MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL HADI AL IRAQI**	**AE 155** **Defense Motion** to Compel Production of Discovery Regarding Judicial Bias and Violations of Rule for Military Commissions 902(a) **24 June 2019**

1. Timeliness:

This motion is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court (RC) 3.7.c.(1).

2. Relief Sought:

Nashwan al-Tamir respectfully requests that the military commission compel the government to provide discovery relating to judicial bias and violations of Rule for Military Commissions 902(a), as requested in the defense's 54th and 55th Supplemental Discovery Requests, in which Mr. al-Tamir seeks documents and information relating to employment applications with parties to the litigation.[1]

3. Overview:

The District of Columbia Circuit recently granted a writ of mandamus vacating all orders that Military Judge Spath entered in the military commission *United States v. al-Nashiri* because Judge Spath had applied for post-judicial employment as an immigration judge in the

[1] AE 151C Attachments B and C, Defense 54th and 55th Supplemental Requests for Discovery, dated 30 April 2019, and 1 May 2019.

Department of Justice.[2] This job application created a "disqualifying appearance of partiality," since it sought employment with a party to the litigation.[3]

As the D.C. Circuit explained, "it is beyond question that judges may not adjudicate cases involving their prospective employers."[4] The court had little hesitation concluding that Judge Spath's job application to be an immigration judge with the Department of Justice constituted a violation of Rule for Military Commissions 902(a), which mirrors other ethical canons governing judicial conduct, including 28 U.S.C. § 455(a); Code of Conduct for United States Judges, Canon 3(c)(1); the American Bar Association Model Code of Judicial Conduct, Rule 2.11; and Rule for Courts-Martial 902(a), as well as due process.[5]

About a week after the D.C. Circuit vacated all of Judge Spath's orders entered since he initially applied for employment with the Department of Justice, the government in this commission notified the defense that Captain J. Kirk Waits, the first judge to preside in this commission, also had applied for post-judicial employment as an immigration judge.[6] It turns out that Captain Waits applied to be an immigration judge between two and three months after Mr. al-Tamir was arraigned.[7] Captain Waits's job search began nearly at the beginning of his detailing to this commission and continued during the entire first two years of this commission. Ultimately, he accepted post-judicial employment as a civilian attorney with the Department of

[2] *In re Al-Nashiri*, 921 F.3d 224, 226 (D.C. Cir. 2019).

[3] *Id.* at 235-36.

[4] *Id.*at 235.

[5] *Id.* at 234.

[6] *See* Attachment B, Government Email dated 25 April 2019. *See also* AE 151, Under Seal Notice.

[7] *See id.*

the Navy. Captain Waits, like Judge Spath, never disclosed this job search to Mr. al-Tamir. Nor did the Department of Justice or the Department of Defense, both of whom were parties to the litigation.

Captain Waits's job search was not the only one bearing on the appearance of partiality of the judges in this commission. A few days after the government notified Mr. al-Tamir about Captain Waits's efforts to become an immigration judge, it disclosed that Major [redacted] USMC, the law clerk to both Captain Waits and his successor, Colonel Peter Rubin, applied for jobs with the Department of Justice and the Department of Defense, Defense Intelligence Agency, while he was a law clerk working on this commission.[8] Neither Captain Waits nor Colonel Rubin walled Major [redacted] off from work on this Commission nor informed Mr. al-Tamir of these job applications.

These applications for post-judicial employment establish a disqualifying appearance of partiality in this commission, just as Judge Spath's actions did in *al-Nashiri*. The defense therefore sought additional discovery, including all documents, correspondence, and other information relating to Captain Waits's search for employment,[9] as well as all information relating to any employment search conducted by Judge Rubin.[10] Thus far, the prosecution has declined the requests in part or has otherwise failed to provide relevant documents to the defense (with the sole exception of the two notices attached as Exhibits B and C).[11]

[8] Attachment C, Email Notice Dated 6 May 2019.

[9] AE 151C, Attachment B.

[10] AE 151C, Attachment C. At the time, Mr. al-Tamir had no notice of Major [redacted] applications. But since those implicate the appearance of partiality of both Captain Waits and Colonel Rubin, information relating to his employment applications is responsive.

[11] Attachments D and E, Government Responses to Discovery Requests.

