

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D011

Defense Reply

in Support of Motion to Compel Access to
Potential Defense Witnesses

originally filed 25 January 2008

1. **Timeliness**: This reply is filed within the time frame permitted by the Military Judge's email order dated 15 January 2008.
2. **Relief Sought**: Defendant Salim Ahmed Hamdan moved originally on 4 December 2007 for an Order compelling access to the following five potential defense witnesses:

Khalid Shaykh Muhammad
Ramzi Bin al-Shib
Abu Faraj al Libi
Said Boujaadia
Abdul Rahim al-Sharqawi

Over the Government's initial objection, and by order of the Military Judge, Mr. Boujaadia was made available for examination at the December 5-6, 2007, hearing. The Defense understands that it still has access to Mr. Boujaadia, and reasonable requests for such access will be accommodated in the period leading up to trial. Also, over the Government's objection, and by order of the Military Judge, Mr. al-Sharqawi was made available for an interview in December but arrangements could not be made for his legal counsel to be present on short notice, so the interview did not occur. Although access to Mr. al-Sharqawi presumably is still available based on the Military Judge's December 5 ruling, access has not yet been accomplished and he remains to be interviewed.

Defendant Hamdan continues to seek an Order compelling access to the other three witnesses listed above for the same reasons that access to Messrs. Boujaadia and al-Sharqawi was allowed in the first place. Defendant's motion for access to the other three witnesses is not in any way foreclosed. The Military Judge's December 5 oral ruling and December 7 written

order denying production of these other three witnesses at the December 5-6 hearing was based only on the timeliness of Defendant's request given the special security procedures in place for these detainees, and was not based on any determination that the Defendant should not be able to interview them in preparation of his case.

On 23 January 2008, the Defense requested access to the following four additional potential defense witnesses:

Walid bin Attash Abdul Rahim al-Nashri Abdul Hadi al-Iraqi Mustafa Ahmed al-Hawsawi (See Email from LT Mizer to LCDR Stone dated January 23, 2008, Attachment A.) Because the Prosecution likely will oppose access to these four additional witnesses as well, the Defense seeks relief on this motion for access to all of the witnesses listed above, other than Mr. Boujaadia and Mr. al-Sharqawi (to whom the Defense understands access will continue to be provided based on the Commission's previous rulings). The factual basis demonstrating why these additional four witnesses are likely to have information relevant to preparation of the Defendant's case is set forth in the Affidavits of LT Mizer and Hamdan, Attachments B and C, respectively.

Should access to any of these seven witnesses be denied for reasons of national security or otherwise, in the alternative, Defendant seeks an order holding these proceedings in abeyance and dismissing the charges until such time as access is granted.

3. Overview: In order to prepare for the May 28, 2008, trial on the merits, the Defense needs to interview the seven witnesses identified above because they are high-ranking al-Qaeda operatives with various leadership responsibilities within that organization, and because each of them necessarily has knowledge and information regarding whether the charges brought against Defendant Hamdan – conspiracy and material support of terrorism related to the operations of al-Qaeda – have any factual basis. The Prosecution suggests that the relevance of these witnesses' testimony is strictly limited to the issue of Hamdan's status as an unlawful enemy combatant, but that is plainly wrong. While each of the seven witnesses likely had relevant information on the narrow issue of Hamdan's combatancy status litigated in December, they most definitely possess

first-hand knowledge of relevant information on the broader and critically more important issue whether Hamdan is guilty of the charges he faces at a May 28 trial where his very liberty is at stake.

