

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA

4 v. S(7) 98 Cr. 1023

5 USAMA BIN LADEN, et al.,
6 Defendants.

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8
9 New York, N.Y.
10 May 15, 2001
11 9:40 a.m.

12 Before:

13 HON. LEONARD B. SAND,
14 District Judge

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1 APPEARANCES

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3 Southern District of New York
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16 Attorneys for defendant Wadih El Hage

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1 (Trial resumed; counsel for the government,
2 defendants Odeh and El Hage present; defendants not present)

3 THE COURT: Are there any problems that arose with
4 respect to the jurors' last note?

5 MR. KARAS: No, your Honor. We have the El Hage
6 exhibits, originals plus 12 copies, and we have the government
7 exhibits that were requested. We mentioned to you yesterday
8 that the one exhibit, 310-74A, had already been provided.

9 THE COURT: Yes, and that was included in the note.
10 As soon as the marshals advise me that the jurors have
11 arrived, we will send that in.

12 There are some matters with respect to discovery, the
13 Brady and the Albright subpoena, which I am prepared to take
14 up as soon as counsel are here.

15 MR. KARAS: I will notify Mr. Garcia and Mr.
16 Fitzgerald and have them come down.

17 (Recess)

18 (All counsel present except counsel for defendant
19 Mohamed; defendant al-'Owhali present)

20 THE COURT: I understand the jurors are arriving and
21 we will send in the exhibits that were requested yesterday. I
22 understand there is no issue with respect to those exhibits.
23 What I want to take up is the motion to quash the subpoena of
24 Madeleine Albright, and I would like to address the Brady
25 issue. I realize we have scheduled that for argument on

1 Wednesday, but I think maybe we can resolve that.

2 I would like to see a copy of the protective order in
3 this case. Does someone have that?

4 Let me know when counsel for K.K. Mohammed arrives.

5 (All counsel present)

6 THE COURT: Please note that at 10:00 a.m. the jury
7 arrived and the exhibits requested were sent in to them.

8 (Pause)

9 (Continued on next page)

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1 THE COURT: Is the matter of the motion to quash the
2 subpoena for Madeleine Albright fully submitted and ready for
3 disposition?

4 MR. BAUGH: It is, your Honor.

5 THE COURT: The declaration by Mr. Mason, the
6 attorney adviser for the Department of State, states that the
7 subpoena served upon Madeleine Albright did not have attached
8 to it the statement which was attached to the subpoena
9 submitted to the court. Was that intentional or inadvertent?

10 MR. BAUGH: Your Honor, it must have been
11 inadvertent, because when we gave you the subpoena it had it
12 attached and you signed it and it was given to us without the
13 attached, and we took it to the Marshal Service. The one that
14 Mr. Kenneally handed me in the hallway had come back and you
15 didn't have it on there, so we ran it across the street. I
16 don't know why you kept it. I was told you kept it.

17 THE COURT: I kept it? I don't keep subpoenas. I
18 signed the subpoena and I gave it to someone to give to you.

19 MR. BAUGH: I sent back that morning a statement with
20 the attachment on it and it was brought out to me, and the
21 subpoena was brought out, and I was told that the CFR was,
22 something to the effect that it was kept back there. But I
23 prepared it.

24 THE COURT: So it was inadvertent.

25 MR. BAUGH: It was inadvertent, yes.

1 THE COURT: Because Mr. Mason raises the point that
2 there has not been compliance with the CFR, and he also states
3 that former Secretary Albright's staff has informed me that
4 she will be traveling extensively within and outside the
5 United States for the next two months for business.

6 Does the government have any objection to our dealing
7 with this matter on the assumption that the attachments to the
8 subpoena as furnished to the court and to the U.S. Attorney's
9 Office were part of the service upon the ex-secretary?

10 MR. GARCIA: Your Honor, the government would suggest
11 that we go forward, argue the merits of the subpoena, and if
12 necessary and Miss Albright is required, he can reserve the
13 right to serve a subpoena with the attachment at a later date.

