U.S. Department of Justice

National Security Division

Washington, D.C. 20530

August 4, 2017

Mr. Mark Langer, Clerk
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, D.C. 20001

Re: *In re: Mohammad*, No. 17-1156
Letter under Fed. R. App. P. 28(j)
Argued on August 2, 2017

Dear Mr. Langer:

Rule for Military Commissions (R.M.C.) 902(b)(3) is an inappropriate basis upon which to grant mandamus relief because it is at least unclear whether the rule was intended to apply where the challenged statements were made as a professor and not as a judge or a government employee.

The Secretary of Defense based R.M.C. 902(b)(3) on the identical Rule for Courts-Martial (R.C.M.) 902(b)(3). The accompanying commentary explains that "[t]he purpose of this section is analogous to that of 28 U.S.C. § 455(b)(3)." Manual for Courts-Martial at A21-51 (2016). Section 455(b)(3) requires a judge to disqualify himself "[w]here he has served in governmental employment and in such capacity . . . expressed an opinion concerning the merits of the particular case in controversy." Legislative history indicates that the purpose of Section 455(b)(3) is to cover situations where a judge, through his prior governmental participation in a case, obtained personal knowledge of the case and then expressed an opinion on the merits. H.R. Rep. No. 93-1453 (1974).

United States v. Bradley, 7 M.J. 332 (C.M.A. 1979), and *United States v. Cooper*, 8 M.J. 5 (C.M.A. 1979), confirm that R.C.M. 902(b)(3), and thus R.M.C. 902(b)(3), serve the same purpose as Section 455(b)(3). They show that the rules prohibit a judge from serving as the sole trier of fact in a case where he has expressed an opinion on the defendant's guilt or innocence in the same case, after "gain[ing] detailed knowledge of the factual basis for the offenses charged." *See Bradley*, 7 M.J. at 334 (involving guilty-plea colloquy). Because a judge would not have gained such knowledge as a professor, statements he made as a professor, even assuming they express an opinion on guilt, would not support disqualification under R.M.C. 902(b)(3). Petitioner cites no case where such statements have led to a judge's disqualification under this rule. Although *Bradley* and *Cooper* apply paragraph 62*f*(10) of the 1969 Manual for Courts-

Martial, that rule is substantively similar to R.C.M. 902(b)(3), and the commentary for the current rule continues to cite these cases.

Sincerely,

/s/ Danielle S. Tarin
Danielle S. Tarin
Counsel for the United States