

| | | |
|---------------------------|---|--------------------------------------|
| |) | |
| |) | IN THE UNITED STATES COURT OF |
| UNITED STATES, |) | MILITARY COMMISSION REVIEW |
| |) | |
| Appellee, |) | REPLY TO MOTION TO DISQUALIFY |
| |) | CAPT O'TOOLE AND COL THOMPSON |
| |) | |
| |) | CMCR Case No. 09-002 |
| v. |) | |
| |) | |
| SALIM AHMED HAMDAN |) | Sentenced at Guantanamo Bay, Cuba |
| |) | 7 August 2008 |
| |) | before a Military Commission |
| Appellant. |) | convened by Hon. Susan J. Crawford |
| |) | |
| |) | |
| |) | Presiding Military Judge |
| |) | Captain Keith Allred |
| |) | |
| |) | |
| |) | DATE: 20 September 2010 |

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

DoD Regulation for Trial by Military Commissions (RTMC) notwithstanding, the Military Commission Act of 2009, § 949b(b)(4), 10 U.S.C. § 949b(b)(4), provides that “[n]o appellate military judge” on Court of Military Commission Review (CMCR) may be reassigned absent one of four conditions which have not occurred here. Thus Col Thompson and CAPT O’Toole are qualified to be judges on this Court.

Appellant’s contention to the contrary notwithstanding, Article 66(g), Uniform Code of Military Justice, 10 U.S.C. § 866(g), does not make CAPT O’Toole statutorily ineligible to sit as either an service appellate court or CMCR judge. Rather, it simply prohibits him from preparing or approving fitness reports on fellow appellate judges. In fact, pursuant to the governing Navy

instruction, CAPT O'Toole is not the reporting senior for CAPT Price, the only other Navy appellate judge on CMCR at this time. The Judge Advocate General of the Navy has ensured judicial independence of CMCR judges since all Department of Navy appellate judges assigned to the CMCR are rated by the Judge Advocate General himself. JAG Notice 5450, Mission and Function of Assistant Judge Advocate General, Chief Judge of Department of the Navy (May 24, 2010). Further, the order issued by this Court September 16, 2010 moots the recusal issue based on Article 66(g). *United States v. Hamdan*, CMCR Case No. 09-002 (Sept. 16, 2010), citing JAG Notice 5450, Mission and Function of Assistant Judge Advocate General, Chief Judge of Department of the Navy (May 24, 2010).

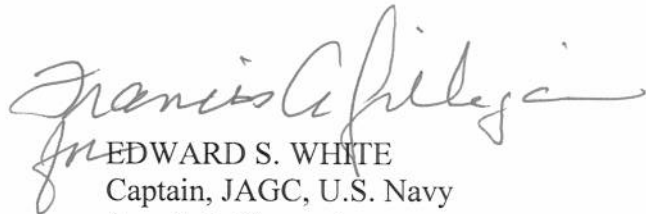
The MCA of 2009 provides that the Secretary of Defense may assign persons who are appellate military judges to be judges on the CMCR. 10 U.S.C. § 950f(b)(2). There is no dispute that CAPT O'Toole was an appellate military judge at the time the Secretary appointed him as a CMCR judge. Consequently, his appointment was lawful under the 2009 MCA. Subsequently, he assumed the position of Chief Judge of the Navy – a judicial position that explicitly provides for his continued service as a CMCR judge, JAGNOTE 5450 at ¶ 3.k – and the Deputy Secretary of Defense appointed him to be the Deputy Chief Judge of the CMCR. Action Memo, General Counsel of the Department of Defense (Dec. 17, 2009), Ex. A. Clearly, CAPT O'Toole's appointment as CMCR Deputy Chief Judge, after he had assumed the position of Chief Judge of the Navy, indicates that his continued service on CMCR is not in violation of the RTMC.

Finally, none of the cases cited by Appellant requires CAPT O'Toole's disqualification, nor does the Regulation for Trial by Military Commissions "create any substantive right enforceable by any party." RTMC 1-1(b).

