

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

**RULING ON MOTION
TO COMPEL ACCESS
TO HIGH VALUE DETAINEES
D 011**

13 February 2008

The Defense has moved this Commission to compel access to certain detainees whom it believes will offer evidence favorable to the accused. He is charged with Conspiracy, and his alleged co-conspirators are the very leaders of al-Qaeda, including Usama bin Laden and Ayman al-Zawahiri. The witnesses to whom the accused seeks access are themselves highly-placed members of al-Qaeda, and the Defense believes they may testify that the accused was not a member of the al-Qaeda inner circle, that he did not conspire to plan, or have foreknowledge of, any al-Qaeda attacks, but was merely a driver in the motor pool. The Government argues that the Defense has not shown the relevance and necessity of access to these detainees, points out that they are "high-value" detainees subject to the greatest security considerations, and argues that they may reveal or disclose various types of sensitive information if allowed to speak to the Defense. In addition, the Government argues that there are other, "low-value" detainees in the Camps who can provide the accused with comparably exculpatory evidence. The Commission heard oral argument at Guantanamo Bay, Cuba on 7 February 2008.

There are seven witnesses at issue. In an effort to proffer to the Commission the substance of the testimony they will give, Detailed Defense Counsel traveled to Yemen and interviewed Mr. Nasser al-Bahri, a former deputy chief of security for al-Qaeda from 1996 until 2000. Based on this interview, LCDR Mizer submitted an affidavit that contains a summary of Mr. al-Bahri's testimony regarding his own involvement with al-Qaeda, what he knows regarding the other witnesses at issue, and what he believes they would say if called on behalf of the accused.

According to LCDR Mizer's Affidavit, Mr. al-Bahri was familiar with bin-Laden's activities, and with the personnel in his inner circle who helped plan and carry out those activities. Mr. al-Bahri would testify that the planning of terrorist, or "outside" activities was a closely guarded process, and that a very limited number of key personnel were invited to participate in those activities. Even senior al-Qaeda leaders would only have known generally that an attack on the United States was planned, but would not have been informed of details until just before the attack happened. Based on this interview with Mr. al-Bahri, and presumably on comments of the accused himself and other evidence available to the Defense, the following proffers of expected testimony have been submitted by the Defense:

1. Khalid Shayk Muhammad

Khalid Shayk Mohammed was a member of al-Qaeda's military counsel and was involved in "outside" activities, which is understood to mean terrorist attacks against the West. Mr. Mohammed and his family lived in the same neighborhood in Kandahar as Mr. Hamdan and

his family, and Mr. Mohammed knew Mr. Hamdan. As one of six drivers in a motor pool, however, Mr. Hamdan was not involved in outside activities and was not a participant in terrorist activities. In contrast, as the mastermind of the September 11 attacks, Mr. Mohammed is one of only two individuals in US custody who knew the details of those attacks in advance, and is only one of several individuals in the world still alive who was specifically involved in the detailed planning and execution of the attacks. Based on his contact with Mr. Hamdan, Mr. Mohammed is expected to testify that Mr. Hamdan was only a member of bin Laden's motor pool, was not involved in "outside" activities, did not have advance knowledge of the September 11 attacks, much less specific intent to conspire with the perpetrators or materially support their efforts, and that he did not participate in any way in the planning or execution of such attacks.

2. Ramzi bin al-Shib

Ramzi bin al Shib Mohammed was the communications link between Khalid Sheik Mohammed and the military committee in Afghanistan including those who would execute the attacks of September 11, 2001. He knows the details of the plot and the identities of those involved. He can substantiate Hamdan's claim of simply being one of six drivers in the motor pool, who had not have prior knowledge of the attacks.

3. Abu Faraj al-Libi

Abu Faraj al-Libi was in charge of the al-Qaeda training camps in Afghanistan. He can substantiate that attendance at one of these camps did not automatically make one a member of al-Qaeda. He was responsible for the conventional weapons training for the Ansars, the Arab fighters in Afghanistan, and would know if Hamdan was involved in the transportation of Taliban weapons to the Ansars on the frontlines.

4. Abdul-Rahim al-Sharqawi

Mr. Sharqawi facilitated travel arrangements for al-Qaeda fighters into Afghanistan, and did not facilitate travel for Mr. Hamdan. The Defense "believes" that Mr. Shawqawi can testify that the accused was merely a driver, and not a member of al Qaeda. He spent most of his time in Afghanistan working on cars.

5. Walid bin Attash

Walid bin Attash was very close with Usama bin Laden and always accompanied him when the two men were in Kandahar. He also frequently interacted with Hamdan. He can verify that Hamdan was a member of the motor pool and that he was uninvolved in terrorist activities.

6. Abdul Rahim al-Nashri

Abdul Raham al-Nashri was the principal planner of the attacks on the USS COLE and the French supertanker, Limberg. He is the only person in U.S. custody who knows the details of those attacks and the identities of those involved. He has known Mr. Hamdan since 1996, when he traveled with Mr. Hamdan and Mr. al-Bahri to the border between Afghanistan and

Tajikistan. Like Walid bin Attash, Abdul Rahim al-Nashri was very close with Usama bin Laden and he would have frequently interacted with Mr. Hamdan as a driver in the motor pool. He was in a position to observe Mr. Hamdan's relationship to al-Qaeda and Usama bin Laden. He will state that Mr. Hamdan was a member of the motor pool only and that he was not involved in terrorist activities.

