

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Motion for the Employment of a Defense Expert at Government Expense Pursuant to RMC 703(c)(2)(D) September 15, 2008
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1. **Timeliness:** This motion is timely. The latest denial from the Convening Authority was received on September 11, 2008. (Attachment 1)
2. **Burden of Poof:** The burden of proof, preponderance of the evidence, is on the moving party. The burden to establish the relevance and necessity of the expert witness has already been met by the defense.
3. **Relief Requested:** The defense seeks an order requiring payment of Professor Morris for services rendered as an expert witness before the commission. The defense also seeks an order authorizing the employment of Professor Morris as a defense expert witness in the law of war for the purposes of the AUEC hearing and, if necessary, for trial. Finally, the defense requests the commission disqualify the Legal Advisor from providing advice on the defense expert requests.
4. **Facts.**
 - a. On 21 July 2008 defense counsel requested the Convening Authority authorize the employment of Professor Madeline Morris as a government appointed expert for the defense in the area of the international law of armed conflict as it relates to child soldiers and the jurisdiction of war crimes tribunals. (Attachment 2) This request was denied. (Attachment 3)
 - b. On 31 July 2008, the defense requested reconsideration, responding to the specific reasons for denial offered by the Convening Authority in her denial letter. (Attachment 4). This request was also denied. (Attachment 5) Both denials indicated that the Convening Authority did not believe Professor Morris' proposed testimony to be relevant and admissible. (See Attachments 3 and 5)

c. Because the CA refused to appoint her as a defense expert, Professor Morris traveled to Guantanamo as an ordinary witness on government issued invitational travel orders. (Attachment 6, enclosure 2)

d. The defense also submitted a written motion to the military judge to compel the appointment of Professor Morris. (Defense Reply to Government Response to D-015 dated 11 August 08) The military judge, over the oral and written objection of the prosecution (See Government Response to D-015 dated 8 August 2008) allowed her testimony and specifically recognized her as an expert in the law of war and international law.

e. The defense requested the military judge to authorize the payment of Professor Morris as a government funded expert witness for the defense. The military judge directed that the defense instead take the matter up again with the Convening Authority. When the defense informed the commission that the Convening Authority had rejected the defense request not once, but twice, he replied "the circumstances have changed." The military judge noted specifically that he had recognized Professor Morris as an expert. When pressed, the military judge reluctantly agreed that he would be willing to take up the matter again if the Convening Authority again denied compensation for Professor Morris.

f. On 2 September 08, the prosecution reversed its position that law of war experts are irrelevant and immaterial and informed the defense that "The prosecution is actively seeking experts in the areas of the Law of War" to call as government expert witnesses in the Alien Unlawful Enemy Combatant Hearing and at trial. (This witness list has previously been provided to the commission as an attachment to D-017, see Para 4.)

g. On 3 September 08, the defense submitted an invoice to the Convening Authority for services rendered by Professor Morris along with a detailed second request for reconsideration setting forth the pertinent facts. (Attachment 6, Enc 1)

h. The defense then received two e-mails from an attorney in the Legal Advisor's office demanding to know who had authorized Professor Morris to travel when the CA had specifically denied her appointment as an expert. (Attachment 7) The defense informed this attorney that Invitational Travel Orders had been issued at the direction of the prosecution.

i. Over the course of the following week, the Office of the Legal Advisor engaged in discussion with OMC-P. Lead counsel LTC Darrel Vandeveld urged that Professor Morris be paid since she had gone in good faith to GITMO with the expectation that if her testimony was accepted that she would be paid. He advised the Office of the Legal Advisor that it is traditional to pay expert witnesses for services rendered and that they had no lawful or legitimate reason to withhold payment.

j. The defense believes that the Legal Advisor, who knew or should have known that there was no good faith basis in law or fact to do so, recommended to the Convening Authority that she deny the defense expert and refuse to pay Professor Morris and drafted a letter for her signature to that effect or directed that such a letter be drafted.

k. The Convening Authority, who knew or should have known that her actions were arbitrary, capricious, an abuse of power, contrary to law and without a good faith basis denied the defense request. (Attachment 1)

5. Law and Argument

The Military Judge has the authority to direct that Professor Morris be paid. The military judge abused his discretion in refusing to order that she be paid after receiving her testimony. Authorization and employment of expert witnesses such as Professor Morris is provided for in the Rules for Military Commissions (R.M.C.) R.M.C. 703(d) is clear: "A request denied by the convening authority may be renewed before the military judge, who **shall** determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute." The military judge determined the testimony to be relevant and necessary but hesitated to grant the defense's timely motion for employment of the defense expert with hopes that the Convening Authority (CA) would take proper action. Unfortunately, the commission's deference to the Convening Authority resulted in an improper refusal to pay the defense expert.

