MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 806A (GOV)** **Government Motion** For Lieutenant Colonel Matthew N. McCall To Recuse Himself as Military Judge Due to Disqualification for Non-Compliance With Manner of Detailing Specified By Lawful Regulation 8 December 2020

1. Timeliness

This Motion is timely filed.

2. Relief Sought

The Prosecution respectfully requests that Lieutenant Colonel (Lt Col) Matthew N. McCall recuse himself as the military judge in this case. Should he decline to do so, the Prosecution regretfully requests that he abate the proceedings pending the challenge of such ruling. Further, the Prosecution requests that, in either case, Lt Col McCall issue a ruling in a timely manner so that any further delay in this Commission's safe resumption of progress toward trial is minimized.

3. Overview

Lt Col McCall must recuse himself under R.M.C. 902(b)(4), as he is not eligible to act because he was not detailed under R.M.C. 503(b). Three reasons compel this conclusion. First, the governing regulation for military commissions, the Regulation for Trial by Military Commissions (R.T.M.C.)—upon which R.M.C. 503(b) necessarily relies—is an exercise of statutory authority granted by Congress to the Secretary of Defense and is to be accorded substantial deference. Second, Lt Col McCall was improperly detailed to this military commission, and therefore is disqualified, because he lacks two years of judicial experience, a

requirement of R.T.M.C. 6-3.d. Third, even if Lt Col McCall were to disagree with the analysis herein and deny this motion, the noncompliance of his detailing with the manner prescribed in the lawful governing regulation would create legal uncertainty for the remainder of the trial and any subsequent appellate litigation.

4. Burden of Proof

Although the moving party generally must demonstrate by a preponderance of the evidence that the requested relief is warranted, *see* R.M.C. 905(c)((1)-(2), the Military Judge must disqualify himself whenever the circumstances require. If the military judge rules that he is disqualified, then he must recuse himself regardless whether the moving party is deemed to have met a burden.

5. Facts

On 17 October 2009, the Military Commissions Act (M.C.A.) of 2009 became law. In the M.C.A. provision on the detailing of military judges, Congress directed that "[t]he Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions." 10 U.S.C. § 948j(a). Invoking this provision, the R.T.M.C. of 6 November 2011 provided, among other things, that military judges nominated by the Judge Advocates General "must have a TOP SECRET clearance[,]" and that "[m]ilitary judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial." R.T.M.C. at ¶ 6-3.d. Both of these requirements regarding the manner of detailing remain in force. Both have verbatim predecessors in the M.C.A. of 2006 and R.T.M.C. of 2007, respectively, making the TOP SECRET clearance and two-years-of-experience rules for nominees to the military commission judge pool more than 13 years old at the time of Lt Col McCall's detailing. *See* Pub. L. 109–366, § 948j(a) (Oct. 17, 2006); R.T.M.C. ¶ 6-3.d-e (Apr. 27, 2007).

On 17 June 2019, Judge Shane Cohen, United States Air Force, presided on the record for the first time as the new military judge for this Commission. During voir dire by defense counsel that day, and while acknowledging that Article 6 of the Uniform Code of Military Justice

empowered the Judge Advocate General of the Air Force to recommend his reassignment,[1] Judge Cohen explained his qualifications and expressed hope that he could remain detailed so as to provide the continuity needed for the case to move forward:

> However, I have been a Colonel now for essentially three years. I am only one year into my second stint as a military judge. Having been detailed to a court of this magnitude and with the need for some level of continuity, it is at least my hope that the Judge Advocate General of the Air Force would see fit to leave me on this for some period of time to allow this case to move forward and for some continuity in rulings by the military judge . . . But my hope is that you all will have—both sides, both the prosecution and defense—will have the continuity that you deserve.

Unofficial/Unauthenticated Transcript (Tr.) at 23097–98 (Cohen, J.). Judge Cohen further explained that when detailed by the Chief Trial Judge, "I obviously had three years as a military judge under my belt; you know, the minimum qualifications [are] at least two years as a military judge[,]" and "I also had a current TS//SCI clearance." *Id*. at 23172.

Judge Cohen's explanation of his eligibility to preside over the case was consistent with the explanations of his two predecessors when responding to defense counsel on voir dire. On 5 May 2012, Judge James Pohl stated, "just so everybody is clear, the way the judge process works, each service TJAG nominates military judges for Commission work[,]" and "[y]ou have to be a judge for at least two years with proper clearance." Tr. at 112. On 10 September 2018, Judge Keith Parrella explained, "[t]he qualifications, as I read them, are that you're a trial judge for at least two years[,]" and "I provided my bio so that you would see that I've met those qualifications." Tr. at 20441.

On 30 August 2019, the Commission issued AE 639M, a trial scheduling order setting a trial date of 11 January 2021. The trial scheduling order also listed several deadlines for the Prosecution and Defense in preparation for, and leading up to, the trial date. *See* AE 639M, Attach. A. Until the first of the now ten extensions of the briefing and litigation deadlines

[1] Article 6 provides that "[t]he assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members." 10 U.S.C. § 806(a).

articulated in the trial scheduling order, the Government had met every deadline, without extension, required of it by AE 639M.

On 17 March 2020, Judge Cohen unexpectedly announced his retirement, noting that his last day of active duty would be 24 April 2020. *See* AE 001E. On that date, and as his final case-related action, Judge Cohen issued this Commission's last substantive ruling on any pre-trial motion pending before it. *See* AE 695C, Ruling—Mr. Bin 'Attash's Motion to Compel Material and Information Related to Knowledge Interrogators Possessed Before Interrogating Mr. Bin 'Attash, and Questions They Asked Him During Interrogations.