The Government contends that the al-Qaeda witnesses identified by Defendant Hamdan are "some of the world's most accomplished terrorists". (Response at 2.) But the Government simultaneously pretends that these same witnesses would not have relevant information regarding whether Hamdan participated in their conspiracy to wage terrorism or whether he materially supported their terrorist activities. That is an untenable position. This Commission already has observed that Khalid Shaykh Muhammad, one of the seven witnesses, "has admitted to being the mastermind of most, if not all, al-Qaeda attacks against the United States." But the Government pretends that this same witness would not have relevant information regarding whether Hamdan was a co-conspirator of his acting in furtherance of such crimes or whether Hamdan materially supported Mr. Muhammad in executing such attacks. That, too, is an untenable position for any tribunal that would intend to afford Hamdan the necessary judicial guarantees recognized as indispensable by civilized peoples.

In short, access is sought because these witnesses are uniquely qualified to speak to the ultimate issues of (a) whether Defendant Hamdan conspired with al-Qaeda operatives, and (b) whether Defendant Hamdan provided material support for terrorism waged by al-Qaeda operatives. These seven witnesses probably are among the most knowledgeable people in the world on those two subjects, and they conveniently are located within a few miles of the Commission Building where Hamdan's fate will be decided by the Military Commission convened for no other purpose than to determine his guilt or innocence. It is difficult to imagine witnesses who could be more qualified or informed about these subjects that bear directly on Hamdan's guilt or innocence. If Hamdan was a co-conspirator of these seven witnesses, and if

Hamdan provided material support to advance their terrorist activities, they surely know about it. Absent their testimony, Hamdan himself might be the only other available witness and,

therefore, forced to consider waiving his right against self-incrimination due to the Government's intransigence in making the witnesses available.

The Prosecution's recitation of national security concerns is not a valid reason to conclude that this demonstrably relevant evidence is not discoverable. If legitimate national security concerns are implicated, there are procedures in place to protect those interests that do not require key fact witnesses to be hidden away and insulated from legitimate fact-finding in preparation for trial. Finally, if for strategic reasons that have nothing to do with Hamdan's criminal prosecution, the Government genuinely prefers to avoid granting access to these unquestionably relevant witnesses, then the Government is certainly able to solve that problem of its own making by withdrawing the charges against Hamdan or having this prosecution held in abeyance until access is appropriate.

4. Law and Argument:

A. Resolution of Defendant Hamdan's Combatancy Status Does Not Make the Evidence in Question Irrelevant

For its leading argument opposing access to the seven witnesses in question, the Prosecution urges that this Commission's prior determination of combatancy status makes their testimony moot. This argument is incorrect. Just because the Defense previously informed the Military Judge that some of these same witnesses had information relevant to Hamdan's status as an enemy combatant, that does not mean that they do not also have information relevant to the more important issue of his status as an alleged co-conspirator and material supporter of terrorism. If anything, these witnesses' knowledge is even more critical to the guilt phase of these proceedings than it was to the determination of Hamdan's status as an enemy combatant, thus militating in favor of access and not against it.

B. Applicable Law Contemplates Granting Access to Fact Witnesses When Preparing a Defense

"A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the

information from which the truth may be determined." *Gregory v. United States*, 369 F. 2d 185, 188 (D.C. Cir. 1966). While the Prosecution views the Military Commissions Act and the Rules for Military Commissions as imposing restrictions on access to evidence and witnesses, the fact is that both expressly provide to the contrary and permit such access in order to allow a charged defendant to reasonably prepare his defense. Here, the Government wants access to be unilateral, not mutual, with the CIA given the authority to make a determination that instead should be made by a judge. The Prosecution's studied criticism of international law in its response is based on a solitary footnote in the original motion which simply confirms that international law is consistent with the provisions of the MCA and the RMC. While international law conforms to military law in this regard, the Commission need only rely on Rule 701 which permits access to witnesses with relevant information for purposes of discovery and, at this stage, the requirements of Rule 703 pertaining to calling of witnesses at trial need not be considered.

