
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
) DEFENSE MEMORANDUM
) OF LAW IN SUPPORT OF ITS
) CHALLENGES FOR “GOOD
) CAUSE” FOR THE REMOVAL OF
) MEMBERS OF THE MILITARY
) COMMISSION
)
) September 7, 2004

1. Timeliness. This memorandum is filed in a timely manner as prescribed by the Presiding Officer in the initial Commission hearing of 24 August 2004.

2. Overview. Following voir dire of the members appointed to Mr. Hamdan’s Military Commission, the Defense challenged the Presiding Officer and four of the members based in part on actual and implied bias. Following this challenge, the Presiding Officer invited the Defense and the Government to brief to the Appointing Authority what was the standard for challenge constituted by “good cause.”

3. Argument: Military Commission Instruction No. 8, paragraph 3.A.1) provides that “the Appointing Authority may remove members and alternative members for good cause.” Military Commission Instruction No. 8, however, does not further define what constitutes “good cause.” “Good cause” is “a relative and highly abstract term and its meaning must be determined not only by verbal context of statute in which term is employed but also by context of action and procedures involved in type of case presented.” Black’s Law Dictionary 5th edition, citing: *Wray v. Folsom*, 166 F. Sup 390, 394, 395 (D.C. Ark 1958). In order to determine the meaning of good cause it is thus necessary to consider both good cause for challenge in the context in historical precedents surrounding military commissions, the superior military orders governing this commission and the procedures necessarily involved in the Appointing Authority’s determination of whether good cause exists.

The Defense failed to find a clear historical precedent on this question. As such the Defense necessarily turns to the President’s Military Order. The President’s Military Orders overarching directive is that the Commissions provide “a full and fair trial”. Section 3 paragraph (c)(2).of the President’s Military order of November 13, 2001 The courts of the United States have from their inception recognized that a fair trial includes not only fair procedures, but the public’s perception that the jury is in fact free from bias. *Richmond Newspapers Inc. v. Virginia* 448 U.S. at 569-571. The requirement that the proceeding not only be fair but appear fair has been incorporated into the Rules of Courts-martial (R.C.M.). In promulgating R.C.M, 912(f)(1)(N), the President recognized the “concern with avoiding even the perception of bias, predisposition, or partiality of court-martial panels.” *United States v. Lake*, 36 M.J. 317, 323 (C.A.A.F. 1993). R.C.M. 912(f)(1)(N) provides:

(1) Grounds. A member shall be excused for cause whenever it appears that the member:

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

R.C.M. 912(f)(1)(N) encompasses “both actual bias and implied bias”. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). While the President specifically rejected the utilization of the evidentiary rules pertaining to courts-martial it left intact incorporation of R.C.M. 912(f)(1)(N) and its concern with the public perception of bias. Indeed subsequent orders and instructions have recognized the public concern by ensuring that the commissions to the maximum extent possible that the commissions are open proceedings. Additionally, statements by the Department of Defense have repeatedly emphasized the point that public confidence in the proceedings will grow as the public has the opportunity to observe them in action.

To jettison this laudable goal when it extends to implied bias is not only counter-intuitive it ignores the daunting obstacles confronting the President’s mandate of a full and fair trial. Unlike courts-martial, there is no preemptory challenge for a member, eliminating any role for the defense in the selection of the panel. Although the President and Secretary of Defense played significant roles in the creation and referral of charges to the Military Commission, they are exempt from the Uniform Code of Military justice prohibition against unlawful influence and free to comment on the guilt or innocence of the accused. To that end the President’s statements include that the persons detained in Guantanamo are “all bad men” and the Secretary’s that “they are all killers,” thereby creating an atmosphere of prejudice. Finally the wide latitude of evidence admissible opens the door wider to unfair inferences and the necessary closure of portions of the proceedings under cuts public’s confidence. Under such circumstances it is essential that the panel itself be above public reproach if its decisions are to have public confidence.

Consideration of the actions of the procedures necessarily utilized by the Appointing Authority in deciding whether ‘good cause exists under Military Commission Instruction No. 8, also supports the use of implied bias. Specifically, the Appointing Authority is not in a position to rely on either the test for or to make a finding of actual bias. The test for actual bias is whether any bias “is such that it will not yield to the evidence presented and the judges’ instructions.” *United States v. Napoleon*, 46 M.J. 279, 283, (C.A.A.F. 1997), quoting *United States v. Reynolds*, 23 M.J. 292, 294, (C.M.A. 1987). “Actual bias is a question of fact. Accordingly, the military judge is given great deference on issues of actual bias, recognizing that he or she “has observed the demeanor of the” challenged party.” *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999).

Under Military Commission rules the Appointing Authority can not rely on the test because there is no military judge to instruct the members. At present the Presiding Officer has stated his intentions to instruct on the law (a proposition objected to by the Defense) but he has also indicated that the members are free to disregard his instructions; as such there is no guarantee of judicial instructions to cure the bias. Secondly actual bias is a finding of fact, made by the military judge after having the opportunity to observe the demeanor of the challenged party. Again the Appointing Authority is not in a position to observe the demeanor of any of the parties and must similarly to an appellate court rely on a cold record of trial. Appellate courts are able

to apply an implied standard but defer to the Military Judge on an actual finding absence a clear showing of abuse of discretion. Under the present rules, the only standard that the Appointing Authority can apply is an implied bias.

The proper method for the Appointing Authority to determine whether there a member has an implied bias constituting good cause for removal is to view the challenge through the “eyes of the public.” *United States v. Wiesen* 57 M.J. 48, 50 (C.A.A.F. 2002). In so doing the Appointing Authority must be mindful that the members were not randomly and that not only is he the same official that selected them but is also the official exercising prosecutorial discretion. *Id.* Additionally the ‘public’ must be broadly defined, the accused is not a member of the U.S. military, or even a citizen and the goals of justice are not confined to the United States but extend to the international community. The public therefore must be seen as the international community.

At the onset, Appointing Authority’s choice of a panel made up of exclusively white males and presided over by a personal friend, whether or not by design unequivocally raises questions of bias not in keeping with the evolution of a full and fair trial in the United States. To then ignore that the expressed opinion regarding the right a speedy trial, participation detainee operations, providing intelligence in directly related operations, close contact with the events of 911, and expressed strong anger and present specific fear is to disregard the United States concept of what a full and fair trial is

4. Relief Requested: That the Appointing Authority determine that good cause includes implied Bias and grant the defense challenges for cause made on the record.

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