

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion for  
Appropriate Relief**

Clarification and Amendment of the Military  
Commission's 8 May 2008 Order to Produce  
Documents Relating to Ahmed Said Khadr

2 September 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905.
2. **Relief requested:** The defense respectfully requests the Military Commission to clarify and amend its 8 May 2008 bench order and compel production of all documents in the government's possession relating to Mr. Khadr's father, Ahmed Said Khadr.
3. **Facts:**
  - a. On 9 November 2007, the defense requested the government to produce, *inter alia*, all law enforcement, intelligence, or other files relating to the participation of named co-conspirators in the conspiracy alleged in Charge III, including, among others, Mr. Khadr's father, Ahmed Said Khadr. (*See* Def. Disc. Req. of 9 November 2007 (Attachment D to Def. Mot. to Compel, D-025).)
  - b. On 4 December 2007, the prosecution responded to the defense request, stating that it had produced "all documents that relate to [Mr. Khadr's] involvement with . . . Ahmed Said Khadr." (CPT K.A. Petty memo of 4 December 2007 (Attachment E to Def. Mot. to Compel, D-025).)
  - c. During an R.M.C. 802 conference on 7 May 2008, the prosecution disclosed that it was aware of documents in the possession of the U.S. State Department relating to Mr. Khadr's father. Noting Ahmed Khadr's role as an alleged co-conspirator, the Military Judge subsequently ordered the prosecution to make a search for documents relating to Mr. Khadr's father for the period from 1 June 2002 to 27 July 2002. (*See* Record at 300.) As with the Military Judge's ruling in connection with D-026, the limitation to the above-mentioned dates appears to relate to the Military Commission's ruling on D-019 (and D-047), striking the "enterprise" language from Charge III.
  - d. In subsequent discussion on the record, the defense made a proffer as to how nominally inculpatory evidence concerning Ahmed Khadr would constitute relevant evidence in extenuation with respect to Mr. Khadr in light of Mr. Khadr's age at the time of his alleged offenses. The Military Judge agreed and appeared to direct the prosecution to make a "search" without specifying a time limitation. (Record at 302-04.) To date, the government has produced no documents to the defense in response to the Military Judge's order.

e. On 19 August 2008, the government filed a Notice of Appeal from the Military Judge's partial denial of the government's motion for reconsideration of the Commission's ruling on D-019 (and D-047). Pursuant to R.M.C. 908(b)(8), the Commission's order denying the government's motion is automatically stayed pending disposition of the appeal.

**5. Law and argument: The Military Commission should clarify and amend its prior bench order to produce documents relating to Ahmed Said Khadr.**

a. The Military Commissions Act ("M.C.A.") states that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.").

b. Moreover, Rule for Military Commission 701 requires the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." R.M.C. 701(c)(1) (emphasis added).<sup>1</sup>

c. There is some ambiguity as to what the government has been ordered (and thus far failed) to do. This stems in part from the substance of the 8 May 2008 discussion on the record regarding this matter, and in part from the government's initial effort to sidestep the defense discovery request by answering a different question than that asked by the defense – i.e., by claiming that it had provided all documents relating to Mr. Khadr's "involvement with" Ahmed Khadr, rather than simply stating that it had documents relating to Ahmed Khadr that it would not produce. As the government has thus far produced nothing in response to the 8 May bench order, and changed the playing field as a result of its appeal from the Commission's ruling on P-007, this is an appropriate time for the Commission to clarify its previous order(s).

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<sup>1</sup> The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16 addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) ("materiality standard is not a heavy burden") (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would "significantly help [ ] in 'uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal'" (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is "at least helpful to the defense."

Documents relating to Ahmed Khadr are clearly relevant and material and should be produced to the defense for two reasons.

(1) First, Ahmed Khadr is a named co-conspirator in Charge III. Thus, the same reasons that led the Military Commission to grant the defense motion to compel production of documents relating to Abu Laith (D-061) require production of documents relating to Ahmed Khadr. The defense notes that the government is already obligated under the terms of the 8 May 2008 bench order to produce documents relating to Ahmed Khadr. However, that obligation appears to be limited the June/July 2002 timeframe and appears to be (or is arguably) limited to information in the possession of the State Department. As with the Commission's ruling on D-061, the rationale behind production does not militate in favor of limiting the government's obligation to the State Department. The government should be required to produce documents relating to Ahmad Khadr in the possession of any government law enforcement or intelligence agency. Moreover, and especially in light of the government's appeal of the Commission's partial denial of P-007, there is no basis for the temporal limitation to June/July 2002. Evidence showing Ahmed Khadr's affiliation (or lack thereof) with al-Qaeda, to include dealings with Abu Laith or any other alleged al-Qaeda members, during *any period* would be "material to the preparation of the defense" within the meaning of R.M.C. 701(c).