On 28 April 2020, Military Commissions Chief Trial Judge Watkins detailed himself as the military judge in this Commission. In his detailing memorandum issued to the parties, Judge Watkins stated that his detail was only "for the duration of applicable travel restrictions and stay at home orders issued by various federal, state and local officials in response to the current COVID-19 pandemic or until I detail a different military judge." *See* AE 001F. During the time that Judge Watkins presided over this Commission, the Commission issued only trial scheduling and logistics orders and rulings; no substantive rulings were issued by the Commission on any of the pending case-related pre-trial motions.

On 17 September 2020, Chief Trial Judge Watkins detailed Colonel Stephen Keane as the military judge in this Commission. *See* AE 001G. Two weeks later, on 2 October 2020, Judge Keane recused himself as the military judge in this Commission based on his conclusion that he was disqualified due to an appearance of bias arising from various connections to the events and victims of the September 11, 2001 attacks. *See* AE 001I. Judge Keane did not issue any substantive rulings or orders on any of the pending case-related pre-trial motions.

On 16 October 2020, Chief Trial Judge Watkins detailed Lt Col McCall, U.S. Air Force, as the military judge in this case. *See* AE 001J. Lt Col McCall's official biography,[2] which was provided to all parties, states that Lt Col McCall has been assigned as a military judge at Joint

[2] *See* AE 001K, Lieutenant Colonel Matthew N. McCall, United States Air Force Biography (Oct. 2020).

Base Langley-Eustis, Virginia since July 2019. The biography does not specify any prior judicial experience. Later on 16 October 2020, and after having reviewed Lt Col McCall's official biography, the Prosecution filed AE 001L/ AE 806 (GOV), Government Notice of Position on the Qualifications of Lieutenant Colonel Matthew N. McCall to Serve as a Military Commission Judge. In this notice, the Prosecution stated that it did not appear that Lt Col McCall possessed the requisite qualifications under R.T.M.C. ¶ 6-3.d to be detailed as a military judge. Accordingly, the Government respectfully informed the Commission and the parties that the United States cannot and will not defend Lt Col McCall's appointment as military judge in this or any other military commission. *See* AE 001L/AE 806 (GOV). The Government also reserved its right to file a motion to recuse should Lt Col McCall not *sua sponte* recuse himself at the earliest opportunity. *Id.*

On 20 October 2020, Mr. Ali filed AE 807 (AAA), requesting that "[t]he military commission . . . abate proceedings until a judge under Regulation for Trial by Military Commission 6-3 is available."[3] Concurring with the legal analysis in the Prosecution's notice, defense counsel for Mr. Ali stated that "[d]espite his experience in courts-martial, Military Judge McCall apparently does not meet the experience requirement of [R.T.M.C. ¶ 6-3] to qualify as a military judge in the United States Military Commissions at this time."[4] Counsel for Mr. Ali thus asserted that "during a period when there is either no detailed or no qualified military judge presiding, the 9/11 case cannot proceed and should be abated."[5] The Government opposed the motion, noting that abatement was uncalled for as movement toward trial can safely resume under a detailed and medically sound plan that has been approved by the Department of Defense. AE 807D (GOV) at 4–5 & n. 16 (citing AE 653BB, Attach. C, which specifies such plan). The Government maintained that the Military Judge should deny the motion, immediately recuse

[3] AE 807 (AAA), Mr. Ali's Motion to Abate Military Commission Pending Resolution of Judicial Eligibility at 1 (Oct. 20, 2020).

[4] *Id.* at 2.

[5] *Id.*

himself *sua sponte*, and permit the Chief Trial Judge to timely detail a military judge in a manner that complies with R.T.M.C. ¶ 6-3. *Id*. at 5–6.

On 4 November 2020, Lt Col McCall issued AE 653GG, entitled, "Trial Conduct Order—Government Motion for Adoption of a Plan to Resume Proceedings at Naval Station Guantanamo Bay." This filing purported to direct the Government to identify one or more facilities of sufficient size for the safe and secure remote participation by Defense Counsel and others in the proceedings at Guantanamo Bay that the Government has proposed begin on 10 February 2021. The filing also set forth other requirements related to confirming that such proceedings would be safe, secure, and practicable. Lt Col McCall established 30 November 2020 as the date by which the Government's requirements needed to be filed, with Defense responses to the Government filing due on 4 December and any Government reply due by 8 December. While continuing to assert that Lt Col McCall lacked authority to preside over this Military Commission, the Government on 24 November filed AE 653HH, which addressed each requirement listed in AE 653GG. In addition to AE 653GG, Lt Col McCall had by 8 December issued 13 rulings extending various filing deadlines and one expediting the Government's response briefing to a Defense motion, but had not made any decision that could reasonably be construed as prejudicial to any Accused. These rulings are listed at Attachment B.

Having previously informed the Deputy General Counsel (Legal Counsel) of AE 001L/AE 806 (GOV), and upon receiving rulings issued by Lt Col McCall, the Chief Prosecutor reported to the Deputy General Counsel (Legal Counsel) that prosecutors were compelled to consider taking the drastic step of filing a government motion to recuse Lt Col McCall due to noncompliance with R.T.M.C. ¶ 6-3.d. *See* R.T.M.C. ¶ 8-6.b.1 ("In the event that the Chief Prosecutor is in the military pay grade of O-7 or above, he or she shall report directly to the Deputy General Counsel (Legal Counsel)."). On 17 November 2020, the Deputy General Counsel (Legal Counsel) provided the Chief Prosecutor a copy of the one-page memorandum issued by the Deputy Secretary of Defense provided here at Attachment C. The memorandum

from the Deputy Secretary of Defense is dated 16 November 2020 and is addressed to the Chief Trial Judge of the Military Commissions Trial Judiciary.