The Prosecution's argument that the Military Judge lacks the requisite legal authority to order access relies on subparagraph (a) of § 949j of the M.C.A. for the proposition that because regulations promulgated by the Secretary of Defense address only the production of witnesses for trial, therefore there can be no right to conduct interviews of witnesses before trial. That argument might have merit if § 949j of the M.C.A. did not also contain subparagraph (b): "Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any place where the United States shall have jurisdiction." (Internal subparagraph designations omitted; emphasis added). Subparagraph (b) mirrors Section 46 of the UCMJ pertaining to the accused's right to compulsory process in courts-martial,¹ and is not limited to the production of trial witnesses. As

¹ Article 46 states: "Process issued in a court-martial under this chapter to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any place where the United States shall have jurisdiction."

the Supreme Court explained in *Washington v. Texas*, 388 U.S. 14 (U.S. 1967), compulsory process “is in plain terms the right to present a defense.” *Id.* at 19. See *United States v. Aycock*, 15 U.S.C.M.A. 158, 162 (C.M.A. 1964) (Article 46 entitlement to compulsory process provides that a military accused, just as a civilian defendant, has the right to prepare to meet charges against him.)

Courts of the United States having criminal jurisdiction recognize that the right of compulsory process includes the right to ascertain, before trial, what a witness's testimony will be. Military courts agree. See *United States v. Aycock*, 15 U.S.C.M.A. 158, 161 (C.M.A. 1964); *United States v. Enloe* 15 U.S.C.M.A. 256, 262 (C.M.A. 1965).

“If the state can incarcerate a witness and prevent any chance of interview and opportunity to know in advance what such a one's testimony will be, it is in effect a nullification of the salutary provisions of the clause of the Constitution already referred to, as practically all of its benefits are thus destroyed. Such opportunity of interview would seem to be a necessary implication arising from the compulsory process clause above quoted. The right of reputable counsel to interview a witness has apparently been so rarely denied in American jurisprudence that we find very few cases on the subject.” *Aycock* at 161. (Internal cites omitted).

The right to interview, however, is not held to the same standard of materiality and relevance required for the production of a witness at trial. See *Enloe*, at 262 (“the usual purpose of out-of-court interviews is to determine the substance of the witness' knowledge concerning the incidents charged, it is necessarily a “fishing expedition” and frequently will involve matter later found to be irrelevant.”). Accordingly all that is required to implicate the right to compulsory process for access when the defense has not yet had the opportunity to interview the prospective witness is a “plausible showing” of materiality by relating the events to which a witness might testify and the relevance of those events to the crime charged. *United States v. Moussaoui*, 365 F.3d 292,343 (4th Cir. 2004).

LT Mizer’s Declaration setting out the prospective testimony of Mr. Nasser al-Bahri more than establishes Hamdan’s right to interview each of the eight identified witnesses. Each

meets the standards set out in *United States v. Moussaoui* for courts of the United States having criminal jurisdiction.

- **Khalid Sheikh Mohammed**

Khalid Sheikh Mohammed has relevant knowledge with respect to Specification 1 of the conspiracy Charge against Hamdan. He is the alleged "mastermind" of the attacks of September 11, 2001 and he knows the details of those attacks, including who was involved in the planning and execution. Mr. Mohammed is material to Hamdan's defense because he will substantiate Hamdan's claims that he is only a member of Usama bin Laden's motorpool, that he did not have advance knowledge of the attacks of September 11, 2001, and that he did not participate in the planning or execution of those attacks.

- **Ramzi bin al Shibh Mohammed**

Ramzi bin al Shibh Mohammed has relevant knowledge with respect to Specification 1 of the conspiracy Charge against Hamdan. He was the communications link between Khalid Sheikh Mohammed and the military committee in Afghanistan including those who would execute the attacks of September 11, 2001, and he knows the details of the plot and the identities of those involved. Ramzi bin al Shibh Mohammed is material to Hamdan's defense because he can substantiate Hamdan's claim of simply being one of six drivers in the motorpool, and without knowledge of the attacks beforehand.

