the government wants to coordinate its responses to this case and the *Khadr* case for its own internal, interagency purposes, it can and

should do so based on the briefing order entered by the Court in this case nearly three weeks ago. This is the earlier-filed case, and the government did not object to proceeding on the current briefing schedule until the *Khadr* order was issued well after-the-fact. Moreover, if the government needs more time to determine whether or on what basis to respond to Mr. Hicks's appeal, it should simply ask for an extension of time to file its brief rather than seek to adopt an order entered by another panel in an unrelated, later-filed case.

Applying the *Khadr* scheduling order would also serve no purpose in this case – except inordinate, unnecessary delay, which, as noted above, appears to be the government's strategy. The *Khadr* order directs the parties to file briefs addressing only the Court's authority to hear that appeal. But as noted at the outset, this is not a complicated case and none of the possible issues to be addressed warrants bifurcated briefing. Although the government repeatedly cites unspecified "threshold jurisdictional issues" in its motion, it has not raised any jurisdictional impediments to this Court's review of the merits of Mr. Hicks's appeal. Nor could it based on the undisputed facts as stated above. Even if there were such issues, this Court's November 6, 2013 briefing order appropriately instructs the government to address those issues in the ordinary course of litigating this appeal. Nothing more is necessary or required.[2]

[2] It is entirely possible that the *Khadr* panel concluded that bifurcated briefing was appropriate based on the facts and circumstances of that particular case. For example, *Khadr* involves new challenges to several purported war crimes other than material support for terrorism, which will undoubtedly result in substantial litigation over the next several years. The *Khadr* pretrial agreement and waiver form are also different from those in this case. To the extent those factors may have had some bearing on the *Khadr* panel's briefing order, they are irrelevant here. In any event, piecemeal appeals should always be avoided. *See, e.g., United States v. MacDonald*, 435 U.S. 850, 853 (1978) (Court has repeatedly "reiterated that interlocutory or 'piecemeal' appeals are disfavored"); *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (strong presumption against piecemeal appellate litigation "is especially so in criminal cases where encouragement of delay is fatal to the vindication of the criminal law") (internal quotation marks omitted); *United States v. Niles*, 52 M.J. 716, 721 (A. Ct. Crim. App. 2000) ("[P]iecemeal litigation . . . is contrary to orderly appellate practice.").

CONCLUSION

For all of the foregoing reasons, the Court should deny the government's motion and issue a summary order vacating Mr. Hicks's conviction.

Dated: November 26, 2013
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to counsel for Appellee, including BG Mark S. Martins, USA, and CAPT Edward S. White, JAGC, USN, at the Office of the Chief Prosecutor, on the 26th day of November 2013.

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