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

15 May 2008

MEMORANDUM FOR THE CONVENING AUTHORITY

Subj: *UNITED STATES V. OMAR KHADR* – DEFENSE REQUEST FOR EXPERT WITNESS ALISON PARGETER

Encl: (1) Curriculum Vitae of Alison Pargeter
(2) Gen. Thomas L. Hemmingway, Legal Advisor's Pretrial Advice, 13 April 2007
(3) 31 January 2008 CNN.Com article *available at* http://www.cnn.com/2008/US/01/31/alqaeda.death/?iref=mpstoryview#cnnSTCText
(4) MC Form 13-1

1. The defense in the case of *United States v. Omar Khadr* requests that the Convening Authority approve Alison Pargeter as an expert witness on the structure, nature and activities of Libyan militants and organizations, including the Libyan Islamic Fighting Group (LIFG).

2. Qualifications: Ms. Pargeter is a Senior Research Associate, Centre of International Studies, University of Cambridge and Visiting Fellow, Pembroke College, Cambridge. Ms. Pargeter is currently leading a two-year project titled 'Radicalisation in North Africa' that is funded by the Economic and Social Research Council (ESRC). She has published extensively on the politics of Libya and militant groups in North Africa, including the LIFG.

3. Expert consultant's address and telephone number:
Centre of International Studies
First Floor
17 Mill Lane
Cambridge
CB2 1RX
United Kingdom
ap555@hermes.cam.ac.uk
6 [redacted]

4. Synopsis of expected testimony:

a. Relevance:

i. Central to the government's theory of Mr. Khadr's liability are his connections to the al Qaeda organization. The legal advisor to the convening authority has expressly relied upon Mr. Khadr's membership or affiliation with al Qaeda as the basis for personal jurisdiction over him. Encl. 2 at 2 ("Khadr is an enemy combatant and a *member* of or affiliated with al Qaeda. The M.C.A. defines such persons as unlawful enemy combatants."). Charge III, Conspiracy, alleges that Mr. Khadr did "conspire and agree with Usama

bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (alk/a Abu AI-Rahman AI-Kanadi), and various other members and associates of the al Qaeda organization." (Charges Referred at 1). Charge IV, Material Support for Terrorism, alleges that Mr. Khadr did "intentionally provide material support or resources to wit: personnel, himself, to al Qaeda, an international terrorist organization founded by Usama bin Laden." (Charges Referred at 2). Charge V, Spying, alleges that Mr. Khadr conducted unlawful surveillance and "intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces."

ii. In order for the government to prove jurisdiction and its case on three of the five charges against Mr. Khadr, it must demonstrate that the individuals with whom Mr. Khadr associated in Afghanistan in June-July 2002, the period of the alleged overt acts, had some substantial connection to al Qaeda.

iii. According to statements made by trial counsel at the May 8, 2008 hearing before the military commission, Abu Layth al-Libi is an alleged unnamed co-conspirator of Mr. Khadr. In addition, according to the government, al-Libi appears[2] [redacted] allegedly showing Mr. Khadr participating in the manufacture of explosive devices for use against U.S. forces. Open-source media accounts indicate that al-Libi was a member of the LIFG. *See* encl. (3).

iv. The government must prove, and the defense must be provided an opportunity to rebut, the extent of the connections between Abu Layth al-Libi and his organization, the LIFG, on the one hand and al Qaeda on the other. Open-source media accounts indicate that the LIFG did not affiliate with al Qaeda until well after June and July of 2002. *See* encl. (3).

v. Ms. Pargeter will provide testimony detailing the history, structure, aims, activities and associations of the LIFG as of June-July 2002. Ms. Pargeter will be able to testify as to why LIFG fighters would have been in Afghanistan at that time and what relationship, if any, they would have maintained with the al Qaeda organization. Ms. Pargeter will also testify as to the role of Abu Layth al-Libi within the LIFG and what connections, if any, he had with al Qaeda in June-July 2002.