- **Abu Faraj al-Libi**

Abu Faraj al-Libi has relevant knowledge with respect to Specification 1 of the conspiracy Charge and the material support of terrorism Charge against Hamdan. He was in charge of the al-Qaeda training camps in Afghanistan. He is material to Hamdan's defense because he can substantiate that attendance at one of these camps did not automatically make one a member of al-Qaeda. Abu Faraj al-Libi was responsible for the conventional weapons training for the Ansars, the Arab fighters in Afghanistan. Abu Faraj al-Libi would know if Hamdan was involved in the transportation of Taliban weapons to the Ansars on the frontlines.

- **Walid bin Attash**

Walid bin Attash has relevant knowledge with respect to Specification 1 of the conspiracy Charge against Hamdan because he 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 is material to Hamdan's defense because he can verify that Hamdan was a member of the motorpool and that he was uninvolved in terrorist activities.

- **Abdul Rahim al-Nashri**

Abdul Rahim al-Nashri has relevant knowledge with respect to Specification 1 of the conspiracy Charge against Hamdan because he was the principal planner of the attacks on the USS COLE and the French supertanker, Limburg. He is the only person in U.S. custody who knows the details and identities of those involved in these attacks. He has known Hamdan since 1996, when they traveled with 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 frequently would have interacted with Hamdan. He was in a position to observe Hamdan's relationship to al-Qaeda and Usama bin Laden. He is material to Hamdan's defense because he will state that Hamdan was only a member of the motorpool and not involved in terrorist activities.

- **Abdul Hadi al-Iraqi**

Abdul Hadi al-Iraqi was the commander of the Arab ground forces, or Ansars, in Afghanistan and he has relevant knowledge with respect to the material support of terrorism charges and Specification 2 of the conspiracy Charge against Hamdan. He reported to a Taliban general who exercised command and control over the Ansars. His unit was supplied weaponry from Taliban armories and drivers from the al-Qaeda motorpool often were used to transport the Taliban weapons to the Ansars at the front. He is potentially material to Hamdan's defense because he is aware of the identity of the drivers from the motorpool who delivered weapons. As commander of the Ansars, he would know when weapons shipments were arriving and the identity of the driver delivering them. Quite possibly he was in command of the Ansars at the battle of Kandahar in November 2001 and therefore would know if Hamdan was delivering a weapons

shipment to the combatants under his command on November 24, 2001, a question concerning Hamdan's status as a possible lawful enemy combatant.

- **Mustafa Ahmed al-Hawsawi**

Mustafa Ahmed al-Hawsawi is relevant to Specification 1 of the conspiracy Charge against Hamdan because he was involved in the funding of the attacks on September 11, 2001. He is potentially material to Hamdan's defense because he spent a lot of time in Kandahar where he interacted with Hamdan. Based on his knowledge both of the activities of al-Qaeda and Hamdan, he can substantiate that Hamdan was a member of the motorpool and not involved in terrorist activities.

C. Detaining Witnesses as Enemy Combatants Does not Make Them Any Less Relevant as Fact Witnesses

The Government also suggests that any witness who happens to be held as a detainee should be considered, presumptively, off limits as a witness. While convenient, the Government's position is not based on any precedent that is applicable to the present situation involving Hamdan. If they have personal knowledge, and if their testimony is relevant to the issue of Hamdan's guilt or innocence of the charges he faces, the seven witnesses in question should be made available for interviews regardless of their status as detainees. The testimony of fact witnesses is not deemed relevant or irrelevant based on their status as incarcerated or not incarcerated.

D. The Defense Has Made an Adequate Showing of Relevance and Necessity

The Prosecution's argument that the Defense has failed to make an adequate offer of proof regarding the relevance of the identified witnesses' testimony is unconvincing. In effect, the Prosecution wishes to be rewarded for impeding discovery of relevant evidence, by obtaining an order that is based on defense counsel's alleged failure to sufficiently marshal evidence that has been denied to them. Clearly, it is more difficult to prepare a full synopsis of the testimony expected of certain witnesses at trial, when counsel has been prevented from interviewing those

same witnesses in order to obtain an understanding of what they will say in their expected testimony.

But one thing is certain. The record shows that because they were senior al-Qaeda operatives with acknowledged responsibility for oversight of terrorist activities, these seven witnesses were in positions to know the identity of participants who truly were co-conspirators with other al-Qaeda members or material supporters of al-Qaeda's terrorist operations. (See Mizer affidavit, Attachment B.) As the Government emphasizes, "the public record is replete with descriptions of the terrorist activities carried out" by the requested defense witnesses. (Response at 10.) For example, at Khalid Shaykh Muhammad's CSRT the government recorder stated that Khalid Shaykh Muhammad was "head of the al-Qaida military committee and was Usama bin Laden's principal al-Qaida operative who directed the September 11 attacks in the United States." Specification 1 of Charge I alleges that Defendant was involved in that very conspiracy. Who would know better than Mr. Muhammad whether the charge is supportable.

"In the federal courts, a conspiracy conviction still requires at least two persons who genuinely wish to accomplish the ostensible goal of the purported conspiracy." *United States v. Valigura*, 54 M.J. 187, 189 (C.A.A.F. 2000)(internal citations omitted). Conspiracy requires intent to join the conspiracy, not mere presence or proximity when a crime is committed. *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984). Conspiracy to commit "a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678 (1959)(emphasis in original). "No person should be convicted of conspiracy to commit a given crime without proof that he personally possessed that degree of criminal purpose." *United States v. Harrelson*, 766 F.2d 186, 188 (5th Cir. 1985); *United States v. Wright*, 42 M.J. 163, 165 (C.A.A.F. 1995). For example, "one cannot be convicted of conspiracy to commit first degree murder without being found to have entertained the gravest of criminal intents: premeditation and malice aforethought." *Harrelson*, 766 F. 2d at 188. Thus, this Commission's inquiry necessarily involves evidence as to whether Hamdan shared in a specific intent to attack civilians and

destroy property as happened on September 11, 2001.² Khalid Shaykh Muhammad is perhaps the only person in U.S. custody who knows whether Hamdan entered into such an agreement with the specific objective to attack and murder civilians on September 11, 2001², and whether or not he possessed the requisite criminal intent to kill.

If a defendant charged with conspiracy to commit criminal antitrust violations had the opportunity to call to the witness stand the very individuals who already had admitted their complicity in organizing and supervising the price-fixing at issue, no one would seriously contend that such witnesses' testimony was irrelevant. If a defendant charged with being a full participant in an enterprise engaged in organized crime had the opportunity to call to the witness stand the very individuals who were the leaders of the organized crime family at issue, no one would contend that such witnesses' testimony was irrelevant. How, then, can the Government contend with credibility that Hamdan – who is alleged to have conspired with known al-Qaeda leaders and materially supported their acknowledged acts of terrorism – should not be allowed to interview the very individuals who are identified by the Government as the leaders among al-Qaeda conspirators and the very architects of terrorist attacks on the United States?

What these seven individuals are able to say under oath based on personal knowledge makes them percipient witnesses unlike any others. There is no ready substitute to provide such evidence if they are not permitted to testify. It is no small irony that such valuable witnesses already are in the custody of the United States and incarcerated at the location where Hamdan will be tried, but "unavailable" to testify. They are, in effect, captive witnesses whose testimony Hamdan otherwise could never compel and whose presence at trial he never could arrange if they still were at large. Yet despite their proximity and availability, the Government seeks to prevent them from testifying as to what they know.

E. National Security Concerns Do Not Overcome This Defendant's Right to Defend Against the Charges

² Wright, 42 M.J. at 165.