14 THE COURT: Mr. Baugh, is there anything you wish to
15 add to your previous submissions?

16 MR. BAUGH: Yes, your Honor, very briefly. First, I
17 apologize for not giving anything back in writing. The
18 subpoena was served relatively late. I understand that the
19 United States was obviously working on this yesterday.

20 Would you like me to respond to the assertions of
21 fact made by the United States in their motion?

22 THE COURT: If you would like to, if you feel you
23 haven't already dealt with them.

24 MR. BAUGH: I think I have already dealt with them,
25 your Honor. I will say very briefly, one, the United States

1 asserts that Miss Albright is not the most appropriate person
2 to provide the evidence that we indicated in our compliance
3 with the CFR affidavit.

4 THE COURT: Very explicit in your attachment to the
5 subpoena is that you are seeking her understanding.

6 MR. BAUGH: Yes.

7 THE COURT: What is the relevance of the
8 understanding of the former Secretary of State, for example,
9 with respect to the military actions taken by the United
10 States which are the subject of another subpoena?

11 MR. BAUGH: Yes, your Honor. In 1996, when
12 Mrs. Albright, Ambassador Albright gave the interview which we
13 have the tape of and which we have already given you a
14 transcript of --

15 THE COURT: Yes, and we can deal with the question of
16 whether that is admissible even in the absence of Madeleine
17 Albright.

18 MR. BAUGH: I can deal with that very quickly. The
19 United States in its notice of intention to seek the death
20 penalty has indicated several reasons why my client should be
21 executed. One is that he posed a great risk of death to
22 others by his actions, that there was a disregard for innocent
23 people who were standing around, and that he utilized a weapon
24 of mass destruction, is the charge, and that there is also
25 absence of remorse.

1 It is the defendant's intention to show that
2 Miss Albright as ambassador to the United Nations from the
3 United States, and also a person who sat on the sanctions
4 committee, put into motion certain activities that she knew
5 would cause the death of innocent people.

6 THE COURT: The actions that were taken, those are
7 matters of public record and are not dependent upon anything
8 with respect to her state of mind. If the United States, for
9 example, sought to bomb or pollute the Iraqi water supply and
10 that is relevant -- I really want to focus on Madeleine
11 Albright.

12 MR. BAUGH: Yes, sir.

13 THE COURT: If that is relevant, that's not something
14 which requires her presence, right? And indeed, her state of
15 mind would really be irrelevant, wouldn't it? If she did it
16 for purely humanitarian reasons or whether she did it because
17 of animus towards the Iraqis wouldn't alter the fact that the
18 actions were taken.

19 MR. BAUGH: Your Honor, can I get one document, and I
20 will talk while I do that. Your Honor, during the argument,
21 Mr. Fitzgerald pointed out in his argument several times that
22 there was a difference between what Al Qaeda was doing because
23 it is not a government, and that what it was doing was, what
24 Al Qaeda was doing was not an act of a government, it was
25 illegal.

1 THE COURT: That's a different issue.

2 MR. BAUGH: This is the lead-up to this issue.

3 THE COURT: Lead up quickly, please.

4 MR. BAUGH: If Miss Albright -- and she has
5 acknowledged she did this. The question is for her, when she
6 was doing this, when she was sitting on the sanctions
7 committee, when she was authorizing these enforcements was she
8 aware of Protocol 1 Geneva Convention '54, starvation of
9 civilians is prohibited --

10 THE COURT: I am familiar with that.

11 MR. BAUGH: May I put it in the record?

12 THE COURT: My question is, if I may, please, because
13 you are not addressing my question.

14 MR. BAUGH: Yes, sir.

15 THE COURT: If action were taken by the United States
16 which were in violation of Geneva protocols, those are
17 objective facts. This is what the United States did. Is the
18 state of mind of a former Secretary of State relevant?

