

UNITED STATES COURT OF MILITARY COMMISSION REVIEW
before D. O'Toole, C. Thompson, D. Conn, and B. Brand

UNITED STATES,)	
	)	BRIEF <i>AMICUS CURIAE</i> OF NATIONAL
	)	INSTITUTE OF MILITARY JUSTICE IN
	)	SUPPORT OF APPELLANT'S MOTION TO
Appellee,	)	DISQUALIFY CAPTAIN O'TOOLE AND
	)	COLONEL THOMPSON FROM SITTING
v.	)	AS JUDGES IN THIS APPEAL
)	
SALIM AHMED HAMDAN,	)	CMCR Case No. 09-002
)	
Appellant.	)	Tried at Guantanamo Bay, Cuba
	)	4 Jun 2007 – 7 Aug 2008
	)	before a Military Commission
	)	convened by Hon. Susan J. Crawford
)	
	)	Presiding Military Judge
	)	CAPT Keith Allred, JAGC, USN
)	
)	Filed September 21, 2010

**TO THE HONORABLE, THE JUDGES OF THE COURT OF
MILITARY COMMISSION REVIEW**

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SUMMARY OF ARGUMENT

Captain Daniel O'Toole and Colonel Cheryl Thompson no longer sit on their respective services' court of criminal appeals ("CCA"). Given these changes of assignment, they are ineligible to sit on the Court of Military Commission Review (CMCR) and review Appellant's case. Public confidence in the administration of justice by military commissions requires strict adherence to the governing regulations. Deviation from duly promulgated rules not only decreases that confidence, but also adds to the unnecessary veil of secrecy surrounding the military commission process. Captain O'Toole and Colonel Thompson are not currently detailed to a CCA. They therefore may not serve on the CMCR.

ARGUMENT

BECAUSE CAPTAIN DANIEL O'TOOLE AND COLONEL CHERYL THOMPSON ARE NO LONGER APPELLATE MILITARY JUDGES, THEY ARE INELIGIBLE TO SIT ON THE EN BANC PANEL CURRENTLY REVIEWING APPELLANT'S CASE.

I. Captain O'Toole and Colonel Thompson are Disqualified from Serving on the CMCR.

The Military Commissions Act of 2009 ("MCA 2009") provides that the "Secretary of Defense may assign persons *who are appellate military judges* to be [CMCR judges]." 10 U.S.C. § 950f(b) (2009) (emphasis added). The intent of Congress appears to be that CMCR judges must be current CCA judges. Therefore, Captain O'Toole and Colonel Thompson should be disqualified from service.

Appellee argues that the MCA 2009 only requires that the assigned person be an appellate military judge at the time of appointment to the CMCR. Under this interpretation, the judge could remain on the CMCR even if he or she ended duty on a CCA. That is certainly not clear from the plain language of the law; at a minimum, this provision is ambiguous. When Congress is not clear "the court does not simply impose its own construction on the statute."

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). Instead, the court looks to the implementing agency’s interpretation of the statute to determine if it is a permissible interpretation. *Id.* Here, the agency interpretation is found in the Regulation for Trial by Military Commission (“RTMC”). It states that the “CMCR will consist of judge advocates who are *currently* certified and detailed as appellate military judges to the services’ Courts of Criminal Appeals (CCAs).” RTMC 25-2(c) (emphasis added). RTMC 25-2(c) is unambiguous with respect to who may sit on the CMCR: CMCR judges must also be detailed as CCA judges for the duration of their tenure on the CMCR.

The RTMC was promulgated in 2007, under the authority of the Military Commissions Act of 2006. The RTMC has not been updated since Congress passed the MCA 2009. The 2006 law provided that the “Secretary shall assign appellate military judges” to the CMCR. Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2621 (2006); *see also* Pub. L. No. 110-181, Div. A, Title X, § 1063(a)(6), 122 Stat. 322, (2008) (codified as amended at 10 U.S.C. § 950f(b) (2009)).

When Congress enacted the Military Commissions Act of 2009, the language changed from “The Secretary shall assign appellate military judges” to “The Secretary of Defense may assign persons *who are appellate military judges* to be [CMCR judges].” 10 U.S.C. § 950f(b) (2009) (emphasis added). Thus, the 2009 legislation brings the statute closer to the interpretation found in the RTMC. The Court should follow the plain language of the RTMC. Captain O’Toole and Colonel Thompson are ineligible to serve on the CMCR under Court of Military Commission Review (“CMCR”) Rule 24.