(2) This conclusion is bolstered by the fact that evidence relating to Ahmed Khadr has a dual significance in these proceedings. This brings us to the second reason documents relating to Ahmed Khadr should be produced. Any information relating to Ahmed Khadr's alleged involvement with al-Qaeda or other terrorist activities (it is difficult to see what other information the United States government would have relating to Ahmed Khadr), is presumably either inculpatory or exculpatory. If exculpatory, the information would negate the government's allegations in Charge III, tend to exculpate Mr. Khadr, and would therefore be discoverable for this simple reason. Even if inculpatory, however, as recognized by the Military Judge previously, the information would likely constitute evidence in *extenuation*. Cf. R.M.C. 1001(c)(1)(A). In brief, evidence showing the nature and extent of Ahmed Khadr's involvement with al-Qaeda and/or other Islamic militant groups shows the environment and influences to which Mr. Khadr was subjected as a child, and would explain (assuming he is convicted of any offense) why he should be deemed less culpable for conduct in which he may have engaged as a 15 year-old boy in Afghanistan subject to those influences. Moreover, this is precisely the type of evidence that would be beneficial to a defense expert in adolescent psychology seeking information on Mr. Khadr's childhood, and/or the defense's approved mitigation expert. (*See* S.A. Crawford memo of 20 August 2008.)

d. The Commission should take advantage of the opportunity to clarify, and, as appropriate, amend its prior order to produce documents relating to Ahmed Khadr. Ahmed Khadr is one of two known alleged co-conspirators, who provide the only ostensible links between Mr. Khadr and the al-Qaeda organization. The Commission has already ordered production of documents relating to Abu Laith and the same considerations compel production of documents relating to Ahmed Khadr. Moreover, as Mr. Khadr's father, documents relating to his activities, even if inculpatory in the ordinary sense, likely provide a rich source of evidence in extenuation in light of Mr. Khadr's age at the time of the alleged offenses, and are thus doubly "material to the preparation of the defense."

6. **Oral Argument:** The defense requests oral argument in connection with this motion pursuant to R.M.C. 905(h).

7. **Witnesses and evidence:**

Attachment A

8. **Certificate of conference:** The defense has conferred with the prosecution and the prosecution does not consent to the commission granting requested relief.

9. **Attachments:**

A. S.J. Crawford memo of 20 August 2008

/s/

William C. Kuebler  
LCDR, JAGC, USN  
Detailed Defense Counsel

Rebecca S. Snyder  
Assistant Detailed Defense Counsel



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

CONVENING AUTHORITY

20 August 2008

MEMORANDUM FOR LCDR WILLIAM C. KUEBLER, Defense Counsel

SUBJECT: Request for Mr. Joseph Guastaferrero as an expert consultant in mitigation,  
*U.S. v. Khadr*

I have reviewed your 6 August 2008 request for Mr. Joe Guastaferrero to join the defense team as a mitigation specialist. At this time, I approve 40 hours at a rate of \$150.00 per hour for consultative purposes. Should you desire additional services from Mr. Guastaferrero, or his testimony at a presentencing hearing, you may submit an additional request for consideration.

A handwritten signature in black ink that reads "Susan J. Crawford".

Susan J. Crawford  
Convening Authority  
for Military Commissions

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR  
a/k/a “Akhbar Farhad”  
a/k/a “Akhbar Farnad”  
a/k/a “Ahmed Muhammed Khali”

D088

GOVERNMENT’S RESPONSE

To the Defense Motion for Appropriate  
Relief (Ahmed Said Khadr Documents)