19 MR. BAUGH: Whether or not these acts were being
20 committed at the direction of the -- then, in 1996 she was the
21 ambassador to the United Nations, she wasn't appointed to
22 Secretary of State until 1997. If she undertook these actions
23 in 1996, aware that these actions were illegal, and if they
24 were illegal, they are in violation of United States Code as
25 well, concerning the definition of terrorism and genocide, if

1 she authorized and directed these actions and in her state of
2 mind she knew these actions were illegal, then they do not
3 have the protection that was argued by Mr. Fitzgerald that
4 there is some difference between what Al Qaeda does and what
5 the United States does, and we have the effect of minimizing
6 the impact of the government's aggravator. It is sort of
7 saying yes, Al Qaeda did this, but the United States does it
8 too and the person in charge knows it.

9 THE COURT: I find that totally unpersuasive in all
10 respects. I find it unpersuasive first of all because it
11 equates official government action with respect to a hostile
12 sovereign and actions taken by a nongovernmental body, and
13 also it is dependent on -- the argument is dependent on the
14 significance of state of mind of a government official. I
15 think if Madeleine Albright were to say I took this action
16 because I believe that -- this is a hypothetical -- were the
17 heads of state of Iraq to be acting in an acceptable fashion
18 these actions would have brought about quick resolution of a
19 conflict with a consequence of saving lives of countless
20 children, that would be irrelevant. All of that would be
21 irrelevant.

22 In other words, it seems to me that the question of
23 what the government did, what knowledge the government may
24 have had with respect to conditions which existed and things
25 of that sort are not dependent on Madeleine Albright's state

1 of mind.

2 MR. BAUGH: No, I understand your concern.

3 Your Honor, in a death case, the circumstances of the
4 offense are the subject of aggravation and mitigation. This
5 trial for the last four months now has concentrated on one
6 issue only, and that is what happened. There has been no
7 discussion, or limited discussion of the why, and the why of
8 what happened is a circumstance of the offense that is
9 admissible under the reduced standard in death penalty cases
10 to be presented as to why this man shouldn't be executed.

11 THE COURT: You know, I think the umbrella of lack of
12 remorse is a very wide umbrella, and I think that it perhaps
13 is sufficient to enable you to introduce, by some competent
14 witness or document, evidence as to what your client knew or
15 was general knowledge as to why he chose a lack of remorse.

16 MR. BAUGH: That is correct.

17 THE COURT: So I know you have other arguments for
18 relevance which are to varying degrees --

19 MR. BAUGH: I've got a good one.

20 THE COURT: -- lack of remorse. It's a two-edged
21 knife, of course, because also the lack of remorse is also a
22 factor relevant to future dangerousness.

23 MR. BAUGH: However, your Honor, applying even the
24 McVeigh test, all the events about which we are speaking now
25 occurred prior to 1998, the day of the offense, so the McVeigh

1 standard would not keep it out.

2 Additionally, if the court will review the
3 indictment, you will see that the statement given to ABC in
4 July of 1998 which contains all these representations about
5 why Al Qaeda is doing this, according to the indictment filed
6 by the United States, my client was present during the
7 interview and heard the statements made. That is contained in
8 the indictment. So if he was present when the statement was
9 made, we have a copy of the statement as provided by ABC. It
10 predates the offense. We don't need lack of remorse. Even
11 applying the McVeigh standard it all becomes admissible under
12 the doctrine of motivation.

13 THE COURT: I am focusing now on the very narrow
14 issue of the appropriateness of Madeleine Albright. I am not
15 dealing now with whether you can introduce evidence of events
16 preceding the bombing, which would be relevant to, among other
17 things, lack of remorse.

18 Anything else you want to tell me?

19 MR. BAUGH: Yes, your Honor. I will submit to the
20 court this, that there is no better witness from a factual and
21 from an evidentiary standpoint. Number one, this was being
22 done, namely, the sanctions were being enforced by the
23 sanctions committee to whom Madeleine Albright was the
24 representative at the time.

25 Number two, she is the power with the power at the

1 time to come back and she was allegedly having this done to
2 enforce the UN sanctions and she was the representative to the
3 United Nations and would have sat on that committee.