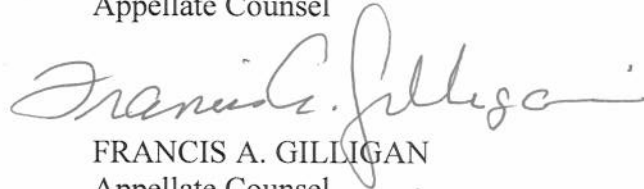
Respectfully submitted,



for JOHN F. MURPHY
Captain, JAGC, U.S. Navy
Chief Prosecutor



for EDWARD S. WHITE
Captain, JAGC, U.S. Navy
Appellate Counsel



FRANCIS A. GILLIGAN
Appellate Counsel
Office of Military Commissions
1600 Defense Pentagon
Washington, D.C. 20301-1600
francis.gilligan@osd.mil
Tel. (703) 614-0826
Fax. (703) 695-2375

CERTIFICATION OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Adam Thurschwell, Capt. Michael Thieme, Harry H. Schneider, Jr., Joseph M. McMillan, and Charles C. Sipos, counsel for the defense on 20 September 2010.



Francis A. Gilligan
Counsel for the Government

Ex. A

4-7
1630

SN



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

ACTION MEMO

December 17, 2009

FOR: DEPUTY SECRETARY OF DEFENSE

FROM: Jeh C. Johnson, General Counsel

Robert Hanger
12/17

SUBJECT: Appointment of Captain Daniel E. O'Toole, JAGC, U.S. Navy, as Deputy Chief Judge of the Court of Military Commission Review (CMCR)

- Judge Frank J. Williams provided notice of his intent to resign as Chief Judge of the CMCR on a date to be determined in order to facilitate the Presidential nomination and Senate confirmation of new civilian judges to the Court in accordance with the Military Commissions Act of 2009 ("MCA") § 950f(b)(3). (TAB A) Moreover, the Deputy Chief Judge of the CMCR, Colonel David R. Francis, USAF, is scheduled to retire on December 31, 2009.
- In order to ensure CMCR continuity of operations during this transition period, I recommend that Captain Daniel E. O'Toole, JAGC, U.S. Navy, be appointed as the Deputy Chief Judge of the CMCR effective December 31, 2009. As the Deputy Chief Judge, Captain O'Toole will be able to exercise all of the authority vested in the Chief Judge in the event of a vacancy in the position between the resignation of Chief Judge Williams and the confirmation of his successor.
- Captain O'Toole is already serving as a Judge on the CMCR and his biography is attached at TAB B. Chief Judge Williams and the Judge Advocate General of the Navy concur with this recommendation.

RECOMMENDATION: That the Deputy Secretary of Defense approve the appointment of Captain O'Toole to be the Deputy Chief Judge of the CMCR effective December 31, 2009.

Approve WJL Disapprove _____ Other _____

DEC 21 2009

COORDINATION:
Judge Advocate General of the Navy

Attachments:
As stated

| | | | |
|-------|-----------|---------|-----------|
| CA | | DSD SA | SWH 12/15 |
| SMA | | DSD SMA | SWH 12/15 |
| MA | | DSD MA | SWH 12/15 |
| IA | WJL | DSD CA | |
| IA SA | | | |
| i | WJL 12/17 | | |
| R | WJL 12/17 | ren | |



OSD 14064-09

12/17/2009 1:54:09 PM

TAB A



United States Court of Military Commission Review
One Liberty Center
875 N. Randolph Street, Suite 8000
Arlington, VA 22203-1995

December 2, 2009

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: Request for Appointment of Deputy Chief Judge

On April 28, 2008, the Deputy Secretary of Defense appointed Colonel David R. Francis, U.S. Air Force, as Deputy Chief Judge for the U.S. Court of Military Commission Review. Deputy Chief Judge Francis will retire from the Air Force on December 31, 2009. I recommend that Captain Daniel E. O'Toole, U.S. Navy, be appointed to replace Colonel Francis. The Navy Judge Advocate General concurs with my recommendation.

On May 8, 2007, the Deputy Secretary of Defense appointed Captain O'Toole to be an appellate judge on the U.S. Court of Military Commission Review. In April 2008, Captain O'Toole became the Chief Judge, Navy-Marine Corps Court of Criminal Appeals. In July 2009, the Secretary of the Navy approved the selection of Captain O'Toole to serve as the first Assistant Judge Advocate General (Chief Judge) of the Department of the Navy.

I intend to resign from my position to enable the President to exercise his authority to appoint civilian judges to the Court. Deputy Chief Judge Francis will become Acting Chief Judge, and his duties will include assignment of judges to panels and assignment of pending cases to panels for decision. It is essential that a replacement Deputy Chief Judge be designated before December 31, 2009, so that he can serve as Acting Chief Judge until a new Chief Judge is appointed.


Frank J. Williams
Chief Judge

CF:
General Counsel, Department of Defense

Enclosure
Captain O'Toole's Biography

TAB B

Captain Daniel E. O'Toole, JAGC, U.S. Navy

Captain Daniel E. O'Toole, Judge Advocate General's Corps, U.S. Navy, graduated from High Point College in 1977 with a Bachelor of Arts degree, with honors. He holds a Juris Doctor degree from Wake Forest University School of Law and a Master of Laws (Environmental Law) degree from The George Washington University National Law Center. Captain O'Toole has been a member of the North Carolina State Bar since 1980.

Captain O'Toole's experience includes four years in the private practice of law, litigating cases in state and federal courts, including appellate practice. In 1984, he accepted a direct commission into the Navy JAG Corps. Since then, he has served in multiple positions in Naval Legal Service Command, as a prosecutor, defense counsel, and as both the Executive Officer and the interim Commanding Officer of Trial Service Office East. He also twice served in the General Litigation Division, Office of the Judge Advocate General (OJAG), including as its Deputy Director, and Director, and he served three years as a Chief Circuit Military Judge. During service on the trial bench, Captain O'Toole was the Navy's designated National Security Judge. He has prosecuted, defended or presided over a wide range of cases, including fraud, rape, murder, including capital murder, and national security cases. In addition, Captain O'Toole served as Presiding Officer over Military Commissions in Guantanamo Bay, Cuba. Captain O'Toole is designated a Litigation Expert in the Navy JAG Corps' Military Justice Litigation Career Track.

In addition to 15 years of active litigation, Captain O'Toole served as SJA on USS THEODORE ROOSEVELT during Desert Shield/Desert Storm, and served as SJA, Commander Carrier Group EIGHT, embarked on USS JOHN F. KENNEDY and USS DWIGHT D. EISENHOWER. He also served as an SJA ashore at Naval Air Station, Brunswick, Maine, on the staff of Navy Region Norfolk, and both the Naval Air Forces Atlantic and U.S. Atlantic Fleet staffs. He has also served as Director of OJAG Management and Plans, as Navy JAG Corps Community Manager, and Executive Assistant and Special Counsel to the Navy General Counsel.

In 2007, Captain O'Toole was elevated from the trial bench to the Navy-Marine Corps Court of Criminal Appeals, and was simultaneously appointed to the Court of Military Commission Review (CMCR). In April 2008, Captain O'Toole was invested as the Chief Judge, Navy-Marine Corps Court of Criminal Appeals. In July 2009, the Secretary of the Navy approved the report of the selection board that recommended Captain O'Toole serve as the first Assistant Judge Advocate General (Chief Judge) of the Department of the Navy. He assumed duties as Chief Judge in September 2009, and upon detailing as the Assistant Judge Advocate General in his third year of service, he will qualify for retirement at the rank of Rear Admiral (Lower Half), as determined by the Secretary. Captain O'Toole remains a Presiding Judge on the CMCR.

Captain O'Toole is a 1984 honors graduate of the Naval Justice School. He is also The Distinguished Graduate of the 47th Military Judge's Course, and was awarded the 2008 Major General William K. Suter Distinguished Judicial Services Award. His personal military decorations include the Legion of Merit (four awards), the Meritorious Service Medal (four awards), the Navy Commendation Medal (three awards), the Joint Services Achievement Medal, and the Navy-Marine Corps Achievement Medal (two awards).