The 16 November 2020 memorandum from the Deputy Secretary records that the Chief Trial Judge had, on 26 October 2020, sought clarification of his authority as the Chief Trial Judge of Military Commissions to waive the two-year experience requirement in R.T.M.C. ¶ 6-3.d. The memorandum then provides that, as the delegated authority to promulgate rules and regulations for the administration of military commissions, the Deputy Secretary declined to issue the requested clarification, and that "waiver of the RTMC requirements does not rest with [the Chief Trial Judge] or members of the trial judiciary." Further, the memorandum states that the two-year experience requirement is "a reasonable and necessary requirement to best protect the interests of the accused and the Government in administering military commissions." The Chief Prosecutor did not receive a copy of the 26 October 2020 Chief Trial Judge action memo referenced in the Deputy Secretary's 16 November 2020 memorandum, nor any other correspondence related to this matter. Nor did the Chief Prosecutor, or any member of the Prosecution, have any involvement in the Deputy Secretary's 16 November 2020 memorandum beyond reporting to the Deputy General Counsel (Legal Counsel) the military commission filings associated with Lt Col McCall's detailing and the associated noncompliance with R.T.M.C. ¶ 6-3.d.

As of the date of the filing of this motion, 229 days have elapsed since this Commission issued a substantive pretrial ruling on any motion or issue pending in this case. To date, Lt Col McCall has not recused himself from this case.

6. Law and Argument

On 29 June 2006, the Supreme Court decided *Hamdan v. Rumsfeld.* The decisive concurring opinion in *Hamdan* emphasized the importance of resolving even issues arising from extraordinary cases "by ordinary rules" and extolled reliance on "standards deliberated upon and chosen in advance . . . ." *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring). Like the majority opinion, the concurrence found fault with *Hamdan*'s military

commission because it failed to conform to pertinent pre-existing rules requiring that procedures be uniform with court-martial procedures insofar as practicable and that military commissions be "regularly constituted." *Id.* at 638–55. Although the present case is convened under statutory authority that post-dates *Hamdan*, and although the United States makes no claim here that Lt Col McCall's improper detailing violated the provisions of U.C.M.J. article 36 and Geneva Convention Common Article 3 (whose contravention deprived Hamdan's military commission of authority to proceed), this motion, too, should be decided by an ordinary rule. In granting the Government's recusal request, Lt Col McCall would thus be applying a qualification standard that was deliberated upon and chosen by competent authority more than 13 years before the Chief Trial Judge issued the detailing memorandum at AE 001J.

The ordinary rule—and sensible standard—controlling the issue before this Commission is that prior to being detailed as a military judge in a military commission, the officer concerned must have at least two years of general court-martial experience as a military judge. Prescribed as an exercise of rule-making authority regarding the manner of judicial detailing expressly granted in § 948j(a) to the Secretary by Congress, R.T.M.C. paragraph 6-3.d seeks to assure simply that trial judges will be detailed by the Chief Trial Judge from among a pool of practiced veterans of the military's trial judiciary. This manner of detailing makes sense in light of the complex legal issues and sharply adversarial process featured in law of war trials under the M.C.A. The authority by which this sensible rule was promulgated, and the rule itself, are part of a framework specifically enacted to address the Supreme Court's concerns in *Hamdan* about participating officers who may tend to substitute their discretion for the lawfully prescribed process. Noncompliance with this rule, however innocently explained, reflects disregard for the Secretary's lawful role in that framework and deviates from the "procedural rigor" the Supreme Court held was fundamental to military commissions' authority. *Id*. at 645. For adherence to pre-existing rules and respect for the distribution of lawful functions among different officers and bodies is essential to counteracting the "mere expedience and convenience" that invalidated Hamdan's military commission. *Id*. at 640.

I. The Regulation for Trial by Military Commissions Is an Exercise of Statutory Authority Granted by Congress to the Secretary of Defense and Is to Be Accorded Substantial Deference

Certain aspects pertaining to the detailing, eligibility, duties, and evaluation of the military judge of a military commission are directed by statute. Other matters, including those of administration and implementation, are generally left by Congress to executive branch regulation. The M.C.A. directs that "[a] military judge shall be detailed to each military commission under this chapter" and that "[t]he military judge shall preside over each military commission to which such military judge has been detailed." 10 U.S.C. § 948j(a). The M.C.A. separately provides that "[t]he Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions." *Id.*

In turn, the R.T.M.C. was promulgated pursuant to § 948j(a) and other authorities of the Secretary of Defense specifically to set forth how military commissions are to be administered and implemented—including the manner of judicial detailing. The R.T.M.C. applies to "the Office of the Secretary of Defense; the Military Departments; . . . and all other organizational entities within the DoD." *See* R.T.M.C., Foreword ¶ 2. While it creates "no substantive rights enforceable by any party[,]" *see* R.T.M.C. ¶ 1-1(b), and would yield to any provisions of the M.C.A. or the Manual for Military Commissions (M.M.C.) with which it is genuinely inconsistent, the R.T.M.C. is binding law. In an introductory paragraph explaining its purpose, the R.T.M.C. states:

> The [R.T.M.C.] prescribes policies and provisions for the administration of military commissions and implements the [M.M.C.]. In drafting this Regulation, every effort was made to ensure that its policies and provisions are not in conflict with the [M.C.A.] . . . or the M.M.C. In the case of any conflict between this Regulation and the rules and procedures prescribed by the M.C.A. and M.M.C., the latter two will always be controlling over this Regulation.

R.T.M.C. ¶ 1-1(a). It further specifies that "[a]ll persons subject to this Regulation are required to adhere to the guidance in this Regulation in all matters related to military commissions." R.T.M.C. ¶ 1-1(b). Every participant in the processes by which this Commission was convened and carries out its lawful functions, including the Chief Trial Judge and each individual judge in

the Trial Judiciary, is thus subject to the R.T.M.C. so long as the regulatory provision at issue conforms to the M.C.A. and the M.M.C. and does not contravene the prohibitions upon evaluating a judge's fitness or attempting some other form of unlawful influence (which R.T.M.C. ¶ 6-3.d does not). *See* 10 U.S.C. § 948j(f); 10 U.S.C. § 949b. Pertinent to this motion, the R.T.M.C. also mandates that "[m]ilitary judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial." *See* R.T.M.C. ¶ 6-3.d (citing R.M.C. 503(b)).