4 Lastly and most importantly from an evidentiary
5 standpoint, she is the only witness we have on tape who the
6 government would have a significant problem trying to
7 rehabilitate or duck those admissions. If they bring in
8 someone else who I do not have on tape, that person is subject
9 to impeachment or can get around the statements that they
10 have. From an evidentiary standpoint to take this
11 distinguished lady, start with that which we have memorialized
12 on videotape, start from that point that she cannot retreat
13 behind, what better witness could there be? What more control
14 of a witness on examination could there be? There is no one
15 from the perspective of Mr. Al-'Owhali who is better prepared
16 to take the stand and better for his case than this witness
17 whose statements have been memorialized.

18 We would apply the appropriate standard for
19 admissibility. We would submit that the why of the offense is
20 one of the circumstances that is relevant to the hearing and
21 to the determination of death, and, further, we would apply it
22 back to the Johnson case, that he has a constitutional right
23 to develop and present all issues that can either lead to his
24 death or mitigate his death, and in this instance we believe
25 we are directly confronting the strength of the aggravators as

1 aggravators, and, more importantly, we are explaining the why
2 of his behavior, and those issues are relevant.

3 THE COURT: Somebody from the government?

4 MR. GARCIA: Your Honor, we will rely on the
5 arguments in our papers. I just think that Mr. Baugh,
6 continuing in his response to the court, fails to distinguish
7 between actions that the United States government has taken,
8 which are a matter of public record, and what the relevance of
9 Ms. Albright's state of mind is to those actions, and seems to
10 be looking to hold her personally accountable for the actions
11 of the government.

12 One other point. Mr. Baugh mentions McVeigh and
13 objective evidence prior to the bombing coming in. That is
14 not the McVeigh standard. The McVeigh standard was state of
15 mind and what the defendant knew at the time of the bombing,
16 and indeed some of the evidence that they tried to put in at
17 the penalty phase had to do with government actions at the
18 time of the original action at Waco.

19 THE COURT: The motion to quash the indictment --
20 what did I say?

21 MR. BAUGH: Do you want to strike that Freudian slip
22 out?

23 THE COURT: The motion to quash the subpoena served
24 on Madeleine Albright is granted.

25 MR. BAUGH: Your Honor, may I have your permission to

1 file a written objection letter?

2 THE COURT: Yes. Do I have your permission to state
3 my reasons?

4 MR. BAUGH: Yes, and I sit down. Feel free.

5 THE COURT: Apart from many other potential problems
6 raised by the subpoena, the court fully agrees with the
7 position taken by the government in its memorandum of law in
8 support of the motion to quash that Madeleine Albright is not
9 a proper witness. What is significant, arguably, with respect
10 to such issues as defendant's lack of remorse is what the
11 United States government has in fact done which has given rise
12 to a perception on the part of the defendant that the United
13 States is an enemy of people with whom the defendant
14 identifies. What the United States has in fact done are
15 events that are reflected in government documents. For
16 example, with respect to military actions taken, the court is
17 aware that the defendant has subpoenaed documents from the
18 military. I understand that discussions are ongoing with
19 respect to compliance with that subpoena.

20 Madeleine Albright's state of mind is not at issue.
21 Whether the actions were taken under her direction for good or
22 bad reasons from the defendant's perspective is not the
23 question. The question is what actions were taken,
24 particularly what actions were taken of which the defendant
25 had knowledge.

1 Counsel for Al-'Owhali argues that she is the best
2 witness because we have her on tape. Well, if you have her on
3 tape and you wish to introduce the tape, we can deal at an
4 appropriate time with whether that tape would be admissible
5 under the standards for admissibility in a death case, which
6 are more lenient than those in the penalty phase.

7 We do not therefore address such questions as the
8 availability of Madeleine Albright at the time she would be
9 called or any other technical issues.

10 So the motion is granted.

11 You wanted to preserve an objection?

12 MR. BAUGH: Yes, your Honor, I would ask permission
13 to file a written objection so I can cite my constitutional
14 basis as well.

