

The US government extended an invitation to The American Legion to send an official observer at the hearing of alleged Al-Qaida member and terrorist Salim Hamdan at Guantanamo Bay Naval Station on December 3-7, 2007. National Commander Marty Conatser was in the midst of a trip to the Far East and unavailable on those dates. He asked that I represent the organization at this hearing. As an official representative of a Non-Governmental Organization (NGO), I was invited to travel by military plane to Guantanamo Bay for the hearing. Four other organizations were represented, the ACLU, Human Rights Watch, Human Rights First and Amnesty International. A handful of journalists and a member of the UN Commission on Human Rights also attended.

The purpose of the hearing was to determine Mr. Hamdan's status as either lawful or unlawful enemy combatant. He was captured during the close of the initial phase of the war in Afghanistan on the main highway and supply route between Pakistan and Kandahar, Afghanistan. The government alleges he was driving a car containing two SA-7 anti-aircraft missiles and had no uniform or other identifying factors marking him as having official status with the Taliban army.

The Geneva Convention governs the status of all combatants in wars between nations. Since both the United States and Afghanistan have signed the Geneva Convention, during that period when the Taliban was still the official government of Afghanistan, the status of all combatants captured is to be determined according to that document. The hearing was to present evidence from both the prosecution and defense to the military judge hearing the case for his decision.

As official observers we traveled on an Air Force C-9 (military version of the DC-9) between Andrews Air Force Base and Guantanamo Bay. It was an interesting feeling to be walking across the same concrete to board the plane that we have watched the President and many foreign dignitaries cross on TV. At Guantanamo Bay or "Gitmo" as it is commonly called, we were housed in the Visitors Quarters and ate either in the mess hall or one of the civilian restaurants.

Since Gitmo is an active military base and since we had official NGO status, we were escorted everywhere by a Army Lt. Col. He was serving along with his Puerto Rican National Guard Military Police unit and was detailed to the Joint Visitors Bureau, hence his escort duties. Our housing was on the less populated side of the bay. We were allowed free access to the few facilities there but were escorted everywhere on the other side. Due to the presence of the detention facilities, security is quite heavy on the base, resulting in the continual escort.

Entering the courthouse for the hearing required passing through four separate checkpoints manned by Army MPs. Successful passage allowed us in the courtroom but we were restricted to one pen and a pad of paper for notes. No spiral notebooks were allowed due to the possibility of using the wire as a weapon in the event someone slipped through the background checks in an attempt to aid the defendant. The defendant, Mr. Hamdan, was escorted by two MPs at all times in the courtroom.

The hearing lasted approximately 21 hours, not all of which was working time since frequent breaks were necessary for the translator. Every word spoken in the courtroom during official sessions was simultaneously translated into Arabic for the defendant. Originally two translators were to relieve each other but one of the two was challenged

by the defense for inaccuracy which left one translator to handle all the duties. It was necessary to take frequent breaks. The defendant and a translator with the defense team wore headphones to receive the translation as did some members of the media and NGOs.

The courtroom was nearly state-of-the-art with a wireless sound system for translation and a computer system used for documents. The evidence was almost all received electronically. The only exception being a small number of pictures that were classified and could only be viewed by the prosecution, defense and judge. The computer system allowed the evidence to be viewed in any combination of the judge, prosecution, defense and audience.

This hearing broke new ground in two ways. It was the first legal proceeding for any of the detainees where witnesses were called and testimony received. In addition, a grant of limited immunity was given to another of the detainees to testify on behalf of Mr. Hamdan. In all, we heard testimony from five witnesses, three for the prosecution and two for the defense.

The prosecution presented Major Henry Smith, the commander of the combined US Army Special Forces and Afghan Northern Alliance force that severed the Highway 4 supply route capturing Mr. Hamdan in the process. He detailed his experience during the Hamdan's capture, his observation of the missiles and his observations of the Taliban Army as regards uniforms and behavior.

Two civilian witnesses also testified for the prosecution. Both George Crouch of the FBI and Robert McFadden, a Defense Department counterintelligence investigator had questioned Mr. Hamdan. They recounted the results of their separate interrogations. They both spoke of Mr. Hamdan's admission of his close prolonged contact with Osama Bin Laden dating to before the USS Cole and East African embassy bombings.

The defense presented testimony from a second detainee, Mr. Boujaadia, who was captured the same day as Hamdan. His testimony was used to attempt to cast doubt on the account of Hamdan's capture and which vehicle actually contained the missiles. He was granted immunity in that his testimony that day cannot be used against him in later proceedings. Mr. Boujaadia has been cleared for release at a future date.

Dr. Brian Williams of the University of Massachusetts – Dartmouth was also called by the defense. Dr. Williams is an expert on the groups that have formed to fight on the side of the Muslims in those places where Muslims have been suppressed, from Bosnia and Kosovo in the West to the Uighur region of China in the East. He spoke from his knowledge of Al-Qaida and the Taliban, the relationships between them and the Arab foreign fighters enlisted on behalf of the Taliban by Bin Laden and Al-Qaida known as 055 brigade. He also referred to a group of the al-Qaida called al-Qaida al-Suba that governed what he termed the "outside activities" of al-Qaida, namely operations like the USS Cole and 9/11, the implication being that Hamdan had not been a member of this second group and therefore should be declared a lawful combatant. Dr. Williams did not make that statement but that was the intent of the defense.

Two other possible witnesses may present testimony. The judge indicated that he was willing to take testimony over the telephone from Hamdan's wife in Yemen if she had relevant information in his defense and that access to a third detainee was granted for his

examination if a potential disagreement on attorney representation for his could be resolved.

The judge will render a decision on Hamdan's status at a later date following reception of the testimony of those two witnesses and his deliberations. Charges have been filed against Hamdan and an arraignment held. If the judge's decision places him as an unlawful enemy combatant, trial on those charges will be held.

In general, the process observed appeared to me to be quite fair. Not coming from a legal background, I cannot speak to any of the legal issues that surround every case of this magnitude whether in a civilian or military court. It did appear though that the defense was accorded every opportunity to present their case. The only possible problem was the defense's request for access to three other detainees to ascertain if they had information on Hamdan's status with al-Qaida. They are considered to be high-value detainees and the judge denied the request based on the lack of available time to work out arrangements with the government for access to the detainees. He also noted that the defense had no knowledge of those potential witnesses actual testimony. The defense replied that without the ability to interview them there was no way to know what knowledge they may hold. This appears to be an issue that will need to be resolved at trial if the judge rules against Mr. Hamdan.

Discussion with the other NGOs based on their experience at prior proceedings and the military personnel on-site, it appears that the process is becoming more open and much more reminiscent of the type of actions taken in the civilian justice system that we are all more familiar with. These proceedings remain in a military court so some differences exist. It did not appear to me that those differences are resulting in a basic unfairness to the defendant.

It is to be remembered that these types of hearing have taken place in past wars much closer to the battlefield and much sooner after the accused is captured. It is possible that while the length of time between capture and the hearing is a problem, the defendant may be receiving a better hearing of his case due to the attention now being given to these cases. Past actions will no doubt leave some residual problems and what-might-have-been's but based on the proceedings I observed, I believe that thanks to that attention, the right actions are being taken.

It was a privilege to be invited to observe these hearings but an even greater privilege to have spent several days among the men and women serving us in the military. I found myself greatly reassured and very comfortable in their presence. They are outstanding.