

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

UNITED STATES OF AMERICA	AE 049
v.	Government Motion
ABD AL HADI AL-IRAQI	To
	Order LtCol Gleason To An Ex Parte, In Camera Hearing to Establish His Former and Current Representational Status of the Accused
	22 July 2015

1. Timeliness

This motion is timely.

2. Relief Requested

The Government moves the Commission to order LtCol Gleason to report to a Secure Video Teleconference (SVTC) location in the United States to conduct an *in camera, ex parte* inquiry, with the Court Security Officer present¹, between the Military Judge, LtCol Gleason, LtCol Jasper, Major Stirk and the Accused to ascertain the exact nature of LtCol Gleason's past and current representation of Mr. Hadi al-Iraqi. The Government respectfully requests that this inquiry occur at 1300 hours on 23 July 2015 in Court Room II of the Expeditionary Legal Complex.

¹ Due to the fact that facilitation of a potential meeting between LtCol Gleason and the Accused was requested by the Military Judge, the Government is making arrangements for a secure phone call to occur, in a privileged matter, between LtCol Gleason and the Accused in a holding cell adjacent to Court Room II. However, any SVTC of LtCol Gleason in the Court Room during this inquiry would require the Court Security Officer's presence to ensure no TS-SCI code word material is transmitted over the SVTC line.

3. Burden of Proof

There is no burden of proof assigned for this motion as the Military Commission should exercise its independent authority to “ensur[e] that criminal trials are conducted within the ethical standards of the profession.” *Wheat v. United States*, 486 U.S. 153, 160 (1988).

4. Facts

On 30 April 2012, the Chief Defense Counsel detailed LtCol Sean Gleason as detailed Defense Counsel for the Accused. *See* Attachment B.

On 12 December 2013, LtCol Gleason made his first appearance on the record on behalf of Mustafa al Hawsawi in *United States v. Mohammad, et al.*

On 22 July 2015, on the record, LtCol Jasper claimed that LtCol Gleason had never been properly excused from his duties as detailed defense counsel for the Accused in this case, and that, due to LtCol Gleason’s current representation of Mustafa al Hawsawi, the Accused’s entire Defense team had a potential conflict of interest for which an independent counsel should be appointed.

On 22 July 2015, the Military Judge found that no conflict existed between LtCol Jasper, Major Stirk, and the Accused, and that he would not be ordering independent counsel. The Military Judge expressed concern that LtCol Gleason may have a conflict of interest due to his current representation of Mustafa al Hawsawi.

Following the Military Judge’s decision, the Accused appeared to fire LtCol Jasper and Major Stirk, and asked to speak with LtCol Gleason. The Military Judge requested that the Government and the Defense use their good offices to facilitate such a meeting as soon as possible.

On information and belief, CDR Walter Ruiz, learned counsel for Mr. al Hawsawi, intends to move Judge Pohl for a protective order prohibiting LtCol Gleason from speaking to the Accused.

5. Law and Argument**I. If LtCol Gleason was Properly Excused From Further Representation of the Accused There is No Potential Conflict of Interest In This Case***1. The Record is Unclear Regarding Whether LtCol Gleason Still Represents the Accused*

As a threshold matter, there would be no need for any conflict inquiry with the Accused in this case regarding LtCol Gleason if LtCol Gleason was properly released from his relationship with the Accused -- a fact that has not been established or refuted on the record other than by another counsel's proffer. There has been no offer of the actual document that purports to excuse LtCol Gleason of his further representational duties, nor has LtCol Gleason made known to this Commission, as an officer of the court, his own understanding of his current representational status regarding the Accused. If LtCol Gleason no longer represents the Accused in this case, the entire issue before the Commission may become moot.

Rule for Military Commission ("R.M.C.") 505(d), titled "Changes of detailed counsel," states in relevant part:

[A]n authority competent to detail . . . [defense] counsel may excuse or change such counsel only (i) upon request of the accused *or application for withdrawal by such counsel*; or (ii) for good cause shown on the record.

R.M.C. 505(d)(2)(B) (emphasis added).

Specific to LtCol Gleason, the question of whether he filed "an application for withdrawal" was answered only by a proffer from LtCol Jasper that LtCol Gleason did not wish to be excused from representing the Accused. On information and belief, there is a withdrawal form of some sort. The issue still needs to be clarified with LtCol Gleason directly. The Military Judge should order LtCol Gleason to produce any and all detailing and withdrawal forms.

