

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 205A

RULING

Recusal of Military Judge

23 December 2021

1. **Procedural History.** I was detailed to serve as the Military Judge in this case on 17 September 2020.

2. **Findings of Fact.**

a. This case was returned for further proceedings from the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) after denial of a writ of mandamus on 9 April 2021.

b. The request for writ of mandamus was based on the issue of judicial bias, since a previously detailed military judge, while presiding over this Commission, had sought employment with the Department of Justice and highlighted his service as a judge on a Military Commissions case in doing so.

c. On 2 November 2021, Headquarters Marine Corps published a message to all hands, known as a MARADMIN, announcing the convening of the Academic Year 2022-2023 Top Level School Selection Board.¹ That announcement can be found in MARADMIN 633/21. That message directed officers to check a roster published on the Marine Corps' Manpower website to see if they were in the population of officers being considered. My name appears on page 17 of that alphabetical roster. An officer must submit a request, endorsed by their immediate superior, to be

¹ Other military services refer to this as Senior Service School.

removed from consideration.² Otherwise an officer is automatically considered by being in the eligible population.³ The eligible population is all officers selected for Lieutenant Colonel, and Lieutenant Colonels (including those selected for, but not yet promoted, to Colonel) that have at least 24 months at their current assignment as of 31 July 2022.

d. I was previously evaluated by the 2019-2020 academic year board and selected as an alternate but never assigned to a program. I was also evaluated by the 2020-2021 academic year board and was not selected. I was not eligible for the 2021-2022 academic year board as my duty station changed in the summer of 2020 and I thus did not meet the 24 months at my new duty station requirement. In each instance I filled out the questionnaire, as directed by the applicable MARADMIN.

e. One of the fellowships available for the 2022-2023 academic year is with the Federal Bureau of Investigation (FBI) and, according to MARADMIN 633/21, this particular fellowship must be awarded to an officer with the primary military occupational specialty (PMOS) of 4402; Judge Advocate.

f. There is no application for this board and officers do not submit writing samples. Instead, all eligible officers are directed by MARADMIN 633/21 to fill out an on-line questionnaire which consists of a listing of the available programs or billets and asks the eligible officer to indicate their preferences. The board considers those preferences, but ultimately makes the determination on

² The Defense motion indicates that a military judge assigned to a military commission should remove themselves from consideration of a service level education opportunity. Such a policy would have a chilling effect on a judge's willingness to serve on these matters. Military judges are not lifetime appointees, but remain military officers. These service level professional education opportunities are ordinarily career enhancing. Requiring judges to remove themselves from consideration for such opportunities would have the effect that the Defense portrayed in its *voir dire* of this judge; that service as a military commission's judge is a career detriment. Service on the military commissions carries no such penalty, but certainly would if the Defense's suggestion that judges be required to remove themselves from consideration be deemed to have merit. The better policy is to allow the military services to continue to make career development decisions based on their own internal manpower needs and have the judge evaluate the effect of those service determinations under the standard for recusal and make a determination if or when an assignment is made.

³ MARADMIN 633/21 states in paragraph 5.d. that an officer will still be considered by the board even if they submit a request to withdraw if their withdrawal request is incomplete.

which program is assigned to a selectee.

g. The Department of the Navy announces promotion selections via a message system called an ALNAV. On 4 November 2021, ALNAV 077/21 was released and announced that I, amongst several other officers, was competitively selected for promotion to the rank of Colonel in the United States Marine Corps

h. On 6 November 2021, when utilizing the on-line questionnaire, I indicated my preference for schools and fellowships using the geographic location of the Washington, D.C. area as my primary consideration. My goal was to prevent my family from having to move away from our current home in the area or be separated from me for an academic year, should I be chosen for one of these opportunities.