b. Necessity:

i. Ms. Pargeter is an expert on Islamic militant movements of North Africa, and specifically on the LIFG. Her testimony is critical to challenging the government's theory of a link between al Qaeda and those individuals with whom Mr. Khadr is alleged to have joined in June-July of 2002.

ii. Defense counsel do not have the resources to independently investigate and provide this information to the military commission. The nature and organization of the LIFG has not been widely described in academic literature and involves activities spanning diverse countries, cultures and languages. It

is the kind of research that requires field-work and analysis of the kind that can only be provided by a trained academic who has specialized in the region and these issues.

iii. The government has enlisted the expert assistance of Evan Kohlmann, who not only provided consultations to trial counsel on the structure and politics of organizations such as al Qaeda, but produced an elaborate documentary called "The al Qaeda Plan" that trial counsel is currently seeking to introduce as evidence against Mr. Khadr. When the government builds its case around expert testimony on a subject such as this one, a basic equality of arms would necessitate that the defense be afforded the opportunity to introduce evidence from its own experts in rebuttal. "[T]he playing field at trial is rendered even more uneven when the Government benefits from scientific evidence and expert testimony while the defense is wholly denied a necessary expert to prepare for and respond to the Government's expert." *United States v. Lee*, 64 M.J. 213, 218 (CAAF 2006); *see also United States v. Warner*, 62 M.J. 114, 120 (CAAF 2005).

5. Estimated Cost:

a. Total hours/days and total cost:
Ms. Paregeter typically charges $250.00 per hour for consultative services. Ms. Pargeter will require time to write-up her findings in a formal report that will be submitted to the military commission. She will also require time to be consulted by counsel in the case and to testify at trial. The defense, therefore, requests a maximum authorization of 100 hours be allotted to Ms. Pargeter. The Defense therefore requests authorization for up to $25,000 in fees to Ms. Pargeter.

b. Total days TDY at the per diem rate (such as travel days and casual status):
Assuming two days of travel time, plus the typical two days at Guantanamo Bay, Cuba for the conduct of hearings, Ms. Pargeter would need a minimum of eight days TDY to testify both at pre-trial hearings relating to military commission jurisdiction and then again at trial. However, Ms. Pargeter has expressed an interest, due to the distance she would have to travel and her own personal circumstances, in providing testimony to the military commission via video link. The defense supports her testifying in this manner. In this case, she would likely testify for a total of two to four days between both the pre-trial hearing and the trial.

c. Travel costs:
Ms. Pargeter would, at a minimum, require travel and lodging at Guantanamo Bay, Cuba for the purpose of testifying at Mr. Khadr's trial and pre-trial hearings relating to the nature of the LIFG and Abu Layth al-Libi and their connections to al Qaeda. However if Ms. Pargeter were permitted to testify via video link, she would incur no travel costs traveling to GTMO.

d. Rate for professional services and hours/days (when neither travel nor in-court testimony is involved):
Ms. Paregeter typically charges $250.00 per hour for consultative services.

e. Rate for in-court testimony and number of hours/days:
Ms. Pargeter charges her standard $250.00 per hour rate for in court testimony.

f. Inconvenience fee, in any:
None requested.

6. On 15 May 2008, I notified the opposing party of this request.

7. In the event this request is denied, the defense requests a written response articulating the reasons for the denial. Should you have any questions or require further information, please contact me at[3] [redacted]

WILLIAM KUEBLER
LCDR, JAGC, USN
Detailed Defense Counsel

CC: Chief Defense Counsel
Major[3] [redacted] Lead Prosecutor

Alison Pargeter
Tel: 6[redacted]
Mobile: 6[redacted]
E-mail: 3[redacted]

Date of Birth: 30/08/70 Nationality: British

EDUCATION:

The London School of Economics and Political Science, 1997-98 – MA, The History of International Relations from 1945, with Distinction.

The University of Hull, 1989-92 – BA (Hons) English Language and Literature.