Mr. al-Tamir now seeks an order compelling the government to comply with its constitutional and statutory obligations to provide Mr. al-Tamir with relevant, material, and exculpatory information relating to the ethical violations that have occurred in this commission since its very inception. In *Nashiri*, the facts emerged almost by accident when a reporter filed a FOIA request seeking information about Judge Spath's efforts to become an immigration judge. The D.C. Circuit chided the government for failing to shoulder its shared responsibility of ensuring that Mr. al-Nashiri would have a fair and impartial adjudicator by refusing to provide additional information about the military judge's post-judicial employment applications.[12] Here, Mr. al-Tamir does not have the luxury of hoping a third party will unearth the evidence to which he is entitled. His motions to suppress are due in early November. An order compelling production of this discovery is necessary.

4. Burden of Proof:

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted.[13]

5. Facts:

a. On 16 April 2019, the D.C. Circuit Court of Appeals decided *In re Al-Nashiri*, concluding that Judge Vance Spath's application to be an immigration judge with the Department of Justice—a party to the litigation—created an impermissible appearance of partiality.[14] The court concluded that "it is beyond question that judges may not adjudicate cases involving their prospective employers," because doing so creates an impermissible risk of the appearance of

[12] *In re Al-Nashiri*, 921 F.3d at 235-38.

[13] RMC 905(c)(2).

[14] *In re Al-Nashiri*, 921 F.3d at 240.

partiality.[15] This impermissible appearance of partiality begins at the earliest possible stages of applying for post-judicial employment with a party: "after the initiation of any discussions with a potential employer, no matter how preliminary or tentative the exploration may be, the judge must recuse on any matter in which the prospective employer appears."[16]

b. Because of Judge Spath's failure to disclose his personal financial interest linked to a party to the litigation before him that began when he applied for employment as an immigration judge with the Department of Justice, the D.C. Circuit vacated all orders that Judge Spath had entered in the case.[17] It did so because the "assembled sources of rules governing judicial conduct—including Section 455 of Title 28 of the United States Code, the Code of Conduct for United States Judges, the American Bar Association's Model Code of Judicial Conduct, and the rules for Courts-Martial—all speak with one clear voice when it comes to judicial recusal: judges 'shall disqualify' themselves in any 'proceeding in which [their] impartiality might be reasonably questioned.'"[18]

c. On 25 April 2019, the government notified the defense via email that the first judge to preside over the military commission against Mr. al-Tamir, Captain (now retired) J. Kirk Waits, USN, had applied for the exact same position that disqualified Judge Spath and led to the vacatur of every order entered since Judge Spath first applied for a position as an immigration judge. Captain Waits had applied to be an immigration judge with the Department of Justice only a few short months after Mr. al-Tamir was arraigned. In addition, Captain Waits applied for, and

[15] *Id.* at 235.

[16] *Id.* at 235 (internal quotation and alteration omitted).

[17] *Id.*

[18] *Id.* at 234.

ultimately accepted a job with, the Department of the Navy as a civilian attorney.[19]

d. On 29 April 2019, this commission filed AE 151, an under seal notice to the parties including some specific dates and some other information about Captain Waits's job search. Mr. al-Tamir is not referring to those facts in detail here because he intends this to be a public filing.[20] But he incorporates those facts by reference, as they comprise the most detailed information currently available to him.[21] This notice also includes information relating to the content of Captain Waits's application, which is aligned closely with the contents of Judge Spath's application and that the D.C. Circuit found relevant to its decision.

e. In general, for senior officers in the Navy's Judge Advocate General's Corps, the detailing process involves conversations about future career and retirement plans with the detailing authorities, which includes senior leadership such as the Judge Advocate General, the Deputy Judge Advocate General, and the Chief Judge of the Department of the Navy. Given Captain Waits's position as an O-6, as an experienced military judge who had attained the rank of Captain, this would have been his detailing process.

f. In 2014, when Captain Waits was nominated and detailed to be the military judge on this commission, RDML Christian Reismeier, the current Convening Authority, was the Chief Judge, Department of the Navy (AJAG 05). Accordingly, RDML Reismeier was involved in the detailing process and had administrative oversight of all appellate and trial judges in the

[19] Attachment B.

[20] In AE 151A, Mr. al-Tamir moved to unseal this notice because it includes no personally identifiable information or any other information that is classified or confidential. Instead, it includes information that is in the public interest, albeit embarrassing and detrimental to the legitimacy of the military commissions. Mr. al-Tamir adheres to his position that no legal basis exists to hide the information from the public.

