
UNITED STATES OF AMERICA)

v.)

SALIM AHMED HAMDAN)

**GOVERNMENT MOTION
TO COMPEL DISCOVERY**

1 October 2004

The Prosecution in the case of the *United States v Salim Ahmed Hamdan* provides this Motion to Compel Discovery and, in support of that Motion avers the following:

1. This Motion is timely filed in accordance with the POM 4.
2. Relief Requested: The Prosecution respectfully requests that the Commission compel reciprocal discovery as requested on 30 July 2004 and as required by MCI No. 8, §6.
3. Facts:
 - a. The Defense submitted its initial request for discovery on 18 December 2003.
 - b. On 18 December 2003, the Prosecution provided over 122 pages of discovery to the Defense in an effort to begin meeting its discovery obligation.
 - c. On 30 July 2004, the Prosecution provided an additional 979 pages of discovery to the Defense in an effort to meet its discovery obligation. This batch of discovery also included a compact disc with over 900 pages. Later that day, an additional 7 documents were served on the Defense
 - d. On 9 August 2004, the Prosecution provided an additional 91 pages to the Defense in an effort to meet its discovery obligation.
 - e. On 10 September 2004, the Prosecution provided an additional 350 pages to the Defense in an effort to meet its discovery obligation.
 - f. On 16 September 2004, the Prosecution provided an additional 63 pages to the Defense in an effort to meet its discovery obligation.
 - g. The Prosecution continues diligently to provide discovery as quickly as it gains information and the authority from controlling agencies to release it.
 - h. On 30 July 2004, the Prosecution provided the Defense with a Request for Reciprocal Discovery seeking materials required to be provided to them pursuant to MCI No. 8, §6. (copy attached).

i. On 21 September 2004, detailed defense counsel, LCDR Charles Swift, provided a memorandum to the Convening Authority for the Combatant Status Review Tribunal (hereinafter "CSRT") requesting that he be allowed to testify at his client's CSRT hearing. (copy attached). In that request, LCDR Swift claims "As a result of the investigation of Mr. Hamdan's case, detailed counsel has acquired exculpatory evidence directly bearing on Mr. Hamdan's status as a combatant." See 21 September 2004 memorandum at paragraph 2.

j. As of the date of this Motion, the Defense has provided absolutely no discovery whatsoever to the Prosecution.

k. The Defense has filed notice of two separate speedy trial motions.

4. Discussion.

Military Commission Instruction (MCI) No. 8, §6 sets out the discovery obligations of the parties to military commissions. §6A requires counsel for the Defense to provide to the Prosecution copies of all information intended for presentation as evidence at trial. The same paragraph requires that disclosure happens upon order of the Presiding Officer for good cause or *at least* one week prior to trial. As of the date of this Motion, discovery pursuant to §6A has been a one way street.

The Prosecution has been working diligently to obtain discoverable materials, obtain permission from the controlling agencies to release that material in discovery, and to produce those materials to the defense. The Prosecution's effort in that regard is evidenced by the delivery of over 1,615 pages of discovery in over 6 disclosures over the past 9 months. In stark contrast, the defense has turned over nothing.

The Defense's failure to disclose cannot be attributed to their not having possession of discoverable materials. By the Defense's own admission in their memorandum to the convening authority for the CSRT, they have in their possession evidence that allegedly exculpates their client. This material is in Defense hands, apparently ready to divulge to the CSRT, but has not been turned over in discovery. This is true despite the fact that such materials clearly fall into the purview of MCI No. 8, §6.

The Defense may argue that they are not obligated to furnish such materials until one week prior to trial and this is technically true. However, there is nothing to be gained by holding onto discoverable materials until the deadline when they are already in the Defense's possession. As such, the Presiding Officer has good cause to compel the Defense to produce the discoverable materials that they possess at this time and should do so. The grant of this Motion is in keeping both with the Presiding Officer's charge to conduct the proceedings expeditiously pursuant to MCI No. 8, §5, and the mandate of a full and fair trial pursuant to President's Military Order and MCO No. 1.

5. Attachments to this Motion:

a. Memorandum dated 30 July 2004, subject: Request for Reciprocal Discovery, *United States v. Hamdan*

b. Memorandum dated 21 September 2004, subject: Combatant Status Review Tribunal For Salim Ahmed Hamdan

6. Oral argument is neither required nor requested. However, the Prosecution is prepared to offer argument on this issue if the Defense requests it.

7. Authority Cited:

a. President's Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism

b. MCO No. 1

c. MCI No. 8

8. No witnesses are necessary for resolution of this Motion.

XXXX
Commander, U.S. Navy
Prosecutor



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS**

21 September 2004

From: LCDR Charles D. Swift, Detailed Defense Counsel
To: Convening Authority, Combatant Status Review Tribunal
Subj: COMBATANT STATUS REVIEW TRIBUNAL FOR SALIM AHMED HAMDAN
Ref: (a) Deputy Secretary of Defense Order of 7 July 2004
(b) Secretary of the Navy Implementing Directive of 29 July 2004
(c) My ltr of 21 July 2004
(d) Your ltr of 20 September 2004
Encl: (1) UNITED STATES V. HAMDAN: PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL (FAILURE TO ACCORD THE ACCUSED A STATUS REVIEW HEARING BEFORE A MILITARY COMMISSION)

1. This letter is provided in response to reference (a), a portion of which denies a portion of reference (b). Reference (b) requests that detailed defense counsel will serve as the personal representative for Mr. Hamdan pursuant to references (c) and (d).
2. Reference (b) provides in the alternative that, if the request to serve as personal representative was denied, detailed defense counsel for Mr. Hamdan would serve as a witness. As a result of the investigation of Mr. Hamdan's case, detailed counsel has acquired exculpatory evidence directly bearing on Mr. Hamdan's status as a combatant. Under references (b) and (c) Mr. Hamdan is entitled to call reasonably available witnesses to testify on his behalf. My understanding from consultation with Mr. Hamdan is that he desires me to testify on his behalf and appreciate that reference (a) does not prevent such testimony.
3. My understanding based on the representation of the government in enclosure (1) is that Mr. Hamdan's combatant status review hearing is scheduled for 3 December 2004. I am available at that date and will be present to testify. Should Mr. Hamdan's status review hearing be moved, I respectfully request to notify me at the earliest opportunity, so I may adjust my schedule accordingly to be at that proceeding.
4. With regards to my testimony, I understand from reference (a)'s denial that the combatant status review hearing is administrative and will not implicate judicial proceedings pending before the Military Commission. As such, my understanding is that my testimony and associated documentary evidence will not be forwarded or made available in any form to the Military Commission or the prosecutor for use in those proceedings.
5. In order to facilitate my testimony, I respectfully request that Mr. Hamdan's personal representative when assigned be advised of my work phone number, (703)607-1521 ext. 191# (DSN 327); after hours phone number (703) 244-8777 and email address swiftc@dodgc.osd.mil.

so that he/she may contact me in order to properly advise and assist Mr. Hamdan in obtaining witnesses pursuant to references (c) and (d).

6. Nothing in this letter is meant to waive any right or privilege under the Constitution and laws of the United States, nor is it intended to waive any ethical claims that may arise out of uncounseled attorney/client contact.

A handwritten signature in black ink, appearing to read 'C.D. Swift', with a horizontal line extending to the right from the end of the signature.

C.D. SWIFT
LCDR, JAGC, U.S. Navy
Detailed Defense Counsel



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

July 30, 2004

MEMORANDUM FOR Commander Charles D. Swift, Defense Counsel, Office of
Military Commissions

SUBJECT: Request for Reciprocal Discovery, *United States v. Hamdan*

The United States of America, by and through Commander Scott Lang, Prosecutor, hereby makes a formal request for reciprocal discovery. The United States asks that the defense provide a written response to this request, production of requested matters, and notice of any inability or intent not to comply.

Production includes the opportunity to inspect, photograph, and copy.

As used in this discovery request, the phrase "all documents and information" includes, but is not limited to, any writings (in hardcopy or electronic format), books, papers, sketches, drawings, photographs, video recordings, audio recordings, laboratory tests and results, or copies thereof; any oral statements; any tangible objects; and names and contact information of anyone possessing information about the requested matters.

As used in this request, the term "witness" includes persons who provide testimony in person or by some other means to include Video teleconferencing,

1. Pursuant to Military Commission Instruction 8, paragraph 6(A), copies of all documents and information intended for presentation as evidence at trial. This request includes, but is not limited to, the following:
 - a. Notice of any request or intent to request that the commission take conclusive notice of facts that are not subject to reasonable dispute;
 - b. Notice of any evidence, to include testimony, documents or physical evidence that the defense intends to introduce on either the merits or in sentencing that may constitute classified or protected information;
 - c. Copies of any demonstrative evidence that the defense intends to introduce on either the merits or in sentencing;
 - d. The Curriculum Vitae for any expert the defense intends to call as a witness on the merits or in the sentencing phase;
 - e. A copy of any statements, signed, reviewed, or adopted that relate to this prosecution in any manner of a witness that the defense intends to call on either the merits of the sentencing phase;



f. For any witness that the defense desires the government to produce on their behalf, a synopsis of testimony that the witness is expected to provide (note that the defense should not rely on the fact that a witness appears on the prosecution's witness list to mean that the witness will, in fact, be present. Should the defense wish to examine witnesses on the prosecution witness list they should specifically request them and provide the required information); and

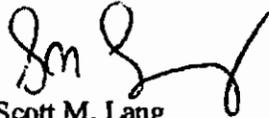
g. All documents and information used by a witness to prepare for trial, to include any writings or documents used by any witness to refresh memory for the purpose of testifying, either while testifying or prior to testifying.

2. Pursuant to Military Commission Instruction 8, paragraph 6(C), notice of any intent to raise any affirmative defense.

3. Pursuant to Military Commission Instruction 8, paragraph 6(D), notice of intent to raise a defense of lack of mental responsibility or to introduce expert testimony regarding the accused's mental condition. This request includes, but is not limited to, the results of any mental health examinations performed by any psychological professional with respect to the accused.

This discovery request is continuing and shall apply to any additional items, requested herein, which become known to the defense at a later date.

The United States reserves the right to make additional continuing discovery requests.



Scott M. Lang
Commander, U.S. Navy
Prosecutor
Office of Military Commissions