



Section 950f(b)(2) is couched in the present tense – “persons who *are* military judges” (emphasis added) – not in the past (“CAPT O’Toole was an appellate military judge . . .” (Gov’t Opp 2)). Any doubt that Congress intended present membership on a CCA and not past membership is dispelled by the fact that the language “are military judges” was absent from the 2006 MCA and added in the new Act. *Compare* 10 U.S.C. § 950f(b)(2) *with* MCA of 2006, § 950f(b) (2006).

3. In any event, the government’s interpretation is expressly rejected by the Trial Regulation promulgated by the Secretary of Defense to implement the Military Commissions Act. *See* Regulation for Trial by Military Commissions (“RTMC”) 25-2(c); 10 U.S.C. § 949a(a), (c) (authorizing promulgation of rules by Secretary of Defense or his delegate). That regulation requires *current* service as an “appellate military judge” to qualify for service on this Court. Under that standard, CAPT O’Toole and Col Thompson are no longer qualified. Any ambiguity in the underlying statute is resolved by that implementing regulation, which is unequivocal. Regulation for Trial by Military Commission (“RTMC”) 25-2(c). As demonstrated in Mr. Hamdan’s initial motion, this subsection states in unqualified language that only military judges who are “currently detailed and assigned” to their service CCAs are eligible for service on this Court, and speaks equally directly to the effect of reassignment. *Id.* (“Appellate military judges serving on CCAs will serve as appellate judges on the CMCR so long as their tour of duty continues with their respective service Court of Criminal Appeals. When a military judge serving on a CCA is reassigned from the CCA, the service Judge Advocate will nominate a replacement appellate military judge for duty as an appellate judge on the CMCR.”). As the National Institute for Military Justice demonstrates in its amicus brief, where a statute is ambiguous, the interpretation adopted by the implementing agency’s regulations prevails. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). With regard to the correct construction of section 950f(b)(2), that ends the matter.

4. Finally, the government points out that the RTMC states that it creates no “substantive right enforceable by any party,” *Id.*, 1-1(b) (*citing* RTMC 1.1(c)), and suggests this unenforceability as a ground for denying the motion. That language, however, is immediately followed by the requirement that “[a]ll persons subject to this Regulation are required to adhere to the guidance in this Regulation in all matters related to the military commissions.” RTMC 1-1(b). Mr. Hamdan is thus not seeking to vindicate any “right” against the government, but to have members of this Court conform to the government’s own regulation that determines their qualification to serve (a duty to follow the law that is in any event inherent in the judicial role regardless of the directive of RTMC 1-1(b), *see* ABA Model Code of Judicial Conduct, Rule 1-1 (2007)). It is thus unclear what the government means by Mr. Hamdan’s “substantive rights.”

What is clear, however, is that by arguing that RTMC 25-2(c) is unenforceable, the government is saying that *this Court cannot be constrained to follow the very law that determines its composition and legitimacy*, even by a party that appears before it and is directly affected by its judgments. The apparent point of this argument is that, even if all of Mr. Hamdan’s arguments are correct and the law requires CAPT O’Toole and Col Thompson to be disqualified, the Court can (and, by necessary implication, should) ignore that law, simply because no party is in a position to object.

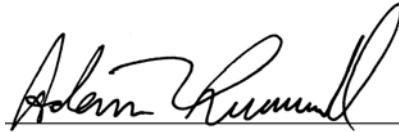
Mr. Hamdan respectfully requests that the Court instead follow the law and find that CAPT O’Toole and Col Thompson are not qualified to sit as judges of this Court.<sup>1</sup>

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<sup>1</sup> The government also points out that CAPT O’Toole’s service on the Court does not offend Article 66(g), UCMJ, 10 U.S.C. § 866(g), because JAG Notice 5450, Mission and Function of Assistant Judge Advocate General, Chief Judge of Department of the Navy (24 May 2010) (“JAG Not 5450”) reassigns fitness evaluations to the JAG in the event the AJAG-CJ develops a conflict of interest with an inferior judge. *Id.*, ¶ 5; *see also* Order, *United States v. Hamdan* CMCR Case No. 09-002 (16 September 2010). However, the policy of judicial independence, of which Article 66(g) is only one aspect, is offended by the fact that the AJAG-CJ is the chief advisor to the JAG on assignment of Navy appellate judges to this Court. JAG Not 5450, ¶ 7.e. (“The AJAG-CJ is also the Judge Advocate General’s principal advisor on the assignment of officers to positions within the trial and appellate judiciaries, active and reserve components, *including officers to be nominated for duty under the Department of*

Respectfully submitted,

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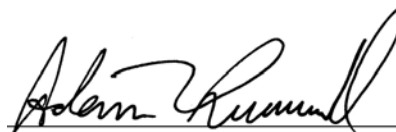
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*Defense as military commission trial or appellate judges.”*) (emphasis added). Thus, to the extent that the government relies on JAG Not 5450 as authoritative, its position appears to be that CAPT O’Toole may serve as judge on this Court with other judges who could owe their positions to CAPT O’Toole’s personal selection. That would constitute a conflict of interest that reassignment of fitness reporting responsibilities does not resolve. And while it is true that JAG Not 5450 also states that the AJAG-CJ may serve on this Court, JAG Not 5450, ¶ 7.k, that statement is flatly contradicted by the regulatory provision discussed above, which is binding authority on the Judge Advocate General. The JAG Notice statement is therefore without legal effect in this regard.

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Mr. Francis Gilligan and CAPT Edward White, counsel for the United States, on 27 September 2010.

A handwritten signature in black ink, appearing to read "Adam Thurschwell", written over a horizontal line.

Adam Thurschwell  
Counsel for Appellant Salim Hamdan