

**COL THOMPSON AND CAPT O'TOOLE HAVE BEEN
"REASSIGNED TO OTHER DUTIES"**

On the merits, Appellee notes that the 2009 amendments to the MCA specify limits on when this Court's judges can be reassigned to other duties. Appellee argues that these amendments, designed to protect this Court from unlawful influence, invalidate the Secretary of Defense's regulations insofar as they require the judges on this Court to remain appellate military judges for the duration of their service here.

Whether this argument has merit or not, these amendments would only apply to Col Thompson. CAPT O'Toole accepted the assignment of AJAG-CJ of the Navy in July 2009 – four months prior to the relevant amendments. Whatever effect these amendments could be said to have today, there is no dispute that the law in force at that time required reassignment from this Court whenever a judge left his or her seat on one of the service Courts of Criminal Appeals. CAPT O'Toole was therefore reassigned from this Court by operation of law the moment he left the NMCCA. Whatever statutory amendments came later are irrelevant.

But even with respect to Col Thompson, the amendments that Appellee points to only require that a judge on this Court be reassigned to other duties for one of four reasons. 10 U.S.C. § 949b(b)(4). The very premise of the motion to disqualify is that both Col Thompson and CAPT O'Toole have already been "reassigned to other duties," and there is no indication that they were reassigned against their will, 10 U.S.C. § 949b(b)(4)(A), or in way that was not "consistent with service rotation regulations." 10 U.S.C. § 949b(b)(4)(C). Under the statute and its implementing regulations, once officers are reassigned from their billets as appellate military judges, they are no longer eligible to serve on this Court.

**IF THE STATUTE IS AMBIGUOUS, THE SECRETARY OF DEFENSE'S
REGULATIONS CONTROL**

Appellee seems to suggest that these amendments could be read to mean that once an appellate military judge is assigned to this Court, they remain eligible to serve as such irrespective of their later being reassigned to other duties. In short, they want the statute to read “once an appellate military judge, always an appellate military judge.” While this may be a conceivable reading of the statute, the most that can be said is that it creates the possibility for some ambiguity over who is eligible to serve. What Appellee is asking this Court to do, is to use that ambiguity to invalidate duly promulgated regulations from the Secretary of Defense.

a. One problem with that approach is that Congress both knew of and ratified the Secretary’s interpretation of who is eligible to serve on this Court, when it re-enacted the MCA in 2009. Like the current law, the Military Commissions Act of 2006 required the judges on this court to be “appellate military judges.” 10 U.S.C. § 950f(b) (2006 ed.). In implementing what he viewed as the plain meaning of the statute, the Secretary’s regulations explained that the judges of this Court must be “currently certified and detailed as appellate military judges to the services’ Courts of Criminal Appeals.” RTMC 25-2(c).

When Congress revisited the military commissions in 2009, it expressed no disagreement with the Secretary’s regulations. Instead, it re-enacted the identical requirement in nearly identical terms. 10 U.S.C. § 950f(b) (2009 ed.). So whatever the ambiguity, longstanding principles of administrative law compel the conclusion that Congress ratified the Secretary’s contemporaneous interpretation of its original statute. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute”); *Society of Plastics Industry v.*

I.C.C., 955 F.2d 722 (D.C. Cir 1992) (“[W]hen Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, Congress has expressed an intention to adopt that interpretation.”).

b. The overriding problem with Appellee’s proposed approach, however, is that it attempts to re-write the regulation through litigation instead of the rulemaking process. Appellee does not contend that the regulation is itself ambiguous. Appellee just wants it to say something else and is asking this Court to accept a novel reading of the statute in its place.

The fact that lawyers representing the United States are seeking to invalidate a duly promulgated regulation is itself highly unusual. It is a “fundamental principle that agency policy is to be made, in the first instance, by the agency itself – not by courts, and not by agency counsel.” *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir 1989); *see also Harrington v. Chao*, 280 F.3d 50, 62 n.1 (1st Cir. 2002) (Torruella, J. concurring) (“Any statement by an agency that is tantamount to a declaration that its own governing regulation is invalid would, surely, require acknowledgement and explanation.”); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”).

And Appellee’s proposed course of action flips one of the most basic tenets of administrative law on its head. When a statute is ambiguous, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron v. N.R.D.C.*, 467 U.S. 837, 844 (1984); *see also Edwards’ Lessee v. Darby*, 25 U.S. 206, 210 (1827) (“In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”).

