

**UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

*en banc*

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)  
) MOTION OF ALI HAMZA AHMAD  
) SULIMAN AL BAHLUL TO HAVE CAPT  
) DANIEL O’TOOLE RECUSE HIMSELF  
) FROM CERTAIN ADMINISTRATIVE  
) FUNCTIONS  
)  
) UNITED STATES, ) CMCR CASE NO. 09-002  
)  
) Appellee, ) Tried at Guantanamo, Cuba on  
)  
) v. )  
) 4 June 2007 – 7 August 2008  
)  
) SALIM AHMED HAMDAN, )  
) Before a Military Commission convened by  
) Hon. Susan Crawford  
)  
) Appellant. )  
)  
) Presiding Military Judge  
) CAPT Keith Allred, JAGC, USN  
)  
)  
)  
) DATE: 15 September 2010  
)  
)  
)

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

COMES NOW Ali Hamza Ahmad Suliman al Bahlul, Appellant in the related case of *United States v. al Bahlul*, CMCR No. 09-001, and respectfully moves this Court to compel CAPT Daniel O’Toole to recuse himself from exercising those supervisory duties delegated to him under JAG Notice 5450, Mission and Function of Assistant Judge Advocate General, Chief Judge of Department of the Navy (“JAGNOTE 5450”), as they pertain to CAPT Eric Price, appellate military judge on the Navy Marine Corps Court of Appeals and the Court of Military Commission Review, for the duration of CAPT Price’s service on the Court of Military Commission Review.

## BACKGROUND

On 3 September 2010, the Court of Military Commission Review (“CMCR”) issued an order reflecting its decision to hear the above captioned case *en banc* following the retirement of a panel member. This order revealed that CAPT Daniel O’Toole, Assistant Judge Advocate General for the Navy, Chief Judge/Department of the Navy (“AJAG-CJ”), has served and continues to serve as a judge on the CMCR despite his reassignment to the position of AJAG-CJ in July 2009.

In his role as AJAG-CJ, CAPT O’Toole is the chief administrator of the Navy and Marine Corps trial and appellate judiciary. He is responsible within the Navy for the handling of all inquiries into alleged judicial misconduct, screening and recommending candidates for judicial service, and for acting as the reporting senior for the Navy and Marine Corps Court of Criminal Appeals (“NMCCA”). JAGNOTE 5450 ¶¶ 3(a)-(e). He is authorized to serve as necessary on general courts-martial, but is given no authority to serve on the NMCCA. *Id.* at ¶ 3(k). This is because Article 66(g) of the UCMJ forbids appellate military judges from influencing the performance evaluations of their fellow appellate military judges in any manner. The AJAG-CJ is therefore statutorily precluded from both serving as an appellate military judge and exercising his supervisory functions over the NMCCA. Accordingly, upon assuming the responsibilities of the AJAG-CJ, CAPT O’Toole was reassigned from the NMCCA.

On 9 December 2009, CAPT Eric Price was assigned to serve as judge the case of *United States v. al Bahlul*, CMCR 09-001. CAPT Price was and remains an appellate military judge on the NMCCA. CAPT Price is and will remain, therefore, under the direct supervision of CAPT O’Toole as his rating senior, so long as the Judge Advocate General for the Navy does not assume that function pursuant to JAGNOTE 5450 ¶ 3(a)(5).

**CAPT O'TOOLE MUST RECUSE HIMSELF FROM HIS SUPERVISORY ROLE AS  
AJAG-CJ INsofar AS IT REACHES CAPT PRICE**

Under the Military Commissions Act of 2009, 10 U.S.C. § 950f(b)(2), the Rules for Military Commissions, R.M.C. 1201(b)(1), and the Regulation for Trial by Military Commission, RTMC 25-2(c), a judge on the CMCR must be either a duly appointed civilian or an “appellate military judge,” who is concurrently serving on one of the Courts of Criminal Appeal. Congress repeatedly emphasized that it wanted the procedures for adjudicating military commission cases to be identical to those for adjudicating general courts-martial, absent an express finding that exceptions were necessary. 10 U.S.C. §§ 948b(c), 949a; *see also* Manual for Military Commissions, pmb. (2010). So in establishing this Court as a court of record, Congress and the Secretary of Defense ensured that its judges brought with them, at a minimum, the same professional safeguards of their judicial independence that they enjoyed as appellate military judges on the CCAs. *See Weiss v. United States*, 510 U.S. 163, 180-81 (1994); *Hamdan v. Rumsfeld*, 548 U.S. 557, 649 (2006) (Kennedy, J. concurring); *CMR v. Carlucci*, 26 M.J. 328, 337 (C.M.A. 1988).

Chief among those safeguards is the broad language of Article 66(g), which makes any effort by one appellate military judge to influence the professional evaluation of another appellate military judge unlawful influence *per se*. *See United States v. Murphy*, 26 M.J. 454 (CMA 1988) (Congress added Article 66(g) “in order to assure that the judges of Courts of Military Review would retain their independence.”). Article 66(g) was one of two new subsections added by the 1968 Amendments, in which Congress created the courts of military review and gave them the procedural safeguards needed “to improve and enhance the stature and independent status of these appellate bodies.” S. Rep. 90-1601 at 14; *see also* An act to increase the participation of military judges and counsel on courts-martial, and for other purposes. Pub.

L. 90-632 § 2(27) (1968). And within a year after the law went into force, the Army Court of Criminal Appeals held up Article 66(g) as a cornerstone of its newfound integrity as a court:

The independence of the judges and the counsel of this Court has been expressly secured by the Congress. . . . The judges of this court are part of an independent judiciary and are insulated by the Act as to the performance of their judicial duties. As in other appellate courts, the cases before us are disposed of, in the exercise of our judicial functions, by majority decision, yet each judge is independent having neither superior nor subordinate.

