
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE MOTION TO
) DISMISS FOR LACK OF
) PERSONAL JURISDICTION
)
) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission find that the President's Military Order authorizing trial by Military Commission is in violation of the rules of personal jurisdiction and dismiss the charge against Mr. Hamdan.

3. Overview. The Military Commission does not have any personal jurisdiction over Mr. Hamdan and should therefore dismiss the charge against him.

4. Facts.

a. From 1996 until approximately October 2001 Salim Ahmed Hamdan worked in Afghanistan in a private capacity as a agricultural and as a personal driver for Usama Bin Laden.

b. At no relevant time did he join either Al Qaeda or the Taliban, participate in a belligerent act towards the United States or its allies, or have foreknowledge of any belligerent or criminal act directed by either of the above organizations against the United States or its allies.

c. On September 11, 2001, Mohammed Atta, Abdul Alomari, Wail al-Shehri, Waleed al-Shehri, and Satam al-Suqami hijacked American Airlines Flight 11, bound from Boston to Los Angeles, and crashed it into the North Tower of the World Trade Center in New York. Mohammed Atta piloted the plane after it was hijacked. Near-simultaneously, Marwan al-Shehhi, Fayeze Ahmed, a/k/a Banihammad Fayeze, Ahmed al-Ghamdi, Hamza al-Ghamdi, and Mohald al-Shehri hijacked United Airlines Flight 175, bound from Boston to Los Angeles, and crashed it into the South Tower of the World Trade Center in New York. Marwan al-Shehhi piloted the plane after it was hijacked. As a result of the crashes, the towers of the World Trade Center collapsed. Approximately 2,752 people, almost all of them civilians, were killed. At the time of the hijackings and attacks, the tenants of the World Trade Center were civilian in nature. The occupants consisted of approximately 430 tenants for business and commerce purposes only. Each of the named individuals are alleged to be members of Al Qaeda.

d. On September 11, 2001, Khalid al-Midhar, Nawaf al-Hazmi, Hani Hanjour, Salem al-Hamzi, and Majed Moqed hijacked American Airlines Flight 77, bound from

Washington D.C. to Los Angeles, and crashed it into the Pentagon in Arlington, Virginia. Hani Hanjour piloted the plane after it was hijacked. As a result of the crash, approximately 184 people including many civilians were killed in and around the Pentagon. Each of the named individuals are alleged to be members of Al Qaeda.

e. On September 11, 2002, Ziad Jarrah, Ahmed al-Haznawi, Saaed al-Ghamdi, and Ahmed al-Nami hijacked United Airlines Flight 93, bound from Newark to San Francisco, and crashed it into a field near Shanksville, Pennsylvania. Ziad Jarrah piloted the plane after it was hijacked. 44 civilians died in the crash. Each of the named individuals are alleged to be members of Al Qaeda.

f. The organization known as al Qaida, or “The Base,” was founded in or around 1989 by Usama bin Laden, and others. Al Qaida is composed of private individuals and did not constitute the armed force of any recognized state.

g. In response to the events of September 11, 2001, on September 18, 2001, Congress passed a joint resolution authorizing the President to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Sept. 18, 2001 Joint Res.

h. On 7 October 2001, pursuant to Presidential Order the United States commenced armed hostilities in Afghanistan in support of the Northern Alliance.

i. At the time that the United States commenced armed hostilities the Northern Alliance consisted of ethnic Tajiks that opposed the Taliban regime by military force. The Northern Alliance controlled approximately 10% of Afghanistan. The remainder of Afghanistan was controlled by military force/government, commonly referred to as the Taliban.

j. The Taliban exercised political and military control over that portion of Afghanistan that it controlled. The Taliban had been recognized as the government of Afghanistan by Pakistan and Saudi Arabia. The United States, however, did not recognize the Taliban as government of Afghanistan.

k. The United States, however, prior to the commencement of the use of military force negotiated with the Taliban seeking that they capture and turn over Usama Bin Laden and other members of al Qaeda to the United States.

l. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that the President determined were subject to the order.

m. Subsequent to the President’s Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.

n. At the time of his capture, Mr. Hamdan was traveling alone, was not part of a belligerent force, and was seeking to flee hostilities in Afghanistan.

o. Mr. Hamdan is not and has never been a member of Al Qaeda..

p. Mr. Hamdan has never taken up arms against the United States government or its nationals.

q. Mr. Hamdan had no advance knowledge of the September 11 attacks on the Pentagon and World Trade Center.

r. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

s. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. The Military Commission Has No Personal Jurisdiction over Mr. Hamdan.

1. "Jurisdiction" refers to the power of a legal body to try an offense. If that body lacks jurisdiction, everything it does in proceeding with a trial is illegal and unlawful.

2. The Supreme Court of the United States has explained what jurisdiction is and what this body's duties are: "The requirement that jurisdiction be established as a **threshold** matter ... is **inflexible** and without exception . . . for [j]urisdiction is **power** to declare the law,, and [**w]ithout jurisdiction the court cannot proceed at all** in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1567 (1999) (internal punctuation and citations omitted). That is why judges across our land, in both the military and civil systems, have said that before proceeding with trial, they must first satisfy themselves that jurisdiction exists. *See In re Grimley*, 137 U.S. 147, 150 (1890); *Carter v. McClaughry*, 183 U.S. 365, 401 (1902); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950).