As it consists of rules promulgated under authorities of the Secretary of Defense granted by Congress in the M.C.A.,[6] the R.T.M.C. is frequently interpreted by the Office of the Secretary of Defense (OSD). Such interpretations are to be accorded deference. *See, e.g., United States v. Al Bahlul*, 807 F. Supp. 2d 1115, 1120–21 (U.S.C.M.C.R. 2011) (O'Toole, C.J.) (finding R.T.M.C. provisions related to qualifications of military commissions appellate judges did not conflict with the M.C.A. or the M.M.C. because the Deputy Secretary of Defense's actions were assumed to be in accordance with the R.T.M.C. and because an agency's interpretation of its own regulation is accorded substantial deference). An OSD interpretation of the R.T.M.C. will be rejected by a court only if it "violates the Constitution, a statute, or is 'plainly erroneous or inconsistent with the regulation . . . .'" *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Here, OSD clearly regards the two-years-of-experience requirement to be consistent with the M.C.A. and the M.M.C. and, as a result, it is binding on all persons participating in military commissions, including the Chief Trial Judge and Lt Col McCall. If that requirement were to have violated the Constitution, or any statute, or was plainly erroneous or inconsistent with the M.M.C. or even the R.T.M.C. itself, one would expect Chief Judge Pohl, or

[6] In the 2006 M.C.A., Congress empowered the Secretary of Defense to "delegate the authority of the Secretary to prescribe regulations under this chapter." 10 U.S.C. § 949a(c) (2006). The 2009 M.C.A. contains identical delegation language. 10 U.S.C. § 949a(c) (2009). On April 26, 2007, the Deputy Secretary of Defense first "prescribe[d] the Regulation for Trial by Military Commission effective April 27, 2007[,]" noting that "the Secretary of Defense delegated to me the authority to prescribe regulations for military commissions." 2007 R.T.M.C., Foreword. The current R.T.M.C. was similarly prescribed by the Deputy Secretary pursuant to Secretarial delegation. *See, e.g.,* Attachment C.

Military Judges Parella and Cohen, to have remarked as much. Instead, they found the requirement unremarkable and accepted its authority.[7] Indeed, the M.C.A.'s delegation of authority to prescribe regulations concerning the selection of military judges is not unique to military commissions, as the U.C.M.J. provides for a similar delegation concerning the selection of military judges for courts-martial.[8]

Deference to OSD's interpretation is further called for because OSD and its implementing offices within the military departments have the policy and other substantive expertise to constitute a pool of qualified military judges capable of implementing the M.C.A. and M.M.C. While the wisdom of deferring may rightly be questioned when an interpretation involves a pure question of law or pertains to a situation or standard that is distinctly within the judicial purview, interpretations of rules regarding officer training and assignment practices

[7] *See* Facts Section, *supra* page 2.

[8] *See* 10 U.S.C.A. § 826(a) (2020) ("The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial."); MANUAL FOR COURTS-MARTIAL, App. 2, Art. 26(a) (2019) (same). The United States Code, provided by the U.S. House of Representatives, *see* https://uscode.house.gov, and the United States Code Service, provided by LexisNexis, *see* 10 U.S.C.S. § 826(a) (2020), contain an error in the statutory language for 10 U.S.C. § 826(a). The correct statutory language is available in the United States Code Annotated, provided by Westlaw. *See* 10 U.S.C.A. § 826(a) (2020). Congress's intent to retain the rulemaking authority in 10 U.S.C. § 826(a) is evidenced by its enactment of the Military Justice Act of 2016. *See* Pub. L. No. 114-328, div. E, tit. LV, § 5184(a), 130 Stat. 2894, 2901 (2016) (amending 10 U.S.C. § 826(a) (2015), but retaining the authority of service secretaries to prescribe regulations concerning the detailing of military judges to general and special courts-martial).

The arm of Congress responsible for the codification of the U.S. Code—the Office of the Law Revision Counsel, U.S. House of Representatives—indicates that, in the "unlikely" event of a "technical error in the publication process" of positively enacted code (such as Title 10, U.S. Code), one may refer to the Statutes at Large to prove the correct "wording of the statute." Office of the Law Revision Counsel, U.S. House of Representatives, Positive Law Codification, *available at* https://uscode.house.gov/codification/legislation.shtml ("Statutory text appearing in a positive law title is the text of the statute and is presumably identical to the statutory text appearing in the Statutes at Large. Because a positive law title is enacted as a whole by Congress, and the original enactments are repealed, statutory text appearing in a positive law title has Congress's 'authoritative imprimatur' with respect to the wording of the statute. *See Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 378 n.2 (4th Cir. Va. 2001); *see generally* NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 36A.10, (7th ed. 2009). Recourse to other sources such as the Statutes at Large is unnecessary when proving the wording of the statute unless proving an unlikely technical error in the publication process.") (last visited Dec. 8, 2020).

should not be subject to judicial second-guessing, even when the assignment at issue is to a military judge position. Such judicial deference should follow principles used by federal courts when reviewing agency regulations under the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).[9] Although the Chief Trial Judge can and should certainly insist that individuals nominated by The Judge Advocates General (TJAGs) of the military departments meet all of the requirements of the M.C.A., M.M.C., and R.T.M.C.—with unqualified nominees rejected for inclusion in the R.M.C. 503(b)(1) pool—neither he nor any individual officer should purport to waive a requirement, thereby substituting his own interpretation of the requirements for that of OSD. This is because judges cannot claim to have comparative expertise over OSD and the TJAGs on these matters.[10]

Chevron applies anytime an agency exercises its delegated authority by promulgating regulations, as such regulations are themselves statutory interpretations meriting deference. *See Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) ("As a general matter, an agency's interpretation of the statute which that agency administers is entitled to *Chevron* deference."). This is particularly true where "Congress has provided 'an express delegation of authority to the agency.'" *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1025 (D.C. Cir. 2000) (quoting *Chevron*, 467 U.S. at 843–44). At Step One of the *Chevron* analysis, "the court asks if the statute unambiguously forecloses the agency's interpretation, if it does not, then at

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[9] *See, e.g.*, Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 107 (1999) (commenting that in *Loving v. United States*, 517 U.S. 748, 768–73 (1996), the Supreme Court deferred to R.C.M. 1004(c) and arguing that such judicial deference is often appropriate).