II. To Ensure Public Confidence in the Military Commission System, the Commissions Must Maintain Strict Adherence to the Governing Rules.

The Administration has made adherence to the rule of law a high priority.¹ The commissions, as they exist under the MCA 2009, are the third iteration of what has proven to be a very difficult system to lawfully create. Deficiencies so far with the commissions have been many, and they have drawn criticism from citizens of the United States, as well as governments with which we have partnered in fighting terrorists.² It is crucial for the credibility of the system and for the public perception of fairness that the commissions adhere strictly to the rules under which they have been created.

The first attempt at creating the military commissions was overturned by the Supreme Court. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Military Commissions Act of 2006 made many changes to the system, but scholars quickly identified a number of serious problems with it. *See, e.g.*, David W. Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 Lewis & Clark L. Rev. 131 (2008). The current administration, together with Congress, created a reformed system that solved a host of the defects contained in the first two commission systems.³ Critical to that reform is adherence to the rules of the system, specifically the MCA 2009 and the RTMC. Equally important is the unbiased interpretation and application of those rules. If the commissions are seen as acting in

¹ Barack Obama, *Inaugural Address*, Jan. 20, 2009 (“Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man — a charter expanded by the blood of generations. Those ideals still light up the world, and we will not give them up for expedience sake”), *available at* <http://www.whitehouse.gov/blog/inaugural-address/> (accessed Sept. 18, 2010).

² *Colin Powell Says Guantanamo Should Be Closed*, REUTERS, July 10, 2007 (“[Former Secretary of State Colin Powell said that] we have shaken the belief the world had in American’s justice system by keeping a place like Guantanamo open and creating things like the military commission.”) *available at* <http://www.reuters.com/article/idUSN1043646920070610?feedType=RSS> (accessed Sept. 18, 2010).

³ *Obama Resurrects Military Trials for Terror Suspects*, CNN, May 14, 2009 (“These reforms will begin to restore the commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law,” Obama said.) *available at* http://articles.cnn.com/2009-05-14/politics/obama.military.tribunal_1_military-commissions-act-guantanamo-bay-detainees-military-trials?_s=PM:POLITICS (accessed Sept. 18, 2010).

an arbitrary or haphazard manner, any confidence the commissions have been able to garner through reform will be squandered.

To increase public confidence in the military commission system and advance the rule of law, CMCR judges should meet every qualification mandated by the governing rule, including the requirement that they be current members of a CCA. There are strong reasons for selecting judges for the CMCR from the CCAs. First, service court judges enjoy a measure of independence from command leadership. Article 26(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 826(c) (“[N]either the convening authority nor member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty *as a military judge.*”) (emphasis added); see *Weiss v. United States*, 510 U.S. 163, 180 (1994). See generally *R. v. Généreux*, [1992] 1 S.C.R. 259 (Can.) (noting that a military judge appears to lack judicial independence when his salary, dependent on rank, is determined by his chain of command). CCA judges are prohibited from participating in rating another CCA judge “for purposes of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.” 10 U.S.C. § 866(g); see *United States v. Murphy*, 26 M.J. 454, 457 (C.M.A. 1988) (Everett, C.J., concurring in part and dissenting in part) (noting that § 866(g) assures the independence of military appellate judges).

CCA judges are less likely to need to recuse themselves from hearing an appeal from a commission than other judge advocates. Because of Article 66(g)’s restrictions, there is little chance that a CCA judge will be rated by or rate a fellow member of the CMCR or a member of a military commission case under review. This helps advance the fairness of the military

commission system and brings it closer to its UCMJ counterpart. “The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments. *United States v. Denedo*, 129 S.Ct. 2213, 2224 (2009).

The CMCR, as the appellate court for the commission system, is the first independent check on legal, procedural, and factual errors which may have been committed by a military commission. Therefore, the independence of the judges of the CMCR is doubly important. A perceived taint of unlawful command influence, impropriety, or lack of impartiality should be strictly avoided, or this could lead to reversible error. *See, e.g., United States v. Harris*, 13 M.J. 288, 292 (C.M.A. 1982). Keeping Captain O’Toole and Colonel Thompson on the CMCR after their reassignment to duties which no longer include service on their respective branches’ appellate courts is exactly the kind of problematic arrangement the Office of Military Commissions needs to avoid in the interest of demonstrating the absence of political or personal motivation of these courts. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 649 (2006) (Kennedy, J., concurring) (“The Court of Criminal Appeals functions as the military’s intermediate appeals court . . . [and is] another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.”).