1. *If the Military Judge Finds that LtCol Gleason Still Represents the Accused, Additional Information Must be Ascertained Before Allowing Him to Continue to Represent the Accused*

Whenever it appears that any defense counsel may face a conflict of interest, the military judge in open session should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. *See* R.M.C. 901(d)(4), Discussion; *see also* R.M.C. 901(d)(4)(E). LtCol Jasper has claimed that due to LtCol Gleason's former representation of the Accused, and present representation of Mustafa al Hawsawi, the Accused's entire Defense team has a potential conflict of interest, for which the Accused should have independent counsel to advise him. On the record this morning, the Military Judge rightly determined that there was no conflict for LtCol Jasper or Major Stirk, and that he would not order independent counsel, but expressed concern that LtCol Gleason may have a potential conflict of interest with the Accused.

On 30 April 2012, the Chief Defense Counsel detailed LtCol Sean Gleason as detailed Defense Counsel for the Accused. *See* Attachment B. On 12 December 2013, LtCol Gleason made his first appearance on the record on behalf of Mustafa al Hawsawi in *United States v. Mohammad, et al.* The document purporting to release LtCol Gleason from his representation of the Accused is not properly in the record, nor is LtCol Gleason's own understanding of his current representational status of the Accused.

While the Government does not believe that LtCol Gleason has a *per se* conflict due to his prior representation of Mr. Hawsawi and the Accused², when a lawyer decides to represent two defendants with arguably conflicting interests, the Supreme Court has found that courts should exercise their independent interest to "ensur[e] that criminal trials are conducted within the ethical standards of the profession." *Wheat v. United States*, 486 U.S. 153, 160 (1988). In addition, defense counsel have an ethical obligation to avoid conflicting representations and to

² The Government will not be calling Mr. Hawsawi to testify in this case, or the Accused to testify in *United States v. Mohammad, et al.* Mr. Hawsawi was not acting as a government informant as a party to the conversations with the Accused, and attorneys were not present for those conversations.

advise the court promptly when a conflict of interest arises during the course of trial. *See Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980).

“A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, *a former client* or a third person.” *See* ABA Model Rule of Professional Conduct 1.7(a) (emphasis added).

If LtCol Gleason does believe he still represents the Accused, and if the Accused wants to retain his counsel, then LtCol Gleason’s own beliefs regarding whether he has a conflict, and, if so, whether that conflict is a waivable conflict, must be ascertained. If LtCol Gleason believes he has a conflict, such a conflict alone would be “good cause” for the Military Judge to decide to not grant the Accused’s request for his continued services. *See* R.M.C. 505(e).

Only if LtCol Gleason believes he still represents the Accused, and that he does not have a conflict of interest with his representation of both Accused, would the Military Judge even have to determine on his own, as a matter of law whether an actual or potential conflict exists; whether it is waivable; and, if so, only then whether the Accused (and Mr. Hawsawi) would want to waive said conflict. However, a conflict inquiry is premature on the current state of the record, which is why LtCol Gleason must be ordered to appear with all detailing and withdrawal documents so the Military Judge can so inquire.

On information and belief, CDR Walter Ruiz, learned counsel for Mr. al Hawsawi, intends to move Judge Pohl for a protective order prohibiting LtCol Gleason from speaking to the Accused.³ *See* Attachment C. As CDR Ruiz is the supervising attorney for LtCol Gleason, absent a court order, LtCol Gleason will be in the position of having to act contrary to his supervisor in the other case just to meet with the Accused. In light of this development, and due

³ The Government submits that a protective order prohibiting LtCol Gleason from speaking to the accused is overly broad and would terminally frustrate the resolution of this issue. The Government has full confidence that LtCol Gleason understands his ethical obligations to his client, Mr. Hawsawi, and will not divulge any privileged information.

to the current record being incomplete on the true nature of the severance of the relationship, it is unlikely that the meeting between LtCol Gleason and the Accused will ever occur, as contemplated by the Military Judge on the record this morning.

Since the meeting the Military Judge envisioned does not appear likely to occur, neither the Accused, LtCol Gleason, or CDR Ruiz should be allowed to thwart justice in this case by refusing to establish the true nature of the Accused's relationship with LtCol Gleason while this Commission remains in extended delay.

The relief requested by the Government will protect any privileged information due to the *ex parte*, in camera nature of the hearing. Due to the nature of the timing and circumstances of how LtCol Gleason's withdrawal was raised, the Government requests expedited resolution of the motion without need for a written response by Defense counsel.