According to the CA's letter "The military judge did not direct her employment or rule that she should receive expert compensation." The denial letter states "absent advance authorization, a witness may not be paid expert fees when directed to appear by

subpoena." Professor Morris was not directed to appear by subpoena. She was invited to appear voluntarily on invitational travel orders, which the convening authority well knew, since the defense provided a copy of the orders with the request for payment. The letter to Professor Morris begins "You are invited to travel." (Attachment 6, Enclosure 2) The denial letter also states Professor Morris "stated on the record that she was testifying *pro bono*." First, it is unclear to the defense how the Convening Authority obtained a copy of the transcript of the proceedings so quickly or what the factual basis is for this claim. The defense does not believe this is an accurate characterization of Professor Morris' testimony. At the very least, the statement is deeply misleading. The defense and Professor Morris made it very clear that, although the CA had denied compensation to Professor Morris, she expected and desired to be paid for her services and was not testifying *pro bono*. For example, in Defense Reply to D-015, the defense stated "Professor Morris agreed to accept less than half her usual expert witness fees out of a sense of patriotic duty. . . Experts of her caliber are very expensive and it is unreasonable to expect her to work *pro bono*." The CA's claim that Professor Morris provided *pro bono* services is a little bit like the diner who orders a meal and then leaves the back door of the restaurant without paying. The diner might say that the chef gave him a free dinner. The chef would say that the diner is a thief. Just because payment is not provided up front, does not mean that someone is volunteering her services.

Of course, Professor Morris willingly took a risk that the commission would not find her testimony relevant, in which case she would not be paid expert fees. But she did not accept the risk that the court would find her testimony relevant, recognize her as an expert, and then refuse to pay her; this is simply not a lawful option. The denial of fees to Professor Morris is tantamount to theft of services, and is also likely in violation of the Anti-Deficiency Act. This law prohibits accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342. Indeed, an officer or employee who violates the voluntary services prohibition of 31 U.S.C. § 1342 "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518. In addition, an officer or employee who "knowingly and willfully" violates this provision of law "shall be fined

not more than \$5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. §§ 1350, 1519. Presumably, the Legal Advisor failed to advise the Convening Authority about the implications of the Anti-Deficiency Act. This is just the latest example of the Legal Advisor's lack of objectivity and inability to provide competent, neutral and dispassionate legal advice. The Convening Authority's third denial and this motion is a direct and predictable result of the Commission's baffling refusal to disqualify the Legal Advisor from providing legal advice on the defense's expert requests, despite finding that the Legal Advisor's objectivity has been compromised.

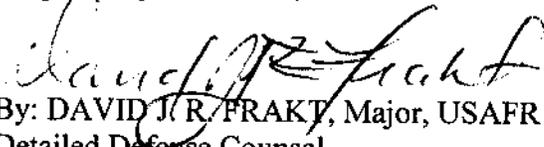
CONCLUSION

Professor Morris' fees associated with her preparation, travel and testimony as an expert witness for the defense must be paid. No legal justification exists for failure to pay her. As Professor Morris has already been recognized as an expert in the area of the law of war, the defense requests an order appointing Professor Morris as an expert to the defense for all future proceedings before this commission where her testimony is relevant and necessary. The defense respectfully renews its request to the commission to reconsider disqualifying the Legal Advisor from further involvement in Mr. Jawad's case, particularly in reviewing expert witness requests.

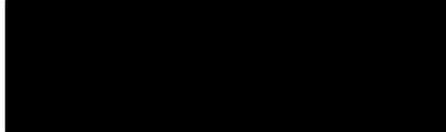
6. **Oral Argument and Witnesses:** The defense requests oral argument, unless the military judge is prepared to order the requested relief based on the written submissions. In support of the motion, the defense intends to call as witnesses Brig Gen Thomas Hartmann, Susan Crawford, Sharon Fijalka, Michael Breslin and LTC Darrel Vandeveld.
7. **Certificate of Conference:** The previous lead trial counsel, prior to resigning, indicated that he concurred with the defense request.

8. **Request for Immediate Public Release:** The defense requests immediate public release of this and all motions filed by the defense and the government responses thereto.