9 September 2008

1. **Timeliness:** This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b).
2. **Relief Requested:** The Government respectfully submits that the Defense’s motion for appropriate relief to amend the Military Judge’s bench order of 9 May 2008 regarding the search for documents relating to Ahmed Said Khadr (“Mot. for Relief”) should be denied.
3. **Burden and Persuasion:** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rules for Military Commissions (“RMC”) 905(c)(1), 905(c)(2)(A).
4. **Facts:**
  - a. The Prosecution has undergone extensive efforts over the past five years in order to search for documents and other relevant materials related to Omar Khadr.
  - b. Most recently, in an attempt to ensure the Prosecution and relevant U.S. Government agencies had performed a diligent search for responsive documents, the Prosecution again made requests of all relevant agencies for responsive information. The Prosecution has spent hundreds of hours on this endeavor and diligently reviewed the results of those search requests and provided the Defense with all materials required under the Military Commissions Act and Manual for Military Commissions.
  - c. On 8 May 2008, the Military Judge ordered the Government to “go back to [the State Department] and make a new search for Ahmed Said Khadr, during the period 1 June 2002 to 27 July 2002.” Partial Record of 8 May 2008 Hearing, at 300 (Attachment A). At no time during this hearing did the Military Judge amend those search parameters. *See id.* at 300-305.
  - d. Following the hearing in May 2008, the Government requested that a search be initiated at the State Department for documents relating to Ahmed Said Khadr between 1 June 2002 and 27 July 2002. The Government has taken significant steps toward completing this search.

e. The Prosecution has followed up with the State Department on numerous occasions since the initial request was sent and has been advised that the search is nearly complete. As of 9 September 2008, the Prosecution was advised that documents produced in response to the subject search would be available for review most likely the week of 15 September.

f. As soon as the Prosecution obtains these documents, it will conduct a review and disclose any materials that are relevant, material and in compliance with the Military Judge's order.

## **5. Discussion:**

### **a. THE DEFENSE REQUEST IS OVERLY BROAD AND NOT REQUIRED.**

i. Assuming *aguedo*, that the Government is successful in its pending appeal to the Court of Military Commission Review (CMCR), the Government's burden to produce documents would not be expanded beyond that ordered by the Military Judge.

ii. The Defense attempts to unilaterally expand the search ordered by the Military Judge. *See* Def. Motion at 2, para. 5c(1). In the facts section of its brief, the Defense accurately reflects the limited scope of the Military Judge's order. The Military Judge instructed the Government to search the State Department for documents relating to Ahmed Said Khadr relating to the 1 June 2002 to 27 July 2002 period. As mentioned, the Government has complied with this request, but has yet to obtain the documents for review. The Defense's efforts to read ambiguity into a clear instruction from the Military Judge is not supported by the record. *See* Attachment A at 300.

iii. The Government's search should be limited, since the role of Ahmed Said Khadr in the al Qaeda organization does not impact the significance of the accused's willful decision to conspire with and take actions in support of that organization. These actions include training on, making, and planting roadside bombs – all without the assistance or influence of Ahmed Said Khadr. To the extent that any of Ahmed Said Khadr's actions were directly related to the accused, the Government has provided those materials.

iv. The Defense has not demonstrated the relevance or materiality necessary to compel a Government search. The accused's participation was voluntary. *See generally* Attachment A to Gov't. Resp. to D-062 (Child Soldier Protocol), at 2-4 (describing Khadr's involvement with al Qaeda and his voluntary statements—including his admission that he is an al Qaeda terrorist, as well as his professed desire “to kill a lot of American[s] to get lots of money”). Any documents relating to the accused's father and his role in al Qaeda merely reemphasizes that it was a family endeavor, not that there was influence over the accused.

v. Two factual issues are important to the resolution of this and other discovery issues. First, in spite of the Defense's arguments to the contrary, the Government has been diligent in its efforts to comply with the Military Judge's order of 8 May 2008 and, as mentioned in the facts section above, the Prosecution anticipates

having the documents at issue for review in the near future. Second, the Prosecution has conducted a thorough review of all relevant government agencies, including intelligence and law enforcement agencies. Prior to the targeted search directed most recently by the defense, over the past five years, the Office of Military Commissions has conducted numerous searches of relevant government agencies and reviewed all responsive documents related to Omar Khadr. Even after completing initial exhaustive searches, the Prosecution, again on 18 October 2007 requested any materials related to Omar Khadr from all relevant U.S. Government agencies. The previous requests for information and subsequent searches related to Omar Khadr very likely would have encompassed information that relates to Ahmed Said Khadr's involvement with Omar Khadr's participation in terrorist activities. Any such documents have been provided to the Defense.

vi. In the event that the Military Judge believes that the reinstatement of the original language in the charge sheet impacts the original order, the Prosecution respectfully requests that the Military Judge delay his decision pending the outcome of the CMCR Appeal.