[10] Professor Maggs—now a judge on the Court of Appeals for the Armed Forces—summarizes Justice Scalia's influential treatment of the arguments for judicial deference:

> First, the separation of powers principle generally requires courts to cede questions of policy to the other branches of government. Second, Congress expressly or implicitly may direct and often has directed courts to defer to agencies. Third, agencies have greater substantive expertise in many areas than the courts.

Maggs, *supra* note 99, at 108 (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511).

Step Two, we defer to the administering agency's interpretation as long as it reflects a permissible construction of the statute." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012) (internal quotation marks and citations omitted). Such deference is warranted given the agency's responsibility for assessing competing interests and its familiarity with the "circumstances surrounding the subjects regulated." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

Nothing within the M.C.A. obviously conflicts with the R.T.M.C. in this instance. The M.C.A. requires that the Secretary of Defense "prescribe regulations" to implement it,[11] much as the military services prescribe regulations for courts-martial under the Uniform Code of Military Justice (U.C.M.J.).[12] Like the U.C.M.J., the M.C.A. names and then describes basic qualifications and disqualifying criteria for trial counsel, defense counsel, and military judges.[13] Also like the U.C.M.J., the M.C.A. does not specify the manner of detailing of military judges; rather, it separately provides that the secretary concerned shall do so.[14] Yet even when a military judge individually and in good faith may nonetheless believe that there is a conflict between the M.C.A. and the R.T.M.C., he or she must defer to a contrary OSD determination because Congress delegated the requisite authority to make non-conflicting regulations in such matters to the Secretary rather to than to him or her. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency

[11] The authority of the Secretary to "prescribe regulations" in 10 U.S.C. § 948j(a) is similar to that in other M.C.A. provisions. *See, e.g.*, 10 U.S.C. § 948k(a)(4); 10 U.S.C. § 948k(c)(2); 10 U.S.C. § 948l(a); 10 U.S.C. § 948l(b); 10 U.S.C. § 949a(c); 10 U.S.C. § 949d(a)(1)(C); 10 U.S.C. § 949g(a)(2); 10 U.S.C. § 949j(a)(1); 10 U.S.C. § 949o(a); 10 U.S.C. § 949o(c); 10 U.S.C. § 949u(a); 10 U.S.C. § 950b(c)(3)(B); 10 U.S.C. § 950c(a); 10 U.S.C. § 950d(f); 10 U.S.C. § 950f(c).

[12] *See, e.g.*, 10 U.S.C. § 814(a); 10 U.S.C. § 815(a); 10 U.S.C. § 825(f); 10 U.S.C. § 826(c); 10 U.S.C. § 826a(b); 10 U.S.C. § 828; 10 U.S.C. § 830a(b); 10 U.S.C. § 838(b)(7); 10 U.S.C. § 839(b); 10 U.S.C. § 842(a); 10 U.S.C. § 843(e); 10 U.S.C. § 860b(a)(5); 10 U.S.C. § 864(a); 864(b)(2); 10 U.S.C. § 865(a)(2); 10 U.S.C. § 870(f); 10 U.S.C. § 876a.

[13] *Compare* 10 U.S.C. §§ 826, 827 *with* 10 U.S.C. §§ 948j, 948k.

[14] *Compare* 10 U.S.C. § 826(a) *with* 10 U.S.C. § 948j(a).

generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). Here, OSD has interpreted the Secretary's authority to "prescribe regulations providing for the manner in which military judges are . . . detailed to military commissions[,]" 10 U.S.C. 948j(a), as empowering the Secretary or his lawful delegate to specify that only military judges with two years of experience and a current Top Secret security clearance may be nominated and placed into the pool. R.T.M.C. ¶ 6 3.d; *see also* Attachment C. That should settle the matter.

II. Lt Col McCall Was Improperly Detailed to This Military Commission, Is Not Eligible to Act, and Must Recuse Himself Under R.M.C. 902.

Rule for Military Commissions 902 governs the disqualification of a military judge, setting forth grounds for which he or she must recuse. When deciding whether or not to recuse himself from a case, a military judge should "broadly construe grounds for challenge, but not step down from a case unnecessarily." *See* R.M.C. 902(d)(1), Discussion; *see also United States v. Witt*, 75 M.J. 380, 383 (C.A.A.F. 2016) (applying the comparable Air Force Uniform Code of Judicial Conduct rule that a judge "shall hear and decide matters assigned to the judge, except those in which disqualification is required") (citations omitted). Once disqualified, a judge "is prohibited from further participation in the case." *Id*. at 384.

Grounds for disqualification include, *inter alia*, "[w]here the military judge is not eligible to act because the military judge is not . . . detailed under R.M.C. 503(b)." R.M.C. 902(b)(4). This specific ground compels Lt Col McCall's recusal because R.M.C. 503(b) necessarily incorporates R.T.M.C. ¶ 6-3 and because, in turn, R.T.M.C. ¶ 6-3 prescribes the manner in which the pool of certified military judges is to be properly formed and a particular military judge is to be detailed *from that pool*. Regardless of the presumed innocent and good faith reasons for the irregularity, that process was not followed here. Outlining the syllogism more fully, the operative provision of the M.M.C.'s judicial detailing rule states, "[a] military judge shall be detailed to preside over each military commission *from a pool of certified military judges nominated for that purpose by* The Judge Advocates General of each of the military

departments." R.M.C. 503(b)(1) (emphasis added). This same "pool" of military judges nominated by the TJAGs is immediately mentioned again in R.M.C. 503(b)(2) to define the universe of candidates from which the Chief Trial Judge is to be selected and then again in R.M.C. 503(b)(3) to denote the proper composition of the "Military Commissions Trial Judiciary."