III. Transparency in the Military Commissions System Demands Strict Adherence to the Rules and Regulations that Govern the Military Commissions.

Despite promises to the contrary,⁴ lack of transparency is a characteristic for which the military commissions have been routinely criticized.⁵ Much of the criticism is merited. The

⁴ *See* Gerry Gillmore, *Military Commission Hearings to Be Fair, Transparent, Trial Advisor Vows*, AMERICAN FORCES PRESS SERVICE, June 5, 2008 (“The [DOD] is reminding us all that fair, just and transparent hearings . . . is the No. 1 legal services priority of the entire [DOD]’ said Air Force Brig. Gen. Thomas W. Hartmann . . .”) available at <http://www.defense.gov/news/newsarticle.aspx?id=50105> (accessed Sept. 18, 2010);

Office of Military Commissions website suffers from a very slow update cycle, as do those of the CCAs. The roster of appellate judges assigned to the United States Air Force Court of Criminal Appeals appearing on the court's website was last updated on December 12, 2008. It lists Colonel Thompson as a member, despite the fact that she left the court in June 2010.⁶ The names of assigned appellate judges do not appear on the websites of the Army Court of Criminal Appeals⁷ or the Navy-Marine Corps Court of Criminal Appeals.⁸

The Office of Military Commissions website fails to shed light on the issue. Captain O'Toole is listed as a CMCR judge, but Colonel Thompson, who was assigned to the CMCR in or about December 2008, is not. *See* App. Ex. F, Promulgation of Panel Assignments, Dec. 2, 2008. If a member of the public were to read an article about the lack of qualification of sitting CMCR judges,⁹ he or she would face a very difficult task in ascertaining the veracity of such an allegation and the qualifications of the judges. This turns transparency on its head and places key parts of the military judicial structure beyond public scrutiny. Because of the lack of transparency in the commissions, or perhaps in spite of it, the Office of Military Commissions should adhere scrupulously to the rules and regulations that govern its activities.

⁵ *See, e.g.,* NIMJ, *Public Participation and the 2010 Manual for Military Commissions*, Apr. 5, 2010, available at <http://www.wcl.american.edu/nimj/documents/PUBLICPARTICIPATIONANDTHE2010MMC.pdf?rd=1> (last visited Sept. 18, 2010); Carol Rosenberg, *Guantánamo Hearings Aren't Any More Transparent, Critics Say*, MIAMI HERALD, May 17, 2010, available at <http://www.miamiherald.com/2010/05/17/1633569/guantanamo-hearings-arent-any.html> (visited Sept. 15, 2010).

⁶ <http://afcca.law.af.mil/content/resources.php?qrylvl=3&lvl1id=12&lvl1folder=yes&lvl2id=103&lvl2folder=yes> (last visited Sept. 18, 2010).

⁷ <https://www.jagcnet.army.mil/8525749F007224E4/0/743B9E914850721085257443006DD643?opendocument&no ly=1> (last visited Sept. 18, 2010).

⁸ <http://www.jag.navy.mil/nmcca.htm> (last visited Sept. 18, 2010).

⁹ *See, e.g.,* Dwight Sullivan, *Court of Military Commission Review Challenges*, CAAFLOG.COM, Sept. 15, 2010, available at <http://www.caaflog.com/2010/09/15/court-of-military-commission-review-challenges/> (last visited Sept. 18, 2010).

CONCLUSION

For the foregoing reasons, Captain O'Toole and Colonel Thompson should be disqualified.

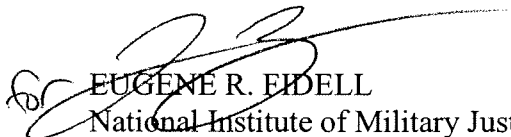
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Francis A. Gilligan, Esq., counsel for the United States, and Joseph McMillan, Esq. and Adam Thurschwell, Esq., counsel for Appellant, on 21 September 2010.


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