1. Information Regarding Hamdan's Alleged Activities as a Conspirator or Material Supporter of Terrorism Cannot Be Classified When He Is Being Tried or Those Crimes

The Prosecution suggests that any information obtained from the seven witnesses in question will implicate national security concerns because of its classified nature. But the most pertinent information in the possession of these seven witnesses does not concern their individual circumstances or how the Government may have learned of their respective culpability for crimes against the United States. The most pertinent information for purposes of the Hamdan trial is what they know about Hamdan's activities as an alleged co-conspirator of al-Qaeda and as an alleged material supporter of al-Qaeda's terrorist acts, the subject matter of which cannot possibly remain classified when Hamdan is tried in open court for precisely those activities.

The Prosecution is concerned that these witnesses possess classified information which has little or nothing to do with Hamdan's guilt or innocence. If so, then the Government has nothing to worry about because all the Defense wishes to adduce at trial is information about Hamdan's participation, if any, in a conspiracy among them and his activities, if any, in support of their unlawful terrorism.

2. The CIA's Sources, Methods, and Activities Are Not At Risk

Similarly, the Prosecution is concerned that these seven witnesses will be asked questions about the location of CIA black sites, the "sources, methods, and activities by which the United States acquired evidence" and the "sources, methods, and activities associated with the CIA's detention and interrogation program". Again, the Defense is not interested in gratuitously exploring at trial these topics, unless they genuinely bear on the reliability of testimony that may be presented relevant to Hamdan. The fact that these seven witnesses might have information on such sensational topics does not make their knowledge of Hamdan's activities irrelevant or protected from discovery. If the Director of the CIA was the most informed fact witness to an automobile accident, he would not be immune from testifying about what he witnessed just because he possesses classified information on other subjects. What Hamdan's defense lawyers have "a need to know" is what these witnesses will say about Hamdan's activities, not what these

witnesses might say about the CIA or its National Clandestine Service. Moreover, the instant motion seeks access for interviews which are one step removed from offering in open court the evidence feared by the Government. In short, the Government's national security concerns are premature, at best, and a bit paranoid, at worst, given the limited relief sought on this motion. The government argues that even if Hamdan has a right to interview the witnesses through counsel, this right is superseded by § 949d (f) providing that “Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.”

Importantly, the Prosecution does not maintain that questioning the witnesses about Hamdan’s alleged activities in al-Qaeda would require the disclosure of classified evidence. Rather, the Prosecution’s concern is that during such an interview the detainee might spontaneously reveal other information such as methods of interrogation, locations of prior detention, or identities of interrogators or their agencies. The Government concedes that members of Hamdan’s defense team have sufficient security clearance to be authorized to receive such information, but still argues that the proper course is to deny access because it gratuitously increases the risk of disclosure. In essence, the Prosecution argues that any risk of disclosure outweighs Hamdan's right to defend himself. The Prosecution’s argument is strikingly similar to the argument rejected in *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003). In *Moussaoui*, the government appealed an order permitting the defense to depose an enemy combatant in custody who had knowledge of Moussaoui's alleged participation in the September 11 attacks. The government argued that permitting such a deposition amounted to “a decision or order ... authorizing the disclosure of classified information governed by § 6 of the Classified Information Procedures Act (CIPA).” Unsurprisingly, the Circuit Court disagreed. Affirming its earlier decision in *United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir. 1985) (en banc); *id.* at 1108-09 (government's interest in confidentiality of classified information is still protectable even if the defendant has access to the information), the Court held that § 6 of CIPA’s language regarding disclosure of classified information at trial or at a pretrial proceeding was not

implicated by the pretrial disclosure of classified information to the defendant or his attorney. Id. 515. Like Moussaoui, here a pretrial interview of the eight witnesses in question does not implicate §949d(f) because the Government's interest in maintaining classified information remains protectable. Members of the defense team previously have been found to be reliable in the handling of just such information by virtue of a grant of Top Secret Clearance. The risk of disclosure is, as in Moussaoui, protectable and therefore §949d(f) does not prevent pretrial interviews.