Yet nowhere does R.M.C. 503 specify the manner in which this "pool" is to be constituted. Nor is there any other mention of the word "pool" in the M.M.C. While the M.C.A., too, contains no reference to "pool" in any of its sections, that statute does authorize the Secretary of Defense to issue further guidance by prescribing regulations. 10 U.S.C. § 948j(a). Upon consulting the applicable regulatory provision in search of such guidance, one notices that the "pool" mentioned in R.M.C. 503(b) is indeed expressly referenced:

> *Organization*. The Military Commissions Trial Judiciary will consist of military judges nominated by the Judge Advocates General from the military departments. The Chief Trial Judge will be selected from *that pool of military judges* by the Secretary of Defense or his or her designee. *See* R.M.C. 503(b)(2).

R.T.M.C. ¶ 6-1(b) (emphasis added). The manner in which the pool is to be constituted is then further prescribed by the regulation:

> Military judges must have a current TOP SECRET clearance. A TOP SECRET/SCI (Sensitive Compartmented Information) clearance or a TOP SECRET clearance with eligibility for SCI is preferred and may be required for certain cases. Military judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial. *See* R.M.C. 503(b).

R.T.M.C. ¶ 6-3.d. In other words, the pool—as properly constituted—must include no military judges lacking a current TOP SECRET clearance and no military judges having less than two years of experience. Moreover, even if there were a different way of reasonably interpreting together the texts of 10 U.S.C. § 848j(a), R.M.C. 503(b), and R.T.M.C. ¶ 6-3, the OSD interpretation must govern, and the two-years-of-experience requirement must be given effect, given the absence of any clear conflict with the statutory and M.M.C. provisions being duly

implemented. This is again the import of the deference analysis in Section I, above. Lt Col McCall was thus not "detailed under R.M.C. 503(b)." Under R.M.C. 902(b)(4), he is therefore "not eligible to act . . . ."

R.T.M.C. ¶ 6-3.d remains in effect, and only the Secretary of Defense or his lawful delegate may waive its requirements. There is no indication that the Secretary or lawful delegate will do so, and there are sound legal and policy reasons against such action. *See* Attachment C. As the cabinet secretary with authority, direction, and control over the war-fighting capabilities of the United States, the Secretary of Defense is uniquely responsible for protecting national and international interests in prosecuting war crimes, including the mass murder of civilians and vast destruction of property that are to be adjudicated by this and other military commissions. The R.T.M.C. logically and reasonably anticipates a heightened complexity to these cases, and thus it sensibly requires military judges in the pool to have more judicial experience than someone who has just recently been qualified to preside over general courts-martial. That lesser baseline qualifications enumerated by statute may be self-executing does not rob the Secretary or delegate of the authority to prescribe a sound manner of detailing, even one that effectively increases the minimum judicial experience of the military judge ultimately selected by the Chief Trial Judge.

Based on the binding nature of the R.T.M.C., as well as the information contained within his official biography, it does not appear that Lt Col McCall possesses the requisite qualifications. He is thus ineligible to be included in the pool comprising the Military Commissions Trial Judiciary, much less detailed as a military judge in this case, until at least July 2021. The fact that the two-year-experience requirement is in the R.T.M.C., as opposed to the other "regulations" issued by the Secretary of Defense (i.e., the rules of procedure and rules of evidence), is of no legal consequence, as military courts, including this Commission's direct reviewing court, routinely rely on the applicable implementing regulations as binding authority. *See Al Bahlul*, 807 F. Supp. 2d at 1120 (O'Toole, C.J.) (looking to R.T.M.C. requirements while deciding to recuse); *United States v. Maher*, 54 M.J. 776, 779 (A.F. Ct. Crim. App. 2001) (relying on AFI 51-103 to interpret judicial qualifications in U.C.M.J. Article 26 and finding that

a military judge was "properly certified" as a judge under UCMJ and Air Force regulation); *United States v. Lyson*, No. ACM 38067, 2013 CCA LEXIS 239, at *97–99 (A.F. Ct. Crim. App. Mar. 13, 2013) (same); *United States v. Graf*, No. 66,766, 1992 CMA LEXIS 1032, at *20–24 (C.A.A.F. Sept. 30, 1992) (discussing SECNAVINST 5813.6C and TJAG Instructions in determining relevant qualifications for Navy military judges). As Lt Col McCall's experience as a military judge does not comply with R.T.M.C. ¶ 6-3, he is not properly detailed under R.M.C. 503(b), is disqualified, and must recuse himself pursuant to R.M.C. 902(b)(4).

III. Lt Col McCall's Detailing, Absent His Prompt Recusal, at the Very Least Would Create Legal Uncertainty for the Remainder of the Trial and Any Subsequent Appellate Litigation

It is not readily apparent whether and how the Chief Trial Judge interpreted the two-year-experience requirement under R.T.M.C. ¶ 6-3.d, as Lt Col McCall's detailing memorandum does not acknowledge the requirement. Perhaps the Chief Trial Judge believes that the Secretary of Defense's two-year-experience requirement for military judges does not fall under the Secretary's express M.C.A. authority to "prescribe regulations providing for the manner in which military judges are . . . detailed to military commissions." 10 U.S.C. § 948j(a). Perhaps he believes that R.T.M.C. ¶ 6-3.d conflicts with the M.C.A. or the M.M.C.—the latter of which, it is important to note, was also promulgated by the Secretary of Defense, but which has no express two-year-experience requirement or security clearance requirement. Or perhaps he believes that determinations as to judicial qualifications are solely reserved to him as Chief Trial Judge under the M.C.A. and the M.M.C.