i. The schools I listed on my preference sheet included the Marine Corps War College, the National War College, the Eisenhower School for National Security and Resource Strategy, the College of International Security Affairs, the College of Information and Cyberspace, the Joint Advanced Warfighting School, the College of Naval Warfare, and the Army War College. The fellowships I listed on my preference sheet included those associated with the Inter-American Defense College, the Center for Strategic and International Studies, the Center for New American Security, the Department of Homeland Security, the Department of State, the School of Advanced International Studies, and the FBI. All of these schools⁴ and fellowships are located in the Washington, D.C. area. At least five programs had to be selected in the preference list, and I selected more than the required number of each type because I wanted to increase the chances that if selected, I would be assigned in the Washington, D.C. area. There was also a requirement to rank the preferences. I ranked the FBI Fellowship as my top fellowship choice. I assumed I would be

⁴ With the exception of the College of Naval Warfare which is in Rhode Island and the Army War College, which is in Carlisle, Pennsylvania. I have friends stationed at the College of Naval Warfare with whom I could reside, and I deemed the distance from Carlisle, Pennsylvania to Washington, D.C. acceptable.

considered most qualified for that program by the Marine Corps as opposed to the other possibilities since it was reserved for Judge Advocates.

j. The FBI Fellowship is a new program and I was, and still am, unaware of what section within the FBI the fellowship resides; nor am I familiar with the duties of a Fellow in this program. I did not reach out to anyone to ask for details when completing the questionnaire, which took about 5 minutes in total to complete.

k. The 2022-2023 Academic Year Top Level School Selection Board met in early December 2021 and was comprised of Marine Corps Officers selected by the Manpower Division of Headquarters Marine Corps.⁵ I did not, and do not, know the identities of any of the members of this board. The various fellowships and schools for which there are allocations have no representation on the selection board, but instead the Marine Corps has complete discretion regarding which officers they select and to what program they are assigned. The board is competitive and selects officers based on their records, then assigns them to a specific fellowship or school based on the needs of the Marine Corps.

l. On 10 December 2021, the Accused filed a motion,⁶ unopposed by the Government, to conduct additional *voir dire* of the judge in light of my selection for promotion. That motion was granted on 14 December 2021,⁷ and the questioning was set to take place at our next session on 4 January 2022. At that time it did not occur to me that there was anything potentially worthy of disclosure in providing a preference list to the Marine Corps for a board to consider when conducting an internal manpower determination. This was particularly true in light of the facts that

⁵ According to paragraph 4.a(2)(d) of Marine Corps Order 1524.1, Marine Corps Graduate Education Program (dated 30 May 2019), the Marines assigned to be members of the board are determined by the annual issuance of Marine Corps Bulletin 5240. That document is published to the various Marine Corps Commands and tasks them with providing Marine Corps Officers to serve as board members.

⁶ AE 186C, Unopposed Defense Motion To Conduct Additional *Voir Dire* of the Military Judge, filed 10 December 2021.

⁷ See AE 186D, RULING, Unopposed Defense Motion To Conduct Additional *Voir Dire* of the Military Judge, dated 14 December 2021.

it was unknown if I would be selected at all, much less to what program I would be assigned, and that the various institutions and agencies to which one could be assigned play no role in the process.

m. On 16 December 2021, MARADMIN 709/21 was published and I learned of my selection for the FBI Fellowship in Washington, D.C.

n. Upon learning of my selection, I immediately informed my Senior Attorney Advisor on the case of the *United States v. Hadi al-Iraqi* of my selection and had him stop the staff from sending me any further matters while I considered what impact my selection by the board would have on my ability to continue to serve as the Military Judge on this case. I have not reviewed any pleadings, considered any draft rulings or orders, nor issued any orders or rulings since I was notified of my selection.⁸

o. Although I understand the decision regarding recusal is solely mine, I sought and received privileged advice from judges with extensive judicial ethics expertise regarding this matter prior to reaching my decision.

p. On 20 December 2021, the Defense filed a motion⁹ requesting I disqualify myself under Rule for Military Commission (R.M.C.) 902. Additionally, the Defense requested I “vacate the orders [I have] issued because [my] impartiality could reasonably be questioned following [my] application, selection, and receipt of notification to report to a fellowship with an adverse party—the Federal Bureau of Investigation (a division within the Department of Justice)—in July 2022.”¹⁰

3. Law.

a. Rule for Military Commissions (R.M.C.) 902 governs the disqualification of the military judge in military commission cases. Generally, the rule requires a military judge to disqualify

⁸ I have coordinated with my advisors to publish an order cancelling the hearing in this Commission scheduled for 4-7 January 2022 (*See* AE 198L, CANCELLATION ORDER, dated 21 December 2021) and on this ruling.