F. CIA Interrogations of These Fact Witnesses Is Not a Reason to Keep their Testimony Out of Evidence

Hamdan himself was interrogated by U.S. Forces and videotapes of those interrogations were introduced into evidence at the December 5-6 hearing. The fact that CIA agents conducted the interviews of the seven witnesses in question is not surprising and certainly is not dispositive as to their availability to testify.

G. Ms. Hilton's Affidavit Does Not Establish An Evidentiary Basis to Deny Access


The Prosecution's heavy reliance on the Hilton Affidavit is misplaced. Contrary to Ms. Hilton's stated concerns, the Defense does not wish to discover the precise location of the CIA's black sites, the specific details of these seven witnesses' confinement, the CIA's employment of "alternative interrogation methods" utilized on these seven witnesses, or any other operational details of what may have happened to these seven witnesses while in the custody or control of the CIA. The Prosecution relies on the Top Secret nature of information that the Defense does not intend to acquire as a basis to deny total access. That is not a legitimate reason to deny this motion.

5. Request for Oral Argument: The Defense requests oral argument. Oral argument will be helpful to the Military Judge and is necessary to provide the Commission with the opportunity to fully explore the legal issues raised by this motion. As provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

6. **Attachments:**

- A. Email from Lt. Mizer to LCDR Stone, January 23, 2008
- B. Declaration of Lt. Brian L. Mizer, January 25, 2008
- C. Declaration of Salim Ahmed Hamdan. The Defense expects to submit this Declaration as soon as Defense counsel returns from Guantanamo Bay, where a member of the Defense team is currently conferring with Mr. Hamdan.

RESPECTFULLY SUBMITTED,

By: 
LT. BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Suite 2000E
Washington, DC 20005
(202) 761-0133, ext. 114

PROF. CHARLES SWIFT
Emory School of Law
(404) 727-1190
Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Civilian Defense Counsel

Attachment A

From: Mizer, Brian, LT, DoD OGC
Sent: Wednesday, January 23, 2008 4:43 PM
To: Stone, Tim, LCDR, DoD OGC
Subject: Request for Access to Four Additional Detainees

LCDR Stone,

After further investigation, the defense requests access to four additional detainees. The detainees are as follows:

Walid bin Attash
Abdul Rahim al-Nashri
Abdul Hadi al-Iraqi
Mustafa Ahmed al-Hawsawi

Am I correct in assuming that the prosecution will oppose granting the defense access to these men on the same grounds that it opposed granting access to the three so-called high value witnesses requested at the December 5th, 2007, hearing? If so, we intend to seek an order compelling access at the February 7, 2008, hearing, and we will address their relevance in our reply due this Friday. Thank you.

V/r

LT Mizer

Attachment B

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Reply

Declaration of Lt. Brian L. Mizer, JAGC, USN

25 January 2008

I, Lieutenant Brian L. Mizer, USN, do hereby swear and attest that, if called to testify, I would state the following under oath:

1. I am one of Defendant Hamdan's defense counsel and I make this Affidavit on personal knowledge about which I am competent to testify.
2. In January 2008, I traveled to Yemen to interview potential fact witnesses, including Mr. Nasser al-Bahri who originally was interviewed on September 17-October 2, 2001, by US Naval Criminal Intelligence Special Agent Robert McFadden who was a Government witness at the December 5-6, 2007, hearing in this case before this Commission.
3. Based on what he told me in person, if called to testify in this case, Mr. al-Bahri is expected to testify as follows.
4. Mr. al-Bahri was a member of al-Qaeda in Afghanistan from 1996 until November 2000, when he was arrested by Yemeni authorities after he returned to Yemen from Afghanistan.
5. Before leaving Afghanistan in November 2000, Mr. al-Bahri served as the second in command of Usama bin Laden's security detail. Because of his position as a senior operative in al-Qaeda, he was intimately familiar with Usama bin Laden's various activities, including economic ventures totally unrelated to terrorism activities as well as so-called "outside activities" that were exclusively designed to wage terrorism abroad.
6. Within the group of al-Qaeda operatives involved in "outside activities",