*United States v. Draughon*, 42 C.M.R. 447 (A.C.C.A. 1970).

The importance of Article 66(g) to preserving judicial independence is, in part, a consequence of what the CMA has recognized to be the unusual significance of fitness-reports to an officer's career and morale. In *United States v. Mabe*, 30 M.J. 200 (C.M.A. 1991), the CMA "unequivocally reject[ed]" the notion that a senior rater could even informally criticize a military judge's decision making. They found unlawful command influence where the Chief Judge of the Navy Trial Judiciary sent a personal and at times jocular memo that let a judge know he was getting a reputation for lenient sentencing. The CMA found that even though this was not directed at the defendant's particular case and even in light of its informality, the mere fact that a senior rater conveyed dissatisfaction with a military judge's approach to his judicial duties was unlawfully coercive. "This coercion results from the well-recognized effect of fitness-report evaluations on a military lawyer's service advancement and security." *Id.* at 205. And in *Weiss*, the Supreme Court expressly relied on *Mabe* as evidence of the ways in which the military justice system as a whole compensates for the otherwise vulnerable position a military judge is in when the law compels results that their rating seniors might not like. *Weiss*, 510 U.S. at 181.

Likewise in *United States v. Mitchell*, 39 M.J. 131, the judges of the NMCCA were "concerned about the fairness of their treatment as professional military officers" because of the fitness reporting system in place at the time. Their concerns were rooted in the fear that fitness

reports by the JAG, exercised through the AJAG for Military Law, could inhibit them from ruling against the government. The CMA sympathized with their concern but upheld this system on the grounds that the JAG and AJAG's general supervisory functions meant that they would generally have no involvement or interest in the outcome of particular cases. They found that Congress had largely remedied the "very problems now raised with respect to fitness reports of appellate military judges," insofar as it had enacted the protections of Article 66(g). *Id.* at 146.

The fear that a rating senior will retaliate against a military judge for an unpopular decision is not the only impairment of judicial independence that Article 66(g) protects against. It also deprives rating seniors of the opportunity to influence or even know the particularities of the deliberative process. On appellate courts, where decisions are rendered by panels, judges must be free to candidly debate, criticize and persuade their fellow judges on the merits of case before them. *Cf. Carlucci*, 26 M.J. at 337 ("Implicit in the existence of the privilege is recognition that the full and frank exchange of ideas among judges or between a judge and his staff may be chilled and obstructed if those discussions are revealed outside the court."). Judges are not independent, and cannot appear to be so, if looming over their deliberations is the knowledge that if they offend or simply fail to persuade another member of their court, the ramifications could be personal.

Here, CAPT O'Toole has apparently continued to serve in some capacity on the CMCR, despite his reassignment from the NMCCA and despite his role as the direct supervisor of any appellate military judge who has been assigned to this Court by the Navy. Irrespective of the character and personal fortitude of any particular appellate military judge, Congress enacted Article 66(g) as a blanket prohibition because the notion that one judge on a collegial court is in a position to rate another irreparably compromises the appearance of judicial independence and

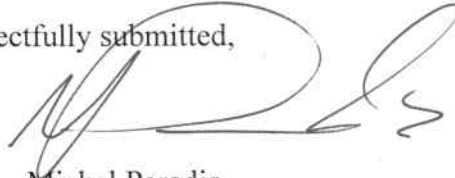
the public's confidence that the decisions rendered reflect the reasoned judgment of a United States court. CAPT O'Toole's position as CAPT Price's rating senior has and continues to constitute a form of command influence that Congress has identified as unlawful since it created the appellate military judge as a judicial office.

In *Mabe*, the CMA ruled that the prejudice was cured by the replacement of the Chief Judge as the rating senior. *Mabe*, 30 M.J. at 206. Under the circumstances presented here, the only adequate remedy is for CAPT O'Toole to recuse himself from those administrative functions that give him positional and rating authority over CAPT Price for the duration of CAPT Price's service on the CMCR. This remedy is expressly contemplated by JAGNOTE 5450 ¶ 3(a)(5) and can therefore be implemented expeditiously.

## CONCLUSION

Wherefore, Appellant in the case of *United States v. al Bahlul* requests that CAPT O'Toole recuse himself from all of his supervisory functions as AJAG-CJ insofar as they are exercised with respect to CAPT Price.

Respectfully submitted,



Michel Paradis  
MAJ Todd E. Pierce, USA  
Office of the Chief Defense Counsel  
Office of Military Commissions  
1600 Defense Pentagon  
Washington, DC 20301  
[michel.paradis@osd.mil](mailto:michel.paradis@osd.mil)  
TEL: 1.703.696.9490 x115  
FAX: 1.703.696.9575  
MOB: 1.571.309.4320

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to COL Francis Gilligan (Ret.), counsel for the government, and Harry Schneider, Joseph McMillian and Adam Thurschwell, counsel for the Appellant, on the 15<sup>th</sup> day of September 2010.

Dated: 15 September 2010

Respectfully submitted,



Michel Paradis

MAJ Todd E. Pierce, USA

Appellate Defense Counsel

Office of the Chief Defense Counsel

Office of Military Commissions

1600 Defense Pentagon

Washington, DC 20301

[michel.paradis@osd.mil](mailto:michel.paradis@osd.mil)

TEL: 1.703.696.9490 x115

FAX: 1.703.696.9575

MOB: 1.571.309.4320