⁹ *See* AE 205, Defense Motion for Judge Zimmerman to Disqualify Himself Under R.M.C. 902, filed 20 December 2021.

¹⁰ *Id.* at 1.

him/herself in “any proceeding in which the military judge’s impartiality might reasonably be questioned.” R.M.C. 902(a). The rule also sets forth specific grounds that require a military judge to disqualify or recuse him/herself. Among these grounds are situations where “the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.” R.M.C. 902(b)(1).

b. In addition to assessing whether recusal is required for actual lack of partiality, the military judge must also determine whether recusal is required because there is an appearance of bias “sufficient to permit the average citizen reasonably to question the judge’s impartiality.” *In re Al-Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019). The appearance standard is designed to enhance public confidence in the integrity of the judicial system. The rule also serves to reassure the parties as to the fairness of the proceedings. *United States v. Hoffmann*, 2018 CCA LEXIS 326, (N-M.C.C.A. July 9, 2018).

c. In a recent opinion regarding recusal of military commission judges, the D.C. Circuit set forth the relevant authorities a military judge should consult when considering whether recusal is required. *In re Al-Hawsawi*, 955 F.3d 152, 157-158 (D.C. Circuit 2020) (*Al-Hawsawi*). The inquiry is fact specific. *Nichols v. Alley*, 71 F.3d 347, 351 (10th Circuit 1995). The decision to recuse on the basis of appearance should not be limited to a specific factual issue, but rather is based on the totality of circumstances. *Nichols*, 71 F.3d at 352 (finding that the initially-assigned judge in the Oklahoma City Terrorist bombing case should have recused himself in consideration of the totality of circumstances).

d. The *Al-Hawsawi* opinion found that the fact that a previous military judge had worked in the US Department of Justice (DOJ) National Security Division Counter-Terrorism Section (CTS) and had known a Commission prosecutor (but who had never worked on Al- Qaida Terrorist Organization (AQ) issues) did not “clearly and indisputably” establish that a writ of mandamus was

required to effectuate his removal. Importantly, the D.C. Circuit left open for appeal the issue of whether that judge's decision not to recuse would be found an abuse of discretion on a potential appeal, but specifically noted on several occasions that the military judge had never done any work on AQ matters. *Al-Hawsawi*, 955 F.3d at 156-157, 160. Further, the D.C. Circuit examined the factual scenario where a sitting military judge in a commission case applied for employment with a section within the Department of Justice in *In re Al-Nashiri*, 921 F.3d 224 (2019). In that case the court began its analysis of the heart of the matter by noting:

judges may not adjudicate cases involving their prospective employers. The risk, of course, is that an unscrupulous judge may be tempted to use favorable judicial decisions to improve his employment prospects—to get an application noticed, to secure an interview, and ultimately to receive an offer. And even in the case of a scrupulous judge with no intention of parlaying his judicial authority into a new job, the risk that he may *appear* to have done so remains unacceptably high. *Id.* at 235.

Thus, the rationale rested on the fact that once a judge applies for a job his or her actions at least appear to be corrupted by the personal interest of the judge in securing the position. There is no mention of a similar impediment when the decision affecting the judge is made by an employer who is not a party and the decision is made for reasons unassociated with the judge's duties. The court went on to analyze who the "employer" was and whether they were a "party" before filtering those facts through the lens of whether it would appear to a reasonable person, knowing all of the facts, that a judge's impartiality was in jeopardy. The court concluded that the Attorney General himself was directly involved in selecting candidates for the position the judge applied for and was thus the employer. The court further found that the Department of Justice did play a role in the prosecution of military commissions cases significant enough to be considered a party. *See id.* at 235-236. The Marine Corps has never been found to be a party to a military commission case.

e. Although a military judge has a duty to recuse when required for actual bias or the

reasonable appearance of lack of partiality, a military judge has an equal duty to continue to preside over a case when recusal is not required. *See* Discussion to R.M.C. 902(d)(1) (“The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.”)