7. Abdul Hadi al-Iraqi

Abdul Hadi al-Iraqi was the commander of the Arab ground forces, or Ansars, in Afghanistan. He reported to a Taliban general who exercised command and control over the Ansars. While his unit was supplied with weaponry from Taliban armories, drivers from the al-Qaeda affiliated motor pool were often used to transport Taliban weapons to the Ansars at the front. He is aware of the identity of the drivers from the motor pool who delivered weapons to the lawful enemy combatants under his command. As commander of the Ansars, he would know when weapons shipments were arriving and the identities of the drivers delivering them. He may have been in command of the Ansars at the battle of Kandahar in November 2001, and, if he were in command of the Ansars there, he would know if Mr. Hamdan was delivering a weapons shipment to the lawful enemy combatants under his command on November 24, 2001.

8. Mustafa Ahmed al-Hawsawi

Mustafa Ahmed al-Hawsawi was involved in the funding of the September 11 attacks. He spent much time in Kandahar, and would have interacted with Mr. Hamdan as a driver. He will state that Mr. Hamdan was a member of the motor pool and that he was not involved in terrorist activities. He will state that Mr. Hamdan was not involved in the terrorist attacks on the United States that occurred on September 11, 2001.

THE LAW

An accused being tried before a military commission shall have an "adequate opportunity to prepare [his] case and no party may unreasonably impede the access of another party to a witness or evidence." R.M.C. 701(j). The Military Judge is expressly authorized to regulate the time, place, and manner of discovery, including the prescription of "such terms and conditions as are just," including the issuance of protective and modifying orders. R.M.C. 701(l). The Government may invoke the National Security Privilege when disclosure of information would be detrimental to the National Security R.M.C. 701 (f).

ANALYSIS AND RULING

The Commission finds that the Defense has made a colorable claim that these detainees may have potentially exculpatory evidence. On this record, the Government's interests in protecting information that may be damaging to the National Security are limited to certain aspects of post-apprehension interaction with U.S. Intelligence agencies. The Commission finds that the Defense's interests in determining whether these witnesses will speak to them, and what these witnesses will say on behalf of the accused, can be accommodated without hazarding the

Government's interests in protecting the information it seeks to protect. The interests of both parties in a fair trial demand that the Defense be able to determine whether potentially exculpatory witnesses located at Guantanamo Bay, the site of the trial, will actually testify as alleged in the Affidavit. Balancing all of these factors, the Commission GRANTS the Defense Motion for Access, subject to the following limitations:


1. The Defense may submit written questions to each of these potential witnesses. The questions shall be submitted in both English and Arabic, and may address areas such as:
 - a. The witness's background in the al-Qaeda organization, including the duties he performed, the people he worked with, and the duties they performed in the organization;
 - b. The witness's familiarity with Mr. Hamdan, his history of activities between 1996 and 2001, his duties, and his involvement or lack thereof, in so-called "outside activities";
 - c. The witness's familiarity with the planning of outside activities, who was and who was not involved, and what part Mr. Hamdan played in any such activities;
 - d. The relationship between the accused and the leaders of al-Qaeda, including whether he was involved in planning, conspiracy, or a common criminal enterprise to conduct attacks against the West.
2. The Defense's questions may be reviewed by a Government Security Officer who has no contact with the Prosecution, to ensure that the questions do not inquire into any sensitive or classified information. A Government linguist not aligned with the Prosecution may review the Arabic version of the questions to ensure the accuracy of the translation and the propriety of the Arabic version. The Linguist and the Security Officer may consult in this review of the questions. The questions, after this review and approval, shall be submitted to the witnesses.
3. The witnesses, if they desire to respond, shall do so in writing. Their responses shall be translated into English by a Government linguist, and shall again be subject to review by a Government Security Official. Neither the Linguist nor the Security Officer may be aligned with the Prosecution, and neither may communicate the witness's responses to any member of the Prosecution in any manner.
4. The Security Officer may redact any portion of a witness's response that he believes would endanger the national security or reveal classified information, before delivering the witness's response to the Defense.

5. The Security Officer shall maintain the un-redacted version of the witness's reply, and shall treat such un-redacted documents as classified documents or otherwise safeguard them as appropriate. If the Defense challenges the redaction performed by the Security Officer, the Military Judge shall determine the matter under MCRE 505.
6. If necessary, the Commission will consider alternatives, or sanctions, as warranted under MCRE 505(h)(6) and (7).

In order to facilitate this process of discovery, the Prosecution shall identify a Government Security Officer who will perform these review and screening functions, and a Linguist who may perform the translation functions, not later than Tuesday, February 19th, and provide the Security Officer's contact information to the Defense.

The Defense shall determine whether any of these prospective witnesses are represented by Counsel, and shall act accordingly.

So Ordered.


Keith J. Alfred
Captain, JAGC, U.S. Navy
Military Judge