At the R.M.C. 802 conference, LtCol Jasper indicated that he was aware since arraignment of what he believed was an infirm severance of the attorney client relationship between LtCol Gleason and the Accused. He also indicated in the R.M.C. 802 session, and on the record, that he believed that LtCol Gleason had continued to represent the Accused at all times during this case, (including the five sessions of the Commission that have occurred, to date, without LtCol Gleason's presence), and that his decision to inform the Military Judge when he did was a strategic decision on this part. This "strategic decision" to inform the Commission now of this issue (if in fact LtCol Gleason has continued to represent the Accused) is inviting error into the record⁴ and should not be allowed to consume the remaining nine remaining days in this session and the important business of the Commission that has been scheduled for the last seven months.

⁴ "The invited error doctrine recognizes that a party may not invite or provoke error at trial and then complain about the error on appeal." *United States v. Harvey*, 67 M.J. 758, 763 (A.F.Ct.Crim.App.2009) (citing *United States v. Wells*, 519 U.S. 482, 488, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) and *United States v. Dinges*, 55 M.J. 308, 311 (C.A.A.F.2001)); *see also United States v. Mazza*, No. 200400095, 2008 CCA LEXIS 623, at *6-8, 2008 WL 2765036 (N.M. Ct.Crim.App. 17 Jul 2008), *aff'd*, 67 M.J. 470 (C.A.A.F.2009).

6. Conclusion

The Government moves the Commission to order LtCol Gleason to report to a Secure Video Teleconference (SVTC) location in the United States to conduct an *in camera, ex parte* inquiry, with the Court Security Officer present, between the Military Judge, LtCol Gleason, LtCol Jasper, Major Stirk and the Accused to ascertain the exact nature of LtCol Gleason's past and current representation of the Accused. The Government respectfully requests that this inquiry occur at 1300 hours on 23 July 2015 in Court Room II of the Expeditionary Legal Complex. Such an inquiry will satisfy this Military Commission's obligation to ensure the Accused has conflict-free counsel, and *the ex parte, in camera* hearing will ensure that privileged information that may be discussed is protected.

7. Oral Argument

No oral argument should be granted to either side on this issue.

8. Witnesses and Evidence

None.

9. Certificate of Conference

On 22 July 2015 the Government spoke with Defense Counsel and informed them of the impending motion, and the Defense counsel objected.

10. Additional Information

None.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 22nd day of July, 2015, I filed **AE 049, Government Motion To Order LtCol Gleason To An *Ex Parte, In Camera* Hearing to Establish His Former and Current Representational Status of the Accused**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

LTC David J. Long, JA, USA
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

30 April 2012

MEMORANDUM FOR MAJOR SEAN M. GLEASON, USMC

Subject: Detailing as Detailed Defense Counsel in the Military Commission Case of
United States v. Nashwan Abd al Razzaq Abd al Baqi (aka Hadi al Iraqi)(10026)

Pursuant to Rule for Military Commission 503(c), I hereby detail you as Detailed Defense Counsel in the military commission case of *United States v. Nashwan Abd al Razzaq Abd al Baqi (aka Hadi al Iraqi)*.


J.P. Colwell
Colonel, U.S. Marine Corps
Chief Defense Counsel



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ATTACHMENT C

From: Jasper, Thomas F Jr LtCol OSD OMC Defense [<mailto:Thomas.Jasper>] [REDACTED]
Sent: Wednesday, July 22, 2015 3:47 PM
To: Long, David J LTC USARMY OSD OMC OCP (US); [REDACTED] Capt USMC (US)
Subject: RE: LtCol Gleason Update

Good Afternoon Capt [REDACTED] —

Mr. Little has informed me that Mr. Ruiz (learned counsel for Hawsawi) is moving for a protective order in his case.

I have no further information.

V/R
LtCol Jasper

From: Long, David J LTC USARMY OSD OMC OCP (US) [<mailto:david.j.long1.mil>] [REDACTED]
Sent: Wednesday, July 22, 2015 3:31 PM
To: Jasper, Thomas F Jr LtCol OSD OMC Defense
Subject: RE: LtCol Gleason Update

Tom,

Sorry I got it now. Please let me know whether you will provide the update or I will go ahead as to the development with Mr. Ruiz. I would like to get the MJ to weigh in and have an 802 on the matter.

Thank you,
Dave

From: Jasper, Thomas F Jr LtCol OSD OMC Defense [<mailto:Thomas.Jasper>] [REDACTED]
Sent: Wednesday, July 22, 2015 2:26 PM
To: Long, David J LTC USARMY OSD OMC OCP (US); [REDACTED] Capt USMC (US)
Subject: LtCol Gleason Update

Good Afternoon LTC Long and Capt [REDACTED] —

Just following up, as instructed by the court, I contacted Mr. Little. He is attempting to reach LtCol Gleason, with no success thus far.

I will continue to advise. Please forward to [REDACTED] and/or the CAPT Waits if you have their emails.

V/R
LtCol Jasper