Appellee's protests notwithstanding, the regulation is clear. The Secretary of Defense's, much less the Navy JAG's, apparent misapprehension about a particular individual's eligibility to serve on this Court does not amend the regulation by inadvertence. As the D.C. Circuit summarized the law:

It is axiomatic that an agency is legally bound to respect its own regulations and commits procedural error if it fails to abide them. Of course, an agency is not forever foreclosed from revisiting existing interpretations of statutes that the agency is called on to administer. What is required, however, is that in changing its course of policy, an agency must indicate that prior policies are being expressly changed and not casually ignored.

Algonquin Gas Transmission Co. v. F.E.R.C., 948 F.2d 1305, 1315-16 (D.C. Cir. 1991) (internal references omitted). If the Secretary believes changes are warranted, all that is required is that he makes them in the manner that Congress has specified. *See* 10 U.S.C. § 949a. Otherwise, this Court is putting itself in the anomalous position of countermanding the regulatory framework that the Secretary of Defense deemed necessary to ensure that this Court is properly constituted. If there is any doubt over who is eligible to sit on this Court, therefore, the reasonable interpretation of the statute set forth in the Secretary's duly promulgated regulations control.

c. Finally, it is also unclear if Appellee's proposed interpretation of the statute would even be a permissible one, since it would frustrate Congress' intent and lead to absurd results. Congress was explicit that the procedures for adjudicating military commission cases should be near identical to those for general courts-martial. 10 U.S.C. §§ 948b(c), 949a; *see also* Manual for Military Commissions, pmbl. (2010). At the appellate stage, the way Congress chose to do that was to establish this Court in parallel to the Courts of Criminal Appeals. LTG Scott Black, then-Judge Advocate General of the Army, made this very recommendation at a time when Congress contemplated abolishing this Court and transferring its cases to the Court of Appeals for the Armed Forces:

I favor, instead, the administration proposal to modify the responsibility and authority of the court of military commission review by infusing that court with the same responsibility and authority of our service courts of criminal appeals under Article 66 of the Uniform Code of Military Justice.

Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006: Hearing before the House Comm. on Armed Services, 111th Cong. (Jul. 16, 2009).

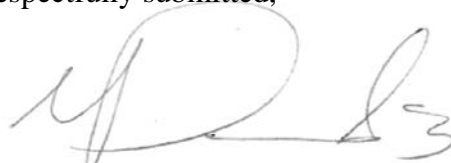
Had Congress or the Secretary instead adopted what Appellee proposes, this Court would not only look nothing like the CCAs, its composition would be unprecedented. Judges appointed to this Court would be asked to “perform[] independent judicial functions” irrespective of the institutional conflicts created by their other duties. *Cf. United States v. Lane*, 64 M.J. 1 (CAAF 2006). Officers could be assigned to the Office of the Chief Prosecutor and continue to serve on this Court, so long as they did not sit on those cases in which they were counsel. Officers could be assigned as the Legal Advisor to the Convening Authority and continue to serve on this Court, so long as they did not sit on cases they personally reviewed.

But one does not need a parade of horrors. Col Thompson is the SJA for a major Air Force installation. In that role, she is senior legal counsel to a component of the same United States government that is a party to this case. *See, e.g.*, AFI 51-201 § 13.1. The same is true for CAPT O’Toole, who as AJAG-CJ, “act[s] for the Secretary of the Navy.” JAGMAN 0606a. Not only does he chair the Navy’s Judicial Screening Board, which selects judge advocates to serve on the NMCCA and thereby become eligible to serve here, JAGINST 5817.1D ¶ 4, he is the “principal advisor” on which NMCCA judges deserve the Navy’ JAG’s nomination to this Court writ large. JAGNOTE 5450 ¶ 3(e). Appellee cannot point to anything in the legislative history of the MCA, or to an example of another court in the United States, that contemplates a judge having that kind of influence over the composition of the court on which he or she serves.

CONCLUSION

Appellant's motion to disqualify CAPT O'Toole and Col Thompson is predicated on the simple premise that the government must follow its own rules. As stated above and in the initial motion, the Secretary's regulations are the most obvious interpretation of the statute, have been approved by Congress and are motivated by a desire to provide this Court the same level of judicial independence enjoyed by the Courts of Criminal Appeal. If counsel for the government believes that changing the rules at this phase of the litigation is warranted, all they have to do is make their case to the Secretary of Defense.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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



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