CAREER:

Main Research Focus:

Security Issues in North Africa and the Middle East; Muslim Communities in Europe and Political Violence; Islamic Radicalisation in Europe and the Middle East; Libyan Foreign and Domestic Policy. Within this context I have undertaken numerous research projects that have entailed conducting fieldwork and interviews within Muslim communities in Europe and in the Middle East.

Senior Research Associate, Centre of International Studies, University of Cambridge and Visiting Scholar at Pembroke College, Cambridge. 2007-present.

- Currently leading a two-year project titled 'Radicalisation in North Africa' that is funded by the Economic and Social Research Council (ESRC) as part of its 'New Security Challenges' Programme. Entails conducting fieldwork in North Africa and among North African diaspora communities in Europe.

Research Fellow, School of Social Science and Public Policy, Kings College London. 1999 - 2007.

- Main Research Projects Include:

- 2006-07: *The Muslim Brotherhood: Aims and Strategies.* This project explored the aims and objectives of the movement as well as the relationship between the branches in Europe and those in the Middle East. Funded by the Smith Richardson Foundation in the US.

- 2004-05: *Western Converts, Radical Islam and UK Security Concerns.* Funded by the Airey Neave Trust.

- 2004-05: *North African Immigrants, Political Violence and UK Security Concerns* funded by the Economic and Social Research Council (ESRC) as part of the 'New Security Challenges' research programme.

- 2003-04: *Security Implications of Libyan Policy in Africa* funded by the British Academy.

- 2003: *Muslim Immigrant Communities and Links to Terrorist Networks in Italy.* Funded by CeMiSS in Rome.

- 2001: *Euro-Libyan Relations* carried out in conjunction with Instituto Affari Internazionali in Rome and funded by CeMiSS.

- May '99-June '01: Part of the research team working on *European Security in the Western Mediterranean* as part of the ESRC's 'One Europe or Several?' programme

Other Achievements

- Regularly participate in and make presentations at international conferences. This has included addressing the NATO Parliamentary Assembly, the International Atomic Energy Agency (IAEA), the US State Department, the German Foreign Ministry and parts of the Italian Government.

- Undertaken a series of research contracts for UK government – this has included work on global security covering the Middle East region, as well as work on terrorism and organised crime in East Africa for the Ministry of Defence and on Egypt and on small arms and refugees for the Department for International Development.

- Acted as an expert witness in a number of terrorism-related cases in the UK.

- UK Book Reviews Editor, Journal for North African Studies, published by Frank Cass

- Acted as peer reviewer for ESRC proposals, Smith Richardson proposals and for Routlegde manuscripts.

Independent Consultancies and Other Affiliations:

- Senior Associate at Menas Associates and author of monthly publication, 'Libya Focus'.

- Regular contributor to Oxford Analytica and the Janes Information Group.

- Independent consultancy projects carried out for numerous institutions including for the Ford Foundation, the Euro-Mediterranean Study Commission (EuroMeSCo), Freedom House, Ergo Advisors, Globe Research and Rand Europe among others.

- Provide expert country opinions for lawyers on Middle Eastern and North African asylum cases in the UK

Freelance Media Work, 1998-99

Scriptwriting, research and production work for:
- BBC News Research and Analysis.
- BBC Arabic Service (World Service)
- LBC Radio

Marketing Executive, The United Bank of Kuwait Plc, 1995-1997

- Responsible for the writing, design and production of investment marketing literature.

PUBLICATIONS:

I have a single authored monograph, The New Frontiers of Jihad: Radical Islam in Europe that is due to be published by I B Taurus in 2008.