15 Next, your Honor, I have received a letter from the
16 United States Army on May 10. On May 9 I faxed them a letter
17 saying please tell me if you can't get the records that you
18 need because you did or not have them. They sent me a letter
19 back explaining --

20 THE COURT: What records are we dealing with now?

21 MR. BAUGH: The United States military.
22 Specifically, I asked for the dates of the bombing raised
23 against Iraq and what type of munitions have been used. The
24 military has told me repeatedly they are having trouble
25 finding the dates, they don't keep track of their bombing

1 rates. I then wrote them a letter back --

2 THE COURT: Tell me before we spend a lot of time on
3 that, what is the significance of the particular dates of the
4 raids?

5 MR. BAUGH: To show the frequency that they occurred.

6 THE COURT: Have you made clear to them that you
7 would like to have some generalized statement as to the
8 frequency and the particular dates are not of any great
9 concern?

10 MR. BAUGH: Yes, your Honor. In fact, I have some
11 dates from another source and I would like to confirm it.
12 Unfortunately, most of those predate 1998 -- the McVeigh
13 problem. The United States wrote me back and said we are not
14 in a position to say we can't give it to you yet. We will get
15 back to you at the close of the next business day. That
16 letter was dated the 10th. The next business day was the
17 11th, today is the 15th, I have not heard.

18 So I would ask the court to issue a directive to
19 Stewart Ally, counsel for the Pentagon, either send a letter
20 saying you can't give us the information or to give us the
21 information, please.

22 MR. FITZGERALD: Your Honor, we will call Mr. Ally
23 later today. We are generally not in the loop. We will call
24 as soon as this is done.

25 THE COURT: Anything else?

1 MR. BAUGH: Not on the issue of subpoenas.

2 MR. COHN: I have something else, your Honor. I have
3 talked to the government about it. Recent discovery about FBI
4 files about McVeigh leave from a timeliness point of view --
5 what seems to have happened in McVeigh is that they didn't
6 discover documents until they ordered an end search and that
7 the computer system is antiquated. Not making any allegations
8 of government misconduct here, but I am making a demand that
9 if any special search has to be instituted, it should be
10 instituted now for any documents that may have been not turned
11 over to us.

12 MR. FITZGERALD: Your Honor, we have already made a
13 request and will continue to pursue it, to make sure that
14 whatever occurred in the McVeigh case, if there are any
15 technological glitches that it doesn't affect the discovery
16 obligations that we believe we have met here.

17 THE COURT: Very well. Then we are adjourned to
18 await further communication from the jury.

19 With respect to the Brady issue, I think we had
20 scheduled that for argument on Wednesday, tomorrow at 3:00. I
21 had an ex parte conference with the government, and there is a
22 possibility that that issue may be resolved, so that that
23 argument may not be necessary. We will keep it on the
24 calendar but I wouldn't spend all night working on preparing
25 that oral argument.

1 We are adjourned then until word from the jury.

2 (Recess)

3 (Continued on next page)

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1 Ali Mohamed, and again they have only asked for 361-T. There
2 are some entries in the passport that are in English and of
3 course the translation only is of the non-English entries.

4 THE COURT: All right. My note will say: "Here are
5 the exhibits you have requested. You have asked for Exhibits
6 357-T and 358-T and 361-T. We have also enclosed Exhibits
7 357, 358 and 361, portions of which are in English."

8 MR. KARAS: We would propose to send in the
9 originals, and so as not to delay matters we can make copies
10 and send in the copies later.

11 THE COURT: Yes. And they say nothing about when
12 they want to go home, so we will await further word from them
13 and we will send the exhibits and this note in and we will
14 await further guidance as to their wishes.

15 (Court's Exhibits I and II duly marked)

16 (Recess)

17 THE COURT: The jury has requested of the marshal
18 that they go home at 4:30. So if there is no objection, I
19 will just tell them that they may leave at 4:30, and then at
20 4:30 we will be adjourned until tomorrow morning.

21 (Recess)

22 (Proceedings adjourned until 9:30 a.m., Wednesday,
23 May 16, 2001)

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