Regardless of the Chief Trial Judge's rationale, and irrespective of its ultimate correctness—or lack thereof, as indicated by several courts' analyses in the *Al Bahlul*, *Maher*, *Lyson*, and *Graf* cases cited above—the unacknowledged legal peril in such beliefs is significant, and that peril injects unnecessary and intolerable risks of error into the proceedings of a case that stands, after more than eight years of pretrial litigation, finally on the doorstep of trial. Based on (1) the relatively small number of judicial legal opinions addressing scenarios such as this one

(after all, it is not common that a military judge is detailed in a manner so directly in contravention of an applicable rule or regulation), (2) Lt Col McCall's judicial experience ostensibly failing to satisfy the R.T.M.C. 6-3.d two-year-experience requirement, and (3) the recognition by all three prior military judges that the two-year-experience requirement was a pre-requisite for serving as the judge in this Commission, there is, at the very least, a significant chance that a reviewing appellate court will determine the Chief Trial Judge erred in detailing Lt Col McCall and that Lt Col McCall was disqualified by regulation and by R.M.C. 902(b)(4).

If this Commission were to proceed with Lt Col McCall presiding over the remainder of this case, every ruling and every decision from 16 October 2020 onward will be subject to appellate reversal or remand. No one in a position to affect the matter should willingly accept such risk to these proceedings, especially when an obvious solution is available, however challenging it may be as a practical matter to identify in military judicial ranks a judge whose appointment will meet the statutory, M.M.C., and R.T.M.C. requirements and will afford the "continuity" to which Judge Cohen referred in June of 2019.

Like the military service secretaries promulgating regulations implementing the U.C.M.J., the Deputy Secretary of Defense, as the Secretary's lawful delegate, interpreted the statute and applicable manual rules as authorizing promulgation of the two-year-experience requirement in R.T.M.C. ¶ 6-3.d. The United States is obligated to defend such a straightforward interpretation of applicable law, notwithstanding prosecutors' enduring respect for the officers involved and the highly unusual circumstances of having to challenge judicial qualifications in the interests of justice.[15] If the United States Court of Military Commission Review (U.S.C.M.C.R.) or the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) were to recognize and straightforwardly enforce the Secretary's regulation, the result

[15] To date, the Office of the Chief Prosecutor has never moved to disqualify a military judge; has never failed to defend against unfounded claims of partiality the various judges in this case and others who have been challenged; and has never prosecuted a case before, against, or with Lt Col McCall. Nor, to the undersigned's knowledge, has any prosecutor currently in the Office of the Chief Prosecutor, let alone this prosecution team, ever even served within the same unit as Lt Col McCall.

would likely involve drastic remedies no matter how Lt Col McCall may decide particular matters.[16] *See In re Al-Nashiri*, 921 F.3d 224, 240 (D.C. Cir. 2019) (vacating all orders and rulings issued by military commission judge from time he was deemed disqualified, despite "recogniz[ing] the burden" such a ruling would "place on the government, the public, and [the accused] himself").

The Government stresses that this is not a personal or professional attack on Lt Col McCall's ability as an attorney or as a jurist. Nor is it intended to disparage the honorable service of the Chief Trial Judge, who himself stepped in when Judge Cohen abruptly retired. This motion to recuse is filed simply because the Secretary of Defense has been given regulatory authority by Congress over the manner in which detailing of military judges can occur. The Secretary's lawful delegate exercised that authority in good faith, specifying that manner in advance. Only judges who possess Top Secret security clearances and at least two years of experience as military judges are to form the pool from which the Chief Trial Judge details the presiding officer of a military commission under the M.C.A. This "ordinary rule" must be applied. *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring).

The Prosecution has been compelled by these unfortunate circumstances to file this motion under R.M.C. 902(d)(1) and seek a ruling regarding disqualification. Although certainly preferring not to have to do so, but needing to protect the record in case this motion is denied, due consideration has also been given to petitioning the U.S.C.M.C.R. to rule that Lt Col McCall is disqualified under R.M.C. 902(b)(4) and to order the Chief Trial Judge and nominating TJAGs to comply with the R.T.M.C. Were that appellate court to deny such a petition on jurisdictional or other grounds, the fact is that until *all* reviewing courts complete their *final* review of this case, *every ruling or order until trial is complete*, including those during the merits phase, could

[16] Although Lt Col McCall's purported rulings to date have either provided the Defense the relief requested or have otherwise caused the Defense no discernible prejudice, the Prosecution intends to ask the next military judge to conduct a *de novo* review of those rulings—one of which deals with an Accused's right to counsel—so as not to imperil the record. Lt Col McCall should not rule on any substantive motions going forward and should immediately recuse himself.

yet be nullified.[17] The 2,976 victims, for whom these referred charges seek to deliver justice, deserve better.[18] For the foregoing reasons, and as was stated in the Notice it filed immediately upon recognizing the problem, the United States cannot and will not defend Lt Col McCall's detailing. *See* AE 001L/ AE 806(GOV).

7. Conclusion

The Prosecution respectfully requests that Lt Col McCall recuse himself as soon as possible, thus requiring the Chief Trial Judge to detail a military judge in compliance with the M.C.A., the M.M.C., and the R.T.M.C.

8. Oral Argument

The Prosecution does not request oral argument, as it seeks Lt Col McCall's immediate recusal.

9. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this pleading.

10. Certificate of Conference

Counsel for Khalid Shaikh Mohammad, Walid Bin 'Attash, and Ramzi Binalshibh deferred stating a position until they were able to review the Government's pleading. Counsel for Ali Abdul Aziz Ali responded that their client's position was as stated in AE 807. Counsel for Mustafa Al Hawsawi did not respond within the 24-hour timeframe established by Military Commissions Trial Judiciary Rule of Court 3.5.k.

[17] This is true irrespective of whether Mr. Ali were to seek review by higher court of a decision to press forward, a decision that if taken soon would effectively deny the abatement Mr. Ali seeks in AE 807 (AAA).

[18] It is also not clear that the time period Lt Col McCall spends on this case as a disqualified military commission judge, whether or not he continues work on other military justice cases, would count toward the remaining ten months of "experience" and enable him to yet become qualified to preside over a military commission. Such a course is fraught with uncertainties of its own and would thus be unwise, notwithstanding the delays that have been separately ordered as part of the Commission's response to the COVID-19 pandemic.

11. Additional Information

The Prosecution has no additional information.

12. Attachments

A. Certificate of Service, dated 8 December 2020.

B. Rulings Issued in *United States v. Mohammad* by Lt Col McCall, as of 8 December 2020.

C. Memorandum from Deputy Secretary of Defense to Chief Trial Judge, Military Commissions Trial Judiciary, dated 16 November 2020.

Respectfully submitted,

_____//s//_____
Clay Trivett
Managing Trial Counsel

Edward Ryan
Trial Counsel

Jeffrey Groharing
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Assistant Trial Counsel

Jackson T. Hall
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 8th day of December 2020, I filed AE 806A (GOV), Government Motion For Lieutenant Colonel Matthew N. McCall To Recuse Himself as Military Judge Due to Disqualification for Non-Compliance With Manner of Detailing Specified By Lawful Regulation, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher M. Dykstra
Deputy Managing Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

RULINGS ISSUED IN *UNITED STATES V. MOHAMMAD* BY LT COL MCCALL

(As of 8 December 2020)

1. AE 788 (9th Sup)/AE 639HH (8th Sup), *Ninth Supplement* to Interim Order, Temporary Extension of Briefing and Litigation Suspense Due to Impacts of Coronavirus COVID-19 (22 Oct. 2020)

2. AE 006JJ, Ruling, Mr. Ali's Request for Excusal of Detailed Military Defense Counsel (22 Oct. 2020)

3. AE 653GG, Trial Conduct Order, Government Motion for Adoption of a Plan to Resume Proceedings at Naval Station Guantanamo Bay (4 Nov. 2020)

4. AE 788 (10th Sup)/AE 639HH (9th Sup), *Tenth Supplement* to Interim Order, Temporary Extension of Briefing and Litigation Suspense Due to Impacts of Coronavirus COVID-19 (18 Nov. 2020)

5. AE 702-8 (RUL)(WBA), Ruling, Mr. Bin 'Attash's Motion for Leave to File a Reply to AE 702A (GOV), Government Response to Motion to Compel the Government to Produce an Unredacted FD-302, Out of Time (18 Nov. 2020)

6. AE 696-2 (RUL)(WBA), Ruling, Mr. Bin 'Attash's Motion for Leave to File Mr. Bin 'Attash's Reply to AE 696A(GOV), Government Response to Motion to Compel Material and Information Pertaining to the Government's Use of Forced Sleep Deprivation Against Mr. Bin 'Attash, Out of Time (18 Nov. 2020)

7. AE 768-2 (RUL)(KSM), Ruling, Mr. Mohammad's Motion for Leave to File Out-of-Time Reply to AE 768A (GOV) (20 Nov. 20)

8. AE 773-2 (RUL)(KSM), Ruling, Mr. Mohammad's Motion for Leave to File Out-of-Time Reply to AE 773A (GOV) (20 Nov. 20)

9. AE 775-2 (RUL)(KSM), Ruling, Mr. Mohammad's Motion for Leave to File Out-of-Time Reply to AE 775A (GOV) (20 Nov. 2020)

10. AE 776-2 (RUL)(KSM), Ruling, Mr. Mohammad's Motion for Leave to File Out-of-Time Reply to AE 776A (GOV) (20 Nov 2020)

11. AE 782-2 (RUL)(KSM), Ruling, Mr. Mohammad's Motion for Leave to File Out-of-Time Reply to AE 782C (GOV) (20 Nov. 2020)

12. AE 783-4 (RUL)(KSM), Ruling, Mr. Mohammad's Motion for Leave to File Out-of-Time Reply to AE 783A (GOV Amend) (20 Nov. 2020)

13. AE 792M, Interim Order, Mr. Mohammad and Mr. Binalshibh's Motion to Reconsider the Ruling in AE 792I (20 Nov. 2020)

14. AE 809-2 (RUL)(WBA), Ruling, Mr. Bin ‘Attash’s Motion for Leave to File Out of Time Motion to Compel Additional Necessary UFIs (24 Nov. 2020)

15. AE 788 (11th Sup)/AE 639HH (10th Sup), *Eleventh Supplement* to Interim Order, Temporary Extension of Briefing and Litigation Suspense Due to Impacts of Coronavirus COVID-19 (24 Nov. 2020)

16. AE 808A, Expedited Briefing Order, Defense Emergency Motion for Preservation of Evidence of Intrusions on Attorney-Client Communications (24 Nov. 2020)

ATTACHMENT C

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

NOV 16 2020

MEMORANDUM FOR CHIEF TRIAL JUDGE, MILITARY COMMISSIONS TRIAL JUDICIARY

SUBJECT: Two Year Experience Requirement for Military Judges included in the Regulation for Trial by Military Commission 6-3(d)

As the delegated authority to promulgate rules and regulations for the administration of military commissions, I am responding to your action memo, dated October 26, 2020, seeking clarification of the authority of the Chief Trial Judge of Military Commissions to waive the Regulation for Trial by Military Commission (RTMC) requirement that military commission judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial.

Upon review of the authorities, waiver of the RTMC requirements does not rest with you or members of the trial judiciary. DoD declines to issue the clarification you seek.

Further, the two-year experience requirement is a reasonable and necessary requirement to best protect the interests of the accused and the Government in administering military commissions.

Thank you very much for your service and your continued stewardship of the Military Commission Trial Judiciary.