I have published a range of articles including:

- The LIFG's Current Role in the Global Jihad CTC Sentinel. Vol. 1. Issue 5. April 2008
- Standing Alone - Isolated Syria holds secret talks with Israel in Jane's Intelligence Review. 9 February 2007.
- Algeria and the National Reconciliation Process. Journal of Middle Eastern Geopolitics. Year II, Volume I, Number 5-6 July - December 2006 (University of Rome La Sapienza)
- Libyan Fighters Join the Iraqi Jihad: Terrorism Monitor. Volume 4, Issue 23 November 30, 2006. Jamestown Foundation
- North African Immigrants in Europe and Political Violence Studies in Conflict and Terrorism. Vol. 29, Issue 8. (November-December 2006.) Taylor and Francis
- Western Converts to Radical Islam: the global jihad's new soldiers? Jane's Intelligence Review. Vol. 18 No. 08 August 2006
- Libya: Reforming the Impossible? Review of African Political Economy. Vol. 33. No. 108/June 2006. Taylor and Francis
- North Africa's Radical Diaspora in Europe Shift Focus to Iraq War Jane's Intelligence Review. March 2006. (With A Al-Baddawy)
- Libya: From Rogue State to Partner. Journal of Middle Eastern Geopolitics. Vol. 1 No. 2 October to December 2005 (University of Rome La Sapienza)
- The Libyan Islamic Fighting Group: An Organisation in Eclipse. Terrorism Monitor. Jamestown Foundation. Volume 3, Issue 21 (November 3, 2005)
- Libya Responds to Shifting Perceptions of Regional Islamist Challenge. Jane's Intelligence Review. July 2005.
- The Islamist Movement in Morocco: Terrorism Monitor. Jamestown Foundation. Volume 3, Issue 10 (May 19, 2005)
- Political Islam in Libya: Terrorism Monitor. Jamestown Foundation. Volume 3, Issue 6 (March 24, 2005)

- The Evolution of Radical Islamist Groups in Europe. Jane's Intelligence Review. Vol. 17 No. 2. Feb 2005

- Symbols and Slogans: Arab Responses to the War in Iraq in The Conflict in Iraq 2003. Ed. Paul Cornish Palgrave Macmillan 2005.

- Openness is Tricky in 'The World Today' (Royal Institute of International Affairs) June 2004

- Morocco: Increase in Social Discontent and Islamic Militancy. Africa Contemporary Record (Vol.26). Holmes and Meier. 2002

- Libya: Coping with Sanctions. Africa Contemporary Record (Vol.26). Holmes and Meier. 2002

- Pariah No More: in 'The World Today' (Royal Institute of International Affairs) June 2002

- Italy and the Western Mediterranean – an ESRC working paper (4144) in the 'One Europe or Several?' Series. (2001) Found on www.one-europe.ac.uk

- Violence in Libya – 'Mediterranean Politics' (Frank Cass) Vol 6 No.1 Spring 2001

- Western Sahara: Still No Referendum. Africa Contemporary Record (Vol.25). Holmes and Meier. 2001

- Libya: Security Tightens as Isolation Increases. Africa Contemporary Record (Vol.25). Holmes and Meier. 2001

- Libya: All Change for No Change in 'The World Today' (Royal Institute of International Affairs) Aug/Sep 2000

- 'The Mediterranean Frontier – The Edge of the Fortress?' in An Analysis of EU Enlargement ed. Charles Jenkins (Centre for Reform, 2000). Co-authored with Dr Claire Spencer.

LANGUAGES: A' Level French; basic Italian and Spanish; learning Arabic

REFEREES: Available upon request

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

May 20, 2008

From: Major[3] [redacted] Major, USMC, Prosecutor, Office of Military Commissions

To: Office of the Convening Authority

SUBJECT: *UNITED STATES V. KHADR* – REQUEST FOR EXPERT WITNESS ALISON PARGETER

1. Defense Counsel in the case of U.S. v. Khadr have requested the Convening Authority approve Ms. Alison Pargeter as an expert witness on the structure, nature and activities of Libyan militants and organizations, including the Libyan Islamic Fighting Group (LIFG). The Defense requests authorization for up to $25,000 in fees.

2. The Prosecution does not believe the Defense has made the requisite showing to warrant expenditure of government funds for this purpose.

3. The Defense request claims that expert consultative services are needed to "provide testimony detailing the history, structure, aims, activities and associations of the LIFG as of June-July 2002." The Defense request states that Ms. Pargeter's testimony "is critical to challenging the government's theory of a link between al Qaeda and those individuals with whom Mr. Khadr is alleged to have joined in June-July 2002."

4. Rule for Military Commission 703 (d) provides that requests for experts shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.

5. As stated in the Convening Authority's 11 March 2008 response to a previous Defense Counsel request, the appropriate analysis for reviewing requests for expert assistance under RMC 703 is set forth in United States v. *Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005,:

> An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity. But necessity requires more than the "mere possibility of assistance from the requested expert…" The accused must show that a reasonable probability exists "both that an expert would be of assistance to the defense and that denial of an expert would result in a fundamentally unfair trial."
>
> We apply a three-part test to determine whether expert assistance is necessary. The defense must show: (1) why the expert assistance is

> needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop. A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion.

Id. At 143 (quoting United States v. Robinson, 39 M.J. 88, 89 (C.M.A. 1994)).

6. The Defense request does not establish why expert assistance is necessary. The Defense has previously made similar requests to the Prosecution, including a discovery request dated 24 March 2008 requesting all "intelligence reports or other documents relating to the Libyan Islamic Fighting Group," and additional requests for intelligence reports or other documents related to Abu Leith al Libi. Because the requests contained no justification why production of the requested material would be "material to the preparation of the defense," or exculpatory, the Prosecution denied the requests.

7. The Defense filed a motion to compel production of any documents related to Abu Leith al Libi, as well as other individuals (filing D044) and a "notice of motion" requesting production of intelligence reports or other documents relating to LIFG, intel reports relating to contacts between al Qaeda and LIFG, and any documents or other materials relied upon by the United States Government in designating LIFG a "terrorist organization" (filing D049). The parties presented oral argument on the motion and "notice of motion" on 8 May 2008. The Military Judge denied the Defense motion and notice of motion stating that the request for documents relating to Abu Leith al Libi was overbroad (Ruling on D044), and that the defense had not made the requisite showing of materiality for production of any documents related to LIFG (Ruling on D049).

8. As with the Defense discovery requests and filings, the Defense again has failed to make the requisite showing in its request for expert assistance. The Defense request provides little insight into how Ms. Pargeter's testimony would be helpful to the Defense, other than a vague statement that Ms. Pargeter will be able to testify as to why LIFG fighters would have been in Afghanistan at that time and what relationship, if any, they would have maintained with the al Qaeda organization. Similarly, the defense offers that Ms. Pargeter will also testify as to the role of Abu Leith al Libi within the LIFG and what connections, if any, he had with al Qaeda in June-July 2002 without providing any additional elaboration of what those connections are (or are not) with al Qaeda.

9. The accused has never claimed to be a member of LIFG or fighting on behalf of LIFG. Rather, the accused has stated that "he was a terrorist trained by al Qaeda." See Appellate Exhibit 17, Attachment 3. In addition to the accused own statements regarding his affiliation with al Qaeda, the accused family members have publicly described their affiliation with Osama bin Laden and al Qaeda, including a statement by Abdurrahman Khadr, the accused's brother, who stated during an interview in 2004 "we are an al Qaeda family."[1]

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[1] See Appellate Exhibit 17, Attachments 12 &13, transcripts of interviews of Maha Elsamnah, Zaynab Khadr, and Abdurrahman Khadr.

10. Additionally, whether or not certain co-conspirators of the accused identified with another terrorist organization, that fact would not make those conspirators anything less than conspirators. This is especially true when applied to an organization such as al Qaeda, whose membership is comprised, in part, of affiliations and allegiances to numerous terrorist organizations. Al Qaeda serves as an umbrella organization – a clearing house – for smaller terrorist groups. The Defense's concession that members of affiliate terrorist groups might have been involved with the accused activities, rather than narrow the scope of the conspiracy, merely highlights the breadth and global nature of al Qaeda.

11. Even if the accused now claims that he was attempting to kill American soldiers by targeting them with improvised explosive devices to support LIFG as opposed to al Qaeda, which he has not claimed to date and to which there is no known evidence, LIFG's history and public statements demonstrate their complete alignment with al Qaeda, and assertion that the accused was a member of LIFG as opposed to al Qaeda would not be helpful for the accused.

12. Among the individuals the accused has stated he was working with in order to target Americans was Abu Leith al Libi. The Defense request for the production of documents related to Abu Leith al Libi, a deceased former member of al Qaeda and LIFG, was premised on the argument that the stated goals of LIFG were somehow less sinister than al Qaeda, quoting a fatwa issued by LIFG shortly after al Qaeda's attacks on the United States embassies in Kenya and Tanzania on August 21, 1998, including the statement that "women, children, and the elderly should not be *specifically targeted*."[2] This argument is unpersuasive and completely belied by the facts.

13. Al Qaeda's attacks on the United States embassies resulted in the deaths of 225 innocent civilians, and injuries to thousands more. Rather than distance themselves from al Qaeda, LIFG embraced al Qaeda and these horrific attacks, calling on all Muslims to confront American aggression in response to the attacks on the embassies (referring to U.S. missile strikes launched in response to the attacks.)[3]

14. The close connection between LIFG and al Qaeda continued following the East Africa embassy attacks. On September 23, 2001, 12 days after al Qaeda committed the worst terrorist attack in history, murdering 2,973 innocent people, including hundreds of women and children, LIFG again embraced their association with al Qaeda, calling on all Muslims to "contribute in defeating this enemy with any means available, whether physically, financially, or simply by calling for jihad in order to spread fear among the infidels..." [4] Perhaps most telling of LIFG's close association and unity of purpose with

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[2] See Defense Motion (D044) at 3, FN 3 (emphasis added).

[3] See Evan F. Kohlmann and Josh Lefkowitz, *Dossier: Libyan Islamic Fighting Group*, Oct. 2007.

[4] "Fatwa of Shaykh Hassan Qaid (Abu Younis al-Sahrawi) Regarding the Crusader American Attack on Afghanistan." http.//www.almuqatila.com/alsharaya/fatwa/Afghanistan.html. September 23, 2001.

al Qaeda, are the postings placed on the official LIFG website **in celebration of the September 11th attacks**, which included images of Osama bin Laden, President Bush and the Twin Towers of the World Trade Center burning and ultimately collapsing. Following the logic of the Defense motion and current request for expert assistance, apparently LIFG determined that the women, children, and elderly that were terrorized and killed that day were not "specifically targeted" and therefore their deaths were justified. Any suggestion that membership or affiliation with LIFG, particularly affiliation that included constructing IEDs in order to target U.S. forces in Afghanistan in direct support of al Qaeda's efforts to expel the U.S. forces from Afghanistan and spread fear among the infidels, would somehow narrow the scope of the charged conspiracy or support a jurisdictional challenge is not supportable by the facts, relevant case law, or common sense.

15. The Prosecution has provided the Defense with all evidence it intends to present at trial to establish that the accused conspired with members and associates of al Qaeda to commit certain offenses. Contrary to the Defense assertions, employment of Ms. Pargeter would not make the accused any less culpable for his actions or support a challenge to the jurisdiction of the military commission to try the accused.

16. The Defense request falls far short of establishing why Ms. Pargeter's assistance is necessary or how denial of the request would result in a fundamentally unfair trial.

17. The Prosecution recommends the request be denied.

3 [redacted]

Major, USMC
Prosecutor
Office of Military Commissions

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

20 May 2008

MEMORANDUM FOR LCDR William Kuebler, Office of Defense Counsel

SUBJECT: *U.S. v. Khadr,* Response to Supplemental matters submitted for consideration in conjunction with the request for alternative disposition.

I have reviewed your memorandum of 13 May 2008, the supplemental materials accompanying the memorandum, and the additional items you provided to my staff. You raise a number of important issues. As you are currently litigating pretrial motions, the commission is the appropriate forum in which to raise and fully present these issues. For that reason, I will abstain from taking any specific action on your request at this time.

Susan J. Crawford
Convening Authority
for Military Commissions

Cc: Hon. Daniel J. Dell'Orto, Acting Department of Defense, General Counsel
Enclosure

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

23 May 2008

From: Major[3] [redacted] Major, USMC, Prosecutor, Office of Military Commissions

To: Office of the Convening Authority

SUBJECT: *UNITED STATES V. KHADR* – REQUEST FOR EXPERT WITNESS DR. LAURENCE STEINBERG

1. Defense Counsel in the case of U.S. v. Khadr have requested the Convening Authority to approve Dr. Laurence Steinberg as an expert witness on psychological development during adolescence and "the ways in which adolescents behave in and are affected by the criminal justice system and the ways in which adolescents respond to interrogation situations. The Defense requests authorization for up to $50,000 in fees.

2. The Prosecution does not believe the Defense has made the requisite showing to warrant expenditure of government funds for this purpose.

3. The Defense request claims that expert consultative services are needed to "review the full interrogation record, file a report with the Court as to his findings and will provide live testimony before the military commission as to his expert opinion."

4. Rule for Military Commission 703 (d) provides that requests for experts shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.

5. As stated in the Convening Authority's 11 March 2008 response to a previous Defense Counsel request, the appropriate analysis for reviewing requests for expert assistance under RMC 703 is set forth in United States v. *Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005):

> An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity. But necessity requires more than the "mere possibility of assistance from the requested expert…" The accused must show that a reasonable probability exists "both that an expert would be of assistance to the defense and that denial of an expert would result in a fundamentally unfair trial."
>
> We apply a three-part test to determine whether expert assistance is necessary. The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused;

> and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop. A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion.

Id. at 143 (quoting United States v. Robinson, 39 M.J. 88, 89 (C.M.A. 1994)).

6. The Defense request does not establish why expert assistance is necessary.

7. Initially, the Defense request states "that the principal, and in large part only, evidence to substantiate the charges against Mr. Khadr are confessions he allegedly made to interrogators." Def. Request at 1. This is simply not true. At trial, the Prosecution will present a videotape found at the site of the accused's capture, showing the accused and other terrorists constructing IEDs and planting them in the ground.

8. Additionally, the Prosecution will offer testimony from several witnesses who observed the accused at the exact location from where a grenade was thrown that killed Sergeant First Class Christopher Speer. The evidence presented at trial will establish that no other person at the compound was in a position to throw the grenade that killed Sergeant First Class Christopher Speer.

9. The accused's numerous admissions certainly strengthen the case against him. However, his statements, rather than being "the principal, and in large part only, evidence to substantiate the charges," are but a portion of the compelling evidence that will be presented against him at trial. At trial, the defense will be free to cross-examine each Prosecution witness who testifies regarding admissions made by the accused and the circumstances surrounding those statements. The Defense may also call their own witnesses who obtained statements from the accused that may be contrary to the statements presented by the Prosecution. The Prosecution does not contest that at different times since being detained, the accused relayed different accounts regarding his activities on 27 July 2002 as well as previous terrorist related activities and knowledge of al Qaeda. The accused was no doubt lying during some of those interviews. This expert will not assist this military commission in determining when the accused was lying and when he was telling the truth. That is a decision best left for the members of this military commission.

10. As with previous defense requests for expert assistance, this requests merely speculates how Dr. Steinberg's assistance *might* help the defense: "..based on my review of these materials, in light of what we know about adolescent development and behavior, and in view of extant research on false confessions among adults, it is certainly appropriate to ask whether the reliability of Mr. Khadr's responses *may* have been compromised by the circumstances and techniques of the interrogations." Dr. Steinberg statement at 2. (Emphasis added). RMC 703 and relevant caselaw provide that the accused must show that a reasonable probability exists "both that an expert would be of assistance to the defense, and that denial of an expert would result in a fundamentally unfair trial." The Defense request fails to make either showing.

11. The Prosecution recommends the Convening Authority deny the request.

3 [redacted]

Major, USMC
Prosecutor
Office of Military Commissions