3. Jurisdiction has always been broken down into two separate concepts. *First*, is the offense something that can be tried by the legal body? This inquiry turns on the history and language of authorizing legislation for that legal body. *Second*, is the person being tried someone that is properly before the reach of the legal body? That question asks whether the Government has alleged facts sufficient to place the specified individual before the military commission. This motion concerns the second of these inquiries.

4. The Government introduces no evidence justifying this commission's personal jurisdiction over Mr. Hamdan. The slender reed they have is a cursory statement by the President from July 2003. In that statement, the President asserts that his authority for such a finding is in accordance with the Constitution and consistent with the laws of the United States,

including the Authorization for the Use of Force passed by Congress on September 18, 2001. This statement is not supported in either fact or law.

5. The President's statement claims that 1) Mr. Hamdan is or was a member of the organization known as al Qaida; 2) that he has engaged in, aided, abetted, or conspired to commit, acts international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or 3) that he has knowingly harbored one or more individuals described in the statements above.

6. These factual assertions are wrong. Mr. Hamdan has specifically denied that he is presently or was at any time a member of al Qaida. He performed the service of driver for monetary compensation and at no time joined or supported the political or alleged criminal activity attributed to Usama Bin Laden and his followers. *See Hamdan Affidavit*, attached. Hamdan denies having any foreknowledge of the activities of any specific criminal enterprise attributed to Bin Laden or his followers, and denies any knowing or willing participation in such activity. Finally, as an employee of Bin Laden, Hamdan can not be said to have "harbored" him within the meaning of the term under established law.

b. The Military Commission Has No Authority Because There Has Been No Declaration of War by Congress.

1. Even if Mr. Hamdan conceded every fact set out in the Government's allegations against him, it would *still* not establish jurisdiction of the military commission in this case. It is well settled that a commission's jurisdiction is limited to a time of war. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality). As explained above, the President's factual assertions fail to allege that Hamdan committed criminal conduct during a time of war. Conspicuously absent is any statement of when the supposed violation occurred. For a commission to have jurisdiction, it is not enough to say that a crime has been committed. Rather it must first be established that the crime was committed in conjunction with a war. Nor can the President rely on Congress's September 18, 2001 Resolution. That Resolution is limited to "force," and it looks only to the future: "That the President is authorized to use all necessary and appropriate force . . . **in order to prevent any future acts** of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res. (emphasis added). Unlike detentions, which "prevent" "future acts" of terrorism, commissions are fully retrospective. Even if it might be thought that the AUMF gives the President the full war power to fight prospectively to keep the peace, Congress circumscribed the President's *retrospective* power to *punish*.

2. The President's sole allegation of a crime committed by Mr. Hamdan is international terrorism. But that is not a violation of the laws of war. Rather, it is a label of convenience, affixed to various acts. As the nation's second-highest court said 20 years ago, terrorism is a term as loosely deployed as it is powerfully charged. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). More recently, a federal appeals court decided that piracy, war crimes and crimes against humanity fall within universal principles of jurisdiction, but refused to accord terrorism the same status. *See U.S. v. Yousef*, 327 F.3d 56 (2nd Cir. 2003).

Implicit in this finding was that terrorism was not a war crime. Nor can it be said that mere membership in a group by itself confers jurisdiction. As such the President's findings of jurisdiction are without support in either fact or law in Hamdan's case.

3. At bottom, the prosecution is under a duty to prove that Mr. Hamdan committed an offense that makes him triable by this commission. They have not even come close to doing so. Neither the Presidential determination in July 2003 nor the charge preferred against Mr. Hamdan on 13 July 2004 accomplish this. Rather, they state the most vague and unsupported allegations. To give the government the power to haul someone before a military tribunal on the basis of literally no concrete evidence that states a violation of the laws of war is dangerous and wrong. If the government finds defendants who acted in ways that violated the laws of war, such as the Nazi Saboteurs, it would be one thing. But this case, alleging vague facts to support a vague offense, is as far from the Nazi saboteurs as one can possibly be. This commission is under a duty to exercise its power to dismiss the prosecution for want of personal jurisdiction.

6. Files Attached.

- a. CV, Witness/Expert
- b. Hamdan Affidavit

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defense's support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

- a. *Carter v. McClaghry*, 183 U.S. 365 (1902)
- b. *Hiatt v. Brown*, 339 U.S. 103 (1950)
- c. *In re Grimley*, 137 U.S. 147 (1890)
- d. *Reid v. Covert*, 354 U.S. 1 (1957)
- e. *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563 (1999)
- f. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)
- g. *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003).

h. Authorization for the Use of Force, U.S. Congress, Sept. 18, 2001

9. Witnesses and/or Evidence Required. In the event that the government disputes the facts contained in Mr. Hamdan's affidavit, the Defense reserves the right to call Mr. Hamdan to testify solely for the limited purpose of Commission jurisdiction.

10. Additional Information. None.

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