[21] AE 151.

Department of the Navy, including Captain Waits. RDML Resimeier would have necessarily communicated with Captain Waits about whether he would retire and what jobs he would have sought.

g. In 2014, Captain Waits's direct supervisor was Colonel Daniel Daugherty, who was at that time Chief Trial Judge of the Department of the Navy. In 2015, Colonel Daugherty retired from the U.S. Marine Corps as Chief Judge for the Navy-Marine Corps Trial Judiciary. Colonel Daugherty became an immigration judge in 2015.[22] Colonel Daugherty would have necessarily communicated with Captain Waits about Captain Waits's retirement plans.

h. On 30 April 2019, the defense filed the 54th Supplemental Request for Discovery, which requested documents, correspondence, and other information regarding Captain Waits's applications—both successful and unsuccessful—for post-judicial employment with executive branch agencies. The defense sought information regarding communications, including emails, records of telephone calls, or any other documentation of communication, between Captain Waits and any of the entities he submitted job applications to or received while presiding over Mr. al-Tamir's case.[23]

i. On 1 May 2019, the defense filed a similar request relating to Colonel Rubin, the second military judge to preside over this commission.[24]

j. On 6 May 2019, the government notified the defense that Major [redacted] a former judicial law clerk to both Captain Waits and Colonel Rubin, applied for multiple positions within the Department of Justice and with the Defense Intelligence Agency while he was

[22] https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios#DanielJ.Daugherty.

[23] AE 151C, Attachment B.

[24] AE 151C, Attachment C.

clerking for the first two judges in this commission. Major [redacted] now a civilian in the Marine Corps Reserves, accepted a position with the Department of Justice and now works as an Assistant United States Attorney in the Western District of Missouri.[25] Mr. al-Tamir understands that these applications occurred in 2018, not just in 2017 as the government had noted.

k. On 13 May 2019, the government filed AE 151C, Government Notice of Proposed Course of Action Related to Discovery of Grounds for Challenge to Prior Military Judges.[26] This notice again informs the defense that Major [redacted] had applied to a number of positions with the DOJ and the Defense Intelligence Agency (DIA) while serving as a law clerk in Mr. al-Tamir's case.[27] The government also outlined a proposed course of action on requesting and providing discoverable information.[28]

l. The government's proposal included no information about Captain Waits's (successful) application for post-judicial employment with the Department of Defense, Department of the Navy, where Captain (ret) Waits currently serves as the Deputy Director of the Criminal Law Division for the Navy Office of the Judge Advocate General.

m. On 14 May 2019, the government responded to the defense's discovery requests.[29] Specifically, the government stated that with regard to the first part of the 54th supplemental request, it had submitted a Prudential Search Request (PSR) to the Executive Office for Immigration (EOIR) in the DOJ, requesting that those sub-components within the DOJ complete a search for any records and other information related to Captain Waits's search for

[25] Attachment C.

[26] AE 151C.

[27] *Id*.

[28] *Id*.

[29] Attachments D and E.

employment.[30] The government stated in its response that it declined to respond with any records of applications or offers from other federal entities and all other applications in his job search, arguing that the request is overbroad and not relevant.[31] In response to the 55th supplemental request, the government declined to provide any documents, stating that Colonel Rubin had indicated he did not apply for any positions while he presided over Mr. al-Tamir's case.[32]

n. On 23 May 2019, the prosecution filed a notice that acknowledged the violations of the canons of judicial conduct. Specifically, the government declined to file supplemental pleadings addressing other discovery motions, including *inter alia* AE 135, AE 136, and AE 140, since, according to the government, the decision in *Al-Nashiri* would likely require vacatur of multiple orders in this commission. The government further recommended that the commission defer ruling on AE 135 and AE 136, with the presumption that earlier issues would have to be re-litigated and the issues in AE 135 and AE 136 could be rendered moot.[33]

o. On 10 June 2019, during the process of conferencing this motion, Major Morgan Engling of the defense team spoke with Captain Corey Squires of the prosecution to inquire whether the government would be producing any additional information. He informed her that the government had received some additional information. As yet, the government has produced nothing beyond the notices described above.

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[30] Attachment D, paragraph 3.

[31] *Id*., paragraphs 4 and 5.

[32] Attachment E.