knowledge of terrorism initiatives and terrorist operations was a closely held secret. Individuals would only be informed of details of operations on a "need to know" basis and only if they were participants in such affairs. Not everyone affiliated with al-Qaeda was such a participant. But even the participants themselves would only be told of their specific individual roles and would not have a broader understanding. They would only be told of their particular role in any given mission. Some participants would be told only that they were to become martyrs, and they would learn of the manner in which they would be "martyred" only on the morning of the day they were to die. Only one or two individuals would know of all the details of any given attack that might be planned or considered. The senior leadership of al-Qaeda included Usama bin Laden and Ayman al-Zawahiri, and only they would know the details of whether an attack would be initiated, the general target of the planned attack, and approximately when the attack would occur. As the date of a planned attack approached, these senior al-Qaeda operatives would be informed of the precise date of the attack.

7. Using the attacks of September 11, 2001, as an example, based on al-Qaeda's custom and practice within the group involved in "outside activities", only Khalid Sheikh Mohammed, Mohammed Atta, Ramzi bin al-Shib, and one or two of the other "officers" responsible for flying the aircraft would have known of all the details of the plot. The "muscle" on the planes, as Mr. al-Bahri described the situation to me, would only have known that they were to go on a martyrdom mission and would not be informed of the details of the mission until the very day of its execution. The senior leadership of al-Qaeda would have known only that there was to be an attack against the United States, and they would later be informed as the date approached, that it was scheduled to occur on September 11, 2001.

8. Khalid Sheikh Mohammed was a member of al-Qaeda's military counsel and was

involved in outside activities. 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 would know of the details of those attacks with knowledge aforethought, 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 almost certainly going to testify that Mr. Hamdan was only a member of Usama 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.

9. Ramzi bin al Shibh was the communications link between Khalid Sheik Mohammed and the military committee in Afghanistan and those others involved in outside activities who would execute the September 11 attacks. Mr. bin al Shibh traveled to Afghanistan with Mohammed Atta and Ziad Jarrah during Ramadan in the year 2000. Mr. bin al Shibh knew the details of the plot and the identities of those involved. Based on his awareness of who was involved, Mr. bin al Shibh will identify Mr. Hamdan as one of six motor pool drivers and not someone who had advance knowledge of the September 11 attacks or otherwise a participant, planner, co-conspirator or supporter of the planning or execution of those attacks.

10. Abu Faraj al-Libi was in charge of the al-Qaeda training camps in Afghanistan. He will testify that the majority of the attendees of these camps were not members of al-Qaeda, and that attendees had to be invited thereafter to join al-Qaeda when they were together in

Afghanistan. Messrs. Al-Bahri and Abu Faraj al-Libi would identify trainees with military potential and approve them for further involvement in al-Qaeda.

11. Abu Faraj al-Libi was responsible for the conventional weapons training for the Ansars, the Arab fighters in Afghanistan. Abu Faraj al-Libi would know if Mr. Hamdan was involved in the transportation of Taliban weapons to the Ansars on the frontlines. He and his family lived in the same neighborhood in Kandahar as Mr. Hamdan and his family, and he knew Mr. Hamdan.

12. Walid bin Attash was very close with Usama bin Laden and always accompanied Usama bin Laden when the two men were in Kandahar. Because of his closeness to Usama bin Laden, he frequently interacted with Mr. Hamdan as a driver in the motorpool. He will state that Mr. Hamdan was a member of the motorpool only and was not involved in terrorist activities.

13. 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 identifies 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 motorpool. 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 motorpool only and that he was not involved in terrorist activities.

14. 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 motorpool were often used to transport Taliban weapons to the Ansars at the front. He is aware of the identity of the drivers from the motorpool 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 identify of the driver 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.

15. 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 motorpool 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.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

Date:

25 Jan 08

Signed:


Brian L. Mizer
LT, JAGC, USN