**b. Conclusion.**

i. The Defense request for appropriate relief is not supported by the law and should be denied. Materials relating to Ahmed Said Khadr remain irrelevant except as they relate to the underlying misconduct of the accused. Furthermore, and in an effort to comply with the Military Judge's unambiguous bench order from 8 May 2008, the Prosecution expects to obtain the relevant materials soon. In the event that the Military Judge believes a successful Government appeal at the CMCR will change the scope of the Government's discovery obligations in this case, prior to the CMCR decision there is clearly no impact. In light of the exhaustive efforts taken by the Prosecution on this and other discovery related matters, the Defense motion should be denied.

**7. Oral Argument:** Should the Military Judge order the parties to present oral argument, the Government is prepared to do so.

**8. Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

**9. Certificate of Conference:** N/A

**10. Additional Information:**

Attachment A: Partial Record of 8 May 2008 Hearing

**11. Submitted by:**

Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Prosecutor

//s//

Keith A. Petty  
Captain, U.S. Army  
Assistant Prosecutor

John F. Murphy  
Assistant Prosecutor  
Assistant U.S. Attorney

Jordan Goldstein  
Assistant Prosecutor  
Department of Justice

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, September 16, 2008 9:29 AM  
**To:** [REDACTED]  
**Cc:** Berrigan, Michael, Mr, DoD OGC; David, Steven, COL, DoD OGC; [REDACTED];  
[REDACTED] Groharing, Jeff, Maj, DoD OGC; Groharing, Jeffrey Off-site;  
Kuebler, William, LCDR, DoD OGC; Lever, Terri, SMSgt, DoD OGC; Morris, Lawrence, COL, DoD  
OGC; [REDACTED] Murphy, John, Mr, DoD OGC [REDACTED]; Ona, Guadalupe,  
SSG, DoD OGC; Pagel, Bruce, COL, DoD OGC; Patrick.parrish@us.army.mil; Petty, Keith, CPT,  
DoD OGC; [REDACTED];  
Snyder, Rebecca, MS, DoD OGC  
**Subject:** D-088 - Military Judge's Order re. Ahmed Said Khadr Documents

Sir,

In response to the Military Judge's bench order, the Prosecution requested the State Department to conduct a search for documents relating to Ahmed Said Khadr from 1 June 2002 to 27 July 2002. After a diligent review, the State Department notified the Prosecution that there were no responsive documents.

V/r,

Keith A. Petty  
CPT, U.S. Army  
Prosecutor  
Office of Military Commissions

[REDACTED]

From: [REDACTED]  
Sent [REDACTED]

[REDACTED]

ed Said Khadr

Documents

See COL Parrish's email. Let's make sure we comply with his request.

V/r,

[REDACTED]

Military Commissions Trial Judiciary  
Department of Defense

-----Original Message-----

From: Parrish, Patrick J COL MIL USA [REDACTED]

Sent [REDACTED] mber 16, 2008 9:5

To: [REDACTED] LTC, DoD OGC

Subj: [REDACTED] Military Judge's Order re. Ahmed Said Khadr Documents

[REDACTED]: Please have the email below marked as an Appellate Exhibit, just in case this  
comes an issue.

Thanks, COL Parrish

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] OGC; Lever, Terri, SMSgt, DoD [REDACTED] ce, COL, DoD

OGC; [REDACTED]; Murphy, John, Mr, DoD OGC; [REDACTED]; Ona,

Guadal [REDACTED] OGC; Page [REDACTED] J C [REDACTED];

[REDACTED] DoD OGC; W [REDACTED]; S [REDACTED]

[REDACTED] OGC; Snyder [REDACTED]

ilitary Judge's Order re. Ahmed Said Khadr Documents

Sir,

In response to the Military Judge's bench order, the Prosecution requested the State Department to conduct a search for documents relating to Ahmed Said Khadr from 1 June 2002 to 27 July 2002. After a diligent review, the State Department notified the Prosecution that there were no responsive documents.

V/r,

Keith A. Petty

CPT, U.S. Army

Prosecutor

Office of Military Commissions

[REDACTED]

[REDACTED]