[33] AE 143EE. Mr. al-Tamir agrees that multiple orders in this commission will need to be vacated. But in fact, Mr. al-Tamir will be arguing that this commission will need to be dismissed. Unlike *al-Nashiri*, substantial untainted litigation did not precede Captain Waits's first applications for post-judicial employment with a party. And as the D.C. Circuit explained, untangling the tainted rulings from the possibility of any untainted is impossible. The commission should expect to see a motion to this effect in the near future.

p. On 14 June 2019, the Commission issued a ruling in the AE 135 series, denying the defense's requested relief.[34] That Order refers to and relies in part on an earlier order in the AE 071 series, issued by Judge Rubin in 2017.

q. On 21 June 2019, Captain Corey Squires of the prosecution informed the defense that Captain Waits had provided additional information as follows:

> "The answer to your question of whether I applied for any other executive branch jobs during the time I presided in the Hadi case, the answer is a qualified yes—only one. I applied to the Office of Personnel Management (OPM) for inclusion on the Administrative Law Judge (ALJ) Register. I note that at the time, this was not an application to a specific agency. At the time, one applied to be added to the register and (some) federal agencies seeking to employ ALJs were required to hire from the register. That has changed within the last year. The application process was still ongoing after I accepted the job with Navy OJAG and retired. I did not receive the results of my application to be included on the register until six months after my retirement. All of my correspondence from OPM was automatically generated/no reply and boilerplate. I had no individual correspondence with anyone from OPM regarding the application before my retirement."

6. <u>Argument</u>:

> **Mr. al-Tamir is entitled to discovery relating to all of Captain Waits's, Colonel Rubin's, and Major [redacted] applications for post-judicial or post-clerkship employment with Executive Branch agencies, particularly including any component of the Department of Justice or Department of Defense.**

Under the Rules for Military Commissions, a defendant is entitled to discovery of all documents or other tangible items that are "material to preparation of the defense,"[35] or that "reasonably tend[] . . . to [n]negate the guilt of the accused of an offense charged; or . . . [r]educe the degree of guilt of the accused with respect to an offense charged; or . . . reduce the punishment"[36] imposed after conviction. Constitutionally, Mr. al-Tamir is entitled to all

[34] AE 135G at p. 3.

[35] RMC 701(c)(1) and (2).

[36] RMC 701(e)(1).

"evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[37]

A. Information relating to applications and preliminary discussions for post-judicial or post-law clerk employment is discoverable.

The documents and information that Mr. al-Tamir seeks in his 54th and 55th Supplemental discovery requests are discoverable under this standard. Documents and information, including applications, emails, communication logs, and the other items listed in the discovery requests are all relevant, material, discoverable, and exculpatory as they directly relate to the existence and extent of the appearance of partiality by the military judges presiding over this military commission.

"Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label. And because '[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges,' jurists must avoid even the appearance of partiality."[38] This may bar judges who have no actual bias,[39] but "justice must satisfy the appearance of justice."[40] In recognizing that the RMC mirror the judicial statute and codes of conduct, the D.C. Circuit stated that the Rules of Military Commissions "focus not on whether a military judge harbored actual bias, but rather on what "would appear to a reasonable person . . . knowing all the circumstances."[41]

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[37] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[38] *In re Al-Nashiri*, 921 F.3d at 234-35 (*quoting United States v. Microsoft Corp.*, 253 F.3d 34, 215 (D.C. Cir. 2001)).

[39] *In re Murchison*, 349 U.S. 133, 136 (1955).

[40] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (*quoting In re Murchison*, 349 U.S. at 136).

[41] *Id.* at 860-61 (*quoting Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)).

When a judge, including a military judge in a military commission, applies for employment with a party to the litigation, the judge develops a financial relationship with a party and must recuse him or herself.[42] Recusal is required at the earliest stages of the application process, including preliminary, exploratory discussions with the party.[43] Failure to recuse under these circumstances creates an impermissible appearance of partiality that invalidates all orders entered from that point onward.[44] Due process, as well as multiples codes and canons regulating judicial conduct compel these conclusions, including the United States Code, the Code of Conduct for United States Judges, the American Bar Association's Model Code of Judicial Conduct, and the rules for Courts-Martial.[45] The D.C. Circuit Court of Appeals concluded that the Rules for Military Commissions (RMC) are no different.[46]

Mr. al-Tamir is entitled to more in discovery than simply the fact of the employment application alone. Information relating to the search for post-judicial and post-clerkship employment is discoverable and relevant to the defense so that the defense can develop facts and formulate arguments regarding motions to challenge this commission. Discoverable information includes information about discussions of future employment after retirement, communications with listed references on the applications, and any employment offers extended or denied, etc. The D.C. Circuit noted that Judge Spath's writing sample and his characterization of his appointment and the commission over which he presided was relevant to the decision to vacate

[42] *In re Al-Nashiri*, 921 F.3d at 234-35.