4. Analysis.

a. I have carefully considered my duty to hear this case and contrasted that with my duty to disqualify myself if my impartiality might reasonably be questioned. I have no doubt that I could continue to fairly preside over this case without bias or prejudice. In addition, I believe that the facts of what transpired here are significantly different from a situation where a judge applies for a job directly with a party, highlighting his or her experience as a judge presiding over a military commission. It is simply incorrect to characterize what occurred here as an application by this Military Judge to the FBI for a fellowship. Whether I was selected for any school or fellowship was based on my Official Military Personnel File; there was no separate application. None of the schools or external organizations, including the FBI, had a representative on the board making the selection and had no input on who was selected by the board and assigned to a program. The Marine Corps had complete authority over those decisions and made those decisions based on the internal manpower requirements of the Marine Corps. Thus the Marine Corps was, and remains, my employer; and there was no self-interest that could be imputed to the decisions I made for this case that would in any way influence the decisions the Marine Corps made regarding any school or fellowship opportunity to which I could be assigned. The questionnaire was an on-line survey that took minutes to complete and consisted of a list of available programs from which one was required to select and rank at least five schools and five fellowships and indicate preferences.¹¹ At the time I completed the preference sheet, I remained genuinely uncertain whether I would be selected at all,

¹¹ MARADMIN 633/21 states in paragraph 5.a, the preferences are merely provided to the board for their consideration.

given my experience with prior year selection boards, and had even less inclination as to what school or fellowship program I might be assigned. Accordingly, I find the facts described above, taken either individually or collectively, do not establish actual lack of impartiality on my part. Thus, recusal is not required for any actual bias, either at the time I filled out the questionnaire or when I was notified of the assignment.

b. However, an appearance of partiality may exist even though no actual partiality exists. I do not find that an appearance of partiality existed as of 6 November 2021, when I filled out the on-line questionnaire. I find that a fully informed member of the public, knowing that the Marine Corps made the decisions regarding career enhancing opportunities based on the manpower considerations of the Marine Corps and that the individual schools and fellowship programs had no involvement at all in the process, would not reasonably question my impartiality. The confidence in the system is reinforced by the fact that the external entities listed on my preference sheet, whether they be the National War College, the College of Information and Cyberspace, the FBI, or the Center for Strategic and International Studies (all of which I listed), had no contact with me and no knowledge I was even being considered. The fact that my employment will remain with the Marine Corps and that I am merely being assigned to an external agency for a period of time for this fellowship would also reinforce that I am not, and never was, seeking employment with any external agency, but instead was selected to a program based solely on the needs of the service. Thus, I decline to recuse myself on the basis of that fact or vacate the rulings I made between 6 November 2021 and 16 December 2021.

c. I believe the answer is different once I was informed that I was selected for a program and assigned to the FBI fellowship by the Marine Corps. Under the totality of the circumstances, the fact that the FBI will likely have a significant role in this case raises the prospect that an average citizen could, knowing all of the facts, reasonably question my impartiality once I was informed

that I was selected and what program I was assigned.¹² At that point it bears emphasizing that I notified my staff to stop engaging with me over matters in the case and I began to *sua sponte* consider my ability to continue as the judge in this case. While I was in the process of researching and drafting this ruling the Defense filed its motion, two business days after MARADMIN 709/21 was released.

5. Ruling.

a. So much of the Defense motion requesting that I vacate all rulings and orders issued by me in this Commission is **DENIED**.

b. Effective this date, I **RECUSE** myself from *UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI*. To the extent this relief corresponds to a portion of the relief requested by the Defense in AE 205, that part of AE 205 is **GRANTED**.

So **ORDERED** this 23rd day of December, 2021.

//s//
M. D. ZIMMERMAN
Lieutenant Colonel
U.S. Marine Corps
Military Judge

¹² It is worth noting that an officer is permitted to turn down the assignment under the procedure outlined in MARADMIN 709/21. It is thus not until one decides to accept an assignment that the appearance of partiality potentially exists. I have yet to accept the assignment pending my consideration of this issue.