Respectfully Submitted,


By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel

Office of the Chief Defense Counsel
Office of Military Commissions



Attachments:

1. CA denial letter dated 11 Sept 08
2. Defense Request for Expert Witness dated 21 July 08
3. CA denial letter dated 29 July 08
4. Defense Request for Reconsideration dated 31 July 08
5. CA denial letter dated 6 Aug 08
6. Second Request for Reconsideration dated 3 Sept 08
7. E-mails from Sharon Fijalka dated 3 Sept 08

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA v. Mohammed Jawad	D-020 Government Response to Defense Motion for the Employment of a Defense Expert at Government Expense Pursuant to R.M.C. 703(c)(2)(D) 16 September 2008
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1. **Timeliness.** This response is timely under the Military Commissions Trial Judiciary Rules of Court.

2. **Burden of Proof.** The burden of proof is on the defense as movant. *See* R.M.C. 905(c)(2).

3. **Relief Requested.** The defense’s motion that the Commission order payment of Professor Madeline Morris for previous testimony and employment of Professor Morris as a defense expert should be denied. The Commission has already ruled on the defense’s request to disqualify the Legal Advisor from advising the Convening Authority on such matters. *See* Commission Order (D-004) of 10 September 2008 (ruling that the Legal Advisor is “only disqualified from participating in any *post trial review* of this case.”) (emphasis added).

4. **Facts**
 - a. The Government agrees that the Convening Authority has denied multiple defense requests that she authorize employment of Professor Morris as a defense expert, to include paying Professor Morris for such employment.
 - b. The Convening Authority’s denials were based on a lack of showing by the defense that Professor Morris’ assistance and testimony were relevant and necessary.
 - c. At defense request, Professor Morris was issued Invitational Travel Orders (“ITO’s”) to travel as an ordinary witness, not a paid expert, to Guantanamo Bay to testify at the hearing conducted in this case in August 2008.
 - d. At the hearing in August at Guantanamo Bay, the Military Judge recognized Professor Morris as an expert pursuant to M.C.R.E. 702. The Military Judge was not asked to

make, nor did he make, any finding that Professor Morris' assistance and testimony were "relevant and necessary" to the facts and issues present in the case, *see* R.M.C. 703(d); *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), such that employment and compensation of Professor Morris would be required by the Government.

e. The defense did request that the Military Judge authorize the payment of Professor Morris as a government funded expert witness for the defense. The Military Judge directed the defense to take the matter up with the Convening Authority, as R.M.C. 703(d) clearly states that "[i]n the absence of advance authorization, an expert witness may not be paid fees" except when directed to appear through issuance of a subpoena. Professor Morris was not testifying under a subpoena at the hearing.

f. Contrary to the defense's assertion, the prosecution has not reversed its position on whether the testimony of law-of-war experts is relevant and necessary. The government's potential retention of any such expert, for rebuttal purposes, is contingent on whether the defense seeks to offer, and the Commission decides to allow, further expert testimony in this area. In its disclosures to the defense, the government was merely serving notice of *potential* government witnesses in this area, pursuant to previous Commission discovery mandates. Regardless of whether such testimony is received by the Military Judge to assist in deciding legal issues, the government remains in opposition to the relevance of such testimony on the merits of the case.

g. On 13 September 2008, the defense was put on notice that the government's previous lead counsel is no longer serving on this case. Whether or not this counsel advised the Convening Authority to issue payment to Professor Morris is irrelevant to the issue before the Commission.

5. Discussion

The rules on this issue are very clear. *See* R.M.C. 703(d). Once a party considers employment of an expert to be necessary, the party submits a request to the Convening Authority, *prior to employment*, along with a statement of the reasons the expert is necessary and an estimated cost of employment. If denied by the Convening Authority (as in this case), the military judge must determine whether the expert's testimony is "relevant and necessary." If so, then the government must either employ the expert or find an adequate substitute. However,

“[i]n the absence of advance authorization, an expert witness may not be paid fees” except when directed to appear through issuance of a subpoena. *See* R.M.C. 703(d)-(e).

a. In light of these rules, the Military Judge does not have the authority to direct Professor Morris be paid for her expert testimony *after the fact*, when (1) her employment as an expert had been specifically denied by the Convening Authority, (2) she had thereupon been requested by the defense and approved by the Government to travel under ITO’s to testify as an ordinary witness, and (3) she was not testifying under subpoena.

b. While the Government agrees the military judge allowed Professor Morris to offer her expert opinion on the law of war (over prosecution objection), allowing such testimony is a far cry from finding that expert’s testimony is relevant *and necessary* to a matter at issue in the proceedings. The Military Judge was not asked to make, nor did he make, such a finding at the August 2008 proceeding, defense assertions to the contrary notwithstanding.

c. The Government disputes the assertion by the defense that there is no “good faith basis in law or fact” to deny the defense request for employment of Professor Morris. There has been no showing that the testimony of Professor Morris is *relevant and necessary* either on the merits or on an interlocutory question pursuant to R.M.C. 703(c)(2)(B)(i). As litigated before this Commission, questions of law are the purview of the Military Judge, not expert witnesses. Expert testimony on the law of war is therefore not necessary to the issues presented in this case.

6. Oral Argument. The government relies on this response.

7. Witnesses and Evidence. Any testimony or evidence to decide this issue is already in the record. To the extent that the defense has given notice of its intent to call various witnesses, the government requests that the defense comply with R.M.C. 703(c)(2)(B)(i) in demonstrating the relevance and necessity of their expected testimony.

8. Certificate of Conference. The defense opposes.

Respectfully submitted,



Douglas M. Stevenson
Lt Col, U.S. Air Force

John T. Ellington
CDR, JAGC, U.S. Naval Reserve



Arthur L. Gaston III
LCDR, JAGC, U.S. Navy

Office of the Chief Prosecutor
Office of Military Commissions



UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-020
RULING ON DEFENSE REQUEST
FOR EMPLOYMENT OF DEFENSE
EXPERT AT GOVERNMENT EXPENSE**

1. On July 29, 2008, the Convening Authority denied a defense request to authorize the employment of Professor Madeline Morris as an expert witness in *United States v. Mohammed Jawad*. On August 6, 2008, the Convening Authority denied a defense request for reconsideration. On or about August 13, 2008, Professor Morris traveled to Guantanamo Bay, Cuba on valid Invitational Travel Orders issued by the Office of Military Commissions. She was not subpoenaed and the Military Commission had not ordered her production. On August 13, 2008, over government objection, the Military Commission recognized Professor Morris as an expert in the law of warⁱ and permitted her to testify at a pretrial session in the above captioned case. The defense then renewed its request that the Military Commission order the Convening Authority pay expert witness fees to Professor Morris. The Military Commission denied the motion, directing the defense to resubmit the request to the Convening Authority. On September 3, 2008, the defense submitted a second request for reconsideration to the Convening Authority. The Convening Authority denied the request on September 11, 2008, relying in part on the fact that the Military Commission had not ruled that Professor Morris should receive expert compensation. On September 15, 2008, the defense filed a motion seeking an order from the

Military Commission compelling the Convening Authority to pay Professor Morris for services rendered as an expert witness. The government opposes the motion.

2. RMC 703(d) states that, in the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled to as an ordinary witness. RMC 703(d) also provides that a request denied by the Convening Authority may be renewed before the military judge who shall determine whether expert testimony is relevant and necessary. In this case, while the Military Commission had not determined Professor Morris to be relevant and necessary prior to her travel to Guantanamo Bay, Cuba, the Commission subsequently did so when it allowed her to testify as an expert witness regarding the law of armed conflict relating to child soldiers and the jurisdiction of war crimes tribunals. While the Military Commission ultimately did not adopt Professor Morris's positions, it did find her testimony relevant and helpful in trying to resolve complex matters of subject matter and personal jurisdiction over unlawful combatants and questions surrounding the prosecution of child soldiers at military tribunals. As such, while the decision may have come after her travel to Cuba, the Military Commission did ultimately determine Professor Morris's testimony to be relevant and necessary.

3. The Military Commission is unaware of any specific authority authorizing it to order the payment of expert witness fees for testimony already provided. The

decision to approve funding appears to remain within the discretion of the Convening Authority. In other words, while the Military Commission can abate the proceedings if a witness is not produced, it has no apparent authority to order the actual disbursement of expert witness fees after the witness has already testified.

4. While the Military Commission rules that Professor Morris *should* be paid reasonable expert witness fees for her August 13, 2008 testimony in this case, the Defense motion to compel payment is DENIED and the Military Commission orders this matter returned to the Convening Authority for her consideration and action as she deems appropriate.

So ordered this 30th day of September 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

ⁱ See MCRE 702.