[43] *Id.* at 235.

[44] *Id.* at 226, 238.

[45] *See id.* at 234; *see also* 28 U.S.C § 455(a); Code of Conduct for United States Judges, Canon 3(C)(1); American Bar Association Model Code of Judicial Conduct, Rule 2.11; Rule for Courts-Martial 902(a).

[46] *In re Al-Nashiri*, 921 F.3d at 234.

the orders.[47] Thus, the scope of documents and information that is discoverable is broad.

Whether this commission or a different reviewing court ultimately finds that information persuasive is a separate issue entirely. For now, the defense is entitled that information so Mr. al-Tamir can mount a robust challenge to the legitimacy of this commission.

The D.C. Circuit recognized the relevance, materiality, and exculpatory nature of this information under nearly identical facts in *Al-Nashiri*.[48] And the court strongly rebuked the government and the Court of Military Commissions Review for failing to produce or order the production of this information as failing to abide by their "shared responsibility" to ensure that a defendant in a military commission receives a fair trial.[49] "Although a principle so basic to our system of laws should go without saying, we nonetheless feel compelled to restate it plainly here: criminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri's defense counsel, all elements of the military commission system—from the prosecution team to the Justice Department to the CMCR to the judge himself—failed to live up to that responsibility."[50]

Moreover, the government has an affirmative obligation to compile that information in light of its highly exculpatory nature. The members of the prosecution team have an affirmative duty to learn of any favorable evidence known to others while acting on the government's behalf.[51]

The D.C. Circuit "look[s] with disfavor on narrow readings by prosecutors of the

[47] *Id.* at 235-36.

[48] *Id.* at 235-238.

[49] *Id.* at 238.

[50] *Id.* at 239-40.

[51] *In re Sealed Case*, 185 F.3d 887, 896-97 (D.C. Cir. 1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

government's obligations under *Brady*."[52] Before and during trial, the government's *Brady* obligation encompasses *all* evidence that is potentially favorable to the accused. The sole criterion for disclosure at the pre-trial and trial phases is whether the evidence is "potentially exculpatory or otherwise favorable . . . without regard to how the withholding of such evidence might be viewed-with the benefit of hindsight-as affecting the outcome of the trial."[53] That is, "[t]he only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial."[54]

B. Since Captain Waits applied for post-judicial employment with parties to the military commission, information relating to those applications is discoverable.

There can be no question that information and documents relating to Captain Waits's application to be an immigration judge are discoverable. But compelling the production of discovery relating only to Captain Waits's application to be an immigration judge is not sufficient. Documents and information about his application to components of the Department of Defense, including the Department of the Navy, is also discoverable.

The Department of Defense in general, and the Department of the Navy as a component of the Department of Defense, are parties to this commission. Captain (ret) Waits now is the Deputy Director of the Criminal Law Division in the Navy Office of the Judge Advocate General. Each service's Judge Advocate General, Deputy Judge Advocate General, Chief Trial Judge, and ultimately service detailing authority provides input for and ultimately nominates individuals as

[52] *United States v. Edwards*, 191 F. Supp. 2d 88, 90 (D.C. Cir. 2002).

[53] *Id*.

[54] *Id*.

prosecution attorneys, defense attorneys, and as military judges. And it just so happens that in this military commission, all the members of the prosecution and the current and former judges in this commission fall under or are or were affiliated with the Department of the Navy.[55]

Any applications to the military service branches, the Department of Defense, any intelligence agency, any government contractor, etc. could have an appearance of partiality. Mr. al-Tamir is therefore entitled to access to the information in order to make those arguments.

C. Information relating to Major [redacted] applications for post-clerkship employment with the Department of Justice and its components, and the Department of Defense, and its components is discoverable because it bears on the appearance of partiality of Colonel Rubin.

Even if Colonel Rubin did not himself apply for post-judicial civilian employment, the appearance of partiality also hangs over orders he entered in this commission. This taint arises from Major Matthew [redacted] employment applications to the Department of Justice and its components and the Department of Defense and its components, all of which are parties to this commission. Major [redacted] clerked for both Captain Waits and Colonel Rubin and applied for positions with parties while he was working as a law clerk on this commission.

"The law clerk's duty to avoid the appearance of impropriety is equivalent to the trial judge's duty."[56] Both the Fifth Circuit and Sixth Circuit explicitly hold that "the clerk is

[55] It also is worth noting and will be particularly relevant to a future motion regarding the current convening authority, but Rear Admiral Christian Reismeier (ret) previously served as the Chief Trial Judge of the Navy and possibly would have had input into Captain Waits's appointment to this commission as military judge, and possibly served as an employment reference for Captain Waits's job applications. This is even more reason for proving broad discovery of the details surrounding these employment searches to provide some air of fairness in an already incredibly tainted case and military commissions system.

[56] *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980).

forbidden to do all that is prohibited to the judge."[57] It is the duty of the law clerk "as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation."[58] This duty arises because law clerks are not like other employees: "Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."[59]

"It is well settled that a law clerk should not participate in litigation in which his future employer appears as counsel for one of the parties. In fact, it is universally accepted that the court must be disqualified where its law clerk continued to participate in a case in which his future employer represented one of the parties."[60] When a law clerk continues to work on matters involving future employers, the appearance of impropriety is enough to mandate disqualification of the judge.[61]

Multiple codes of conduct and ethics canons address a law clerk's application for employment with parties. And these canons require the clerk and the judge to be in frequent and detailed communication about employment applications with parties. The Code of Conduct for

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[57] *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Circuit 1983). *See Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980).

[58] *Hall*, 695 F.2d at 179.

[59] *Id*. at 179.

[60] *McCulloch v. Hartford Life & Acc. Ins. Co.*, 2005 WL 3144656 *5 (D. Conn. Nov. 23, 2005). (internal citations omitted).

[61] *Miller Indus.*, 516 F. Supp. at 89. *Compare Reddy v. Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976) (finding no impropriety when the judge follows "the unvaried custom" of taking law clerks off "all work, conference, hearings, or other activity, including the delivery of messages, in cases being tried by [the clerk's] prospective employers."

Judicial Employees states that if an entity with whom a law clerk or staff attorney is seeking future employment "appears in any matter pending before the [judge for whom the clerk works], the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority."[62]

The codes and canons also dictate that staff attorneys and law clerks should not perform any official duties in any matter with respect to which they know that they have "an interest that could be substantially affected by the outcome of the proceeding."[63] The American Bar Association Model Rules of Professional Conduct state, "A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer."[64] When a law clerk applies to a particular employer, the clerk may no longer work on matters involving that potential employer. The Judicial Conference Committee on Codes of Conduct states that the clerk "should have no involvement whatsoever in pending matters handled by the prospective employer."[65]

Major [redacted] applications for employment with components of the Department of Defense and Department of Justice therefore also raise an impermissible appearance of impartiality. The defense therefore should be provided information about the job openings to which Major [redacted] applied, the timing of these applications, the contents of those

[62] Guide to Judiciary Policy, Vol. 2A, Ch. 3 § 320, Canon 4(C)(4) (emphasis added).

[63] *Id*., Canon 3(F)(2)(a)(iv)(C).

[64] American Bar Association Model Rules of Professional Conduct 1.12(b).

[65] Judicial Conference Committee on Codes of Conduct Advisory Opinion 74. "There may be situations in which, because of the nature of the litigation, or the likelihood that a future employment relationship with the clerk will develop, the judge feels it advisable to take these precautionary measures even at a preliminary stage of the employment discussions." *Id*.

applications, whether Captain Waits and Colonel Rubin were aware of these job searches, whether the judges were listed as references, and if so, what information they provided to prospective employers about Major [redacted] work as a judicial clerk.

These multiple authorities establish that Mr. al-Tamir will be able to mount a challenge to the partiality of the commissions based on Major [redacted] job applications. His conduct implicates the appearance of partiality of the commission, even though he was not entering orders himself. The commission therefore should compel production of his applications for post-clerkship employment as well.

7. <u>Conclusion</u>:

Mr. al-Tamir has the right under the Fifth and Sixth Amendments to the United States Constitution, the Rules for Military Commissions, Judicial Canons, and international human rