

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Government Motion
for Reconsideration
CORRECTED

24 September 2008

1. **Timeliness**: This motion is timely under Rule for Military Commissions (R.M.C.) 905(f).

2. **Relief sought**: The Government requests reconsideration and reversal of the military judge's ruling and sentencing instruction that the accused is entitled to credit against the adjudged sentence for time spent in detention as an enemy combatant prior to trial. Further, should the military judge reverse his prior ruling, the Government requests that the military judge set aside the sentence as the product of legal error, reassemble and correctly reinstruct the members, and direct the members to resume deliberations on sentence.¹

3. **Summary of the argument**: The accused is not entitled to administrative credit because nothing in law or regulation authorizes such credit. Further, even if credit were available, the accused is not entitled to credit. The accused was not subject to pretrial confinement in connection with the charges for which he was tried, but was independently detained under the law of armed conflict as an enemy combatant. Pending military commission charges might have provided a separate legal basis for the accused's pretrial detention for a period of time; that does not, however, change the fact that he was continuously and lawfully detained as an enemy combatant. Because it is likely, based on the members' questions to the military judge, that the sentence adjudged was influenced by the military judge's erroneous instruction to the members that the accused would receive administrative credit, the

¹ If the military judge grants the requested relief and reassembles the members to resume deliberations, the Government will not seek a sentence greater than the 66-month sentence previously adjudged.

sentence is the product of legal error which should be corrected by the members themselves.

4. Burden of persuasion: As the moving party, the burden of persuasion is on the Government.

5. Facts and procedural history: The accused was captured in Afghanistan in November 2001, and detained by the United States as an enemy combatant. A Combatant Status Review Tribunal (CSRT) subsequently confirmed the accused was indeed an enemy combatant subject to detention under the law of armed conflict. In July 2004, the accused was charged before a military commission with various crimes. In July 2006, the United States Supreme Court held that the Presidential order establishing that military commission was invalid. *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006). On 5 April 2007, following enactment of the Military Commissions Act (M.C.A.), 10 U.S.C. §§ 948a, et seq. (2006), the accused was charged with crimes codified by that Act.

Following trial on those charges, the accused was convicted of providing material support, over a five-year period, for both terrorist acts and to an international terrorist organization -- al Qaeda -- by joining al Qaeda, transporting weapons, and driving Usama bin Laden and serving as his armed bodyguard.

The members' findings were made after a full adversarial trial, at which the accused received numerous procedural protections, such as representation by both military and civilian counsel, the opportunity to cross-examine witnesses, and the opportunity to call witnesses (including government-paid expert witnesses) on his behalf, among others.

Prior to instructing the members on sentence, the military judge ruled the accused was entitled to administrative credit. At the time, the military judge stated he had determined he had authority to order administrative credit, but did not state the basis for that conclusion. The United States had continually objected to the granting of any credit for pretrial detention. The judge agreed, however, not to inform the members that he would give such credit. Nevertheless, in response to

questions from the members prior to the start of their deliberations on sentence, the military judge instructed them that the accused would receive 61 months administrative credit.²

6. Law and Argument:

a. Nothing in the M.C.A., the Manual for Military Commissions (M.M.C.), or any other law or regulation authorizes administrative credit against a sentence to confinement adjudged by a military commission. Therefore, the accused is not entitled to such credit, the military judge has no authority to order such credit, and it was error to instruct the members that the accused would receive such credit.

Even in courts-martial, an accused was not historically entitled to administrative credit for pretrial confinement.³ Such credit is, rather, a regulation-based innovation of relatively recent vintage. See *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984). In *Allen*, the Court of Military Appeals construed a Department of Defense (DoD) Instruction⁴ as "voluntarily incorporating [into the DoD sentence computation rules] the pretrial-sentence credit" required by federal law, 80 Stat. 217 (1966), for civilian prisoners in the custody of the Attorney General. *Allen*, 17 M.J. at 128. See *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002) (Congress has not required credit for lawful pretrial confinement, nor constrained authority

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³ Until "enactment of the Uniform Code of Military Justice [in 1950], pretrial confinement was a matter *in mitigation* to be considered by the reviewing authority in his action on the sentence. It was considered highly irregular and impermissible for the members to consider pretrial confinement in reaching an appropriate sentence." *United States v. Davidson*, 14 M.J. 81, 85 (C.M.A. 1982) (citations omitted) (emphasis added). Then "[i]n 1951, the President, in promulgating the Manual for Courts-Martial, provided that pretrial confinement was a matter to be brought to the attention of the court-martial and to be considered by it in adjudging an appropriate sentence." *Id.* at 85-86.

⁴ DoD Instruction 1325.4 (Oct. 7, 1968). This instruction was later revised and reissued as DoD Instruction 1325.7 (July 17, 2001). *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002). This instruction remains in force today in the court-martial system.

of President or Secretary of Defense to grant credit; decision whether to extend credit under DoD instruction is matter of Executive prerogative). The Secretary of Defense's voluntary decision to accord administrative credit for pretrial confinement to members of our Armed Forces sentenced by courts-martial in no way supports a conclusion that such credit is available to alien unlawful enemy combatants convicted and sentenced by military commissions.

Similarly, in federal civilian courts, a defendant's entitlement to administrative credit for time spent in pretrial detention flows from statute. 18 U.S.C. § 3585 (2006). See *United States v. Wilson*, 503 U.S. 329, 335 (1992); Bail Reform Act of 1966, Pub. L. 89-465, § 4, 80 Stat. 214, 217. Further, in *Wilson*, the Supreme Court held that responsibility for determining the amount of administrative credit under the statute fell to the Attorney General, as the person responsible for the incarceration of the offender, rather than to the district court imposing sentence. *Wilson*, 503 U.S. at 334-35.

b. Even assuming, *arguendo*, a person convicted by military commission is entitled to administrative credit against the adjudged sentence, such credit would presumably only be available for days spent in custody in connection with the offense or acts for which sentence was imposed. See *Allen*, 17 M.J. at 128 (quoting Act of June 22, 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217). In the instant case, the accused was independently detained, in accordance with the law of armed conflict, as an enemy combatant. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality *op.*).

There can be no doubt the accused is an enemy combatant whom the United States may detain, pursuant to domestic law and the law of armed conflict, for the purpose of keeping him off the battlefield. The accused has in fact been found to be an enemy combatant on *three separate occasions*: First, at his CSRT; second, by the military judge at the in personam jurisdictional hearing; and third, by the members, in finding the accused guilty under the M.C.A. of multiple specifications of providing material support for terrorism. Accordingly, since the accused's capture in 2001 on the battlefield of Afghanistan, the

accused has been lawfully detained as an enemy combatant. *Hamdi*, 542 U.S. at 521 (plurality op.); *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."). In *Hamdi*, Justice O'Connor, writing for a plurality of the Court, acknowledged that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. At a later point in her opinion, she wrote:

[W]e understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain *for the duration of the relevant conflict*, and our understanding is based on longstanding law-of-war principles. . . . The United States may detain, *for the duration of these hostilities*, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States."

Id. at 521 (plurality op.) (emphasis added).⁵

Enemy combatants are detained to remove them from the battlefield. By contrast, pretrial detention of those facing criminal charges is done in connection with the criminal proceedings against those individuals. The distinction is illustrated by the requirement that detained combatants be released and repatriated without delay once the active hostilities cease, while accused military commission defendants may be held pending trial without regard to the existence of ongoing hostilities.

In the instant case, the accused was originally captured and detained as an enemy combatant. It was only later, concurrent with but separate from his detention as a combatant, that the accused was tried and convicted of committing various war crimes. His status as an enemy combatant remained, throughout, a sufficient and independent basis for his detention. Indeed, following the

⁵ While Justice O'Connor's opinion only commanded the assent of three other justices, this proposition enjoys majority support. See *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).

Supreme Court's decision in *Hamdan*, in which the prior commission proceedings against the accused were found to have been *ultra vires*, the accused was not released, even though charges were no longer pending against him. Rather, his status as an enemy combatant remained a sufficient basis for his continued detention.

Likewise, after charges are sworn in a military commission against a detained enemy combatant, those charges may be withdrawn, or the Convening Authority may choose not to refer them for trial, or the commission may dismiss them for one reason or another. Nevertheless, the United States would be fully justified to continue to detain someone adjudged to be an enemy combatant in order to prevent his return to the battlefield.

Consequently, even if administrative credit against commission sentences were available for pretrial confinement, the accused in this case would not be entitled to such credit since he was not confined in connection with the commission charges, and it was error to instruct the members that he would receive such credit.

7. Conclusion. For the foregoing reasons, the military judge should reconsider his erroneous ruling and instruction, and properly find that the accused is not entitled to administrative credit against his adjudged sentence for time spent in pretrial detention. Further, because the members were instructed to the contrary, and -- based on their questions to the military judge -- their sentence was likely influenced by that erroneous instruction, the military judge should set aside the sentence as invalid due to an error of law, reassemble the members, correctly reinstruct them, and thereafter direct the members to again deliberate on sentence in light of the corrected instructions.

8. Oral Argument: Pursuant to R.M.C. 905(h), the Government requests oral argument.

9. Witnesses: No witnesses are necessary, as this motion presents a pure question of law.

10. Conferral with opposing party: The Government certifies that it has conferred with counsel for the accused, and counsel advises that he opposes this motion.

Respectfully submitted,



Timothy D. Stone,
LCDR, JAGC, USN
Prosecutor

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Prosecutor

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Omar S. Ashmawy
Major, USAF
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/s/

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/s/

Clayton Trivett, Jr.
OFFICE OF MILITARY
COMMISSIONS
Prosecutor

/s/

Omar S. Ashmawy
Major, USAF
Prosecutor

[REDACTED]

From: [REDACTED]
Sent: Tuesday, September 30, 2008 3:01 PM
To: [REDACTED]

Subject: FW: U.S. v. Hamdan - Government motion to reconsider
Attachments: Gvt Motion for Reconsideration - CORRECTED COPY.pdf; GOVT MOTION HAMDAN DTD 24SEP08.pdf

Please accept this corrected copy. There is one changed word. We inserted a "not" on page 6, paragraph right before the conclusion. Inserting the "not" makes it consistent with our possession.

v/r
[REDACTED]

From: [REDACTED]
Sent: Wednesday, September 24, 2008 14:46
To: [REDACTED]
Cc: [REDACTED]
Subject: U.S. v. Hamdan - Government motion to reconsider

LTC Sowder: Please accept for filing in the case of US v. Hamdan the attached Government motion to reconsider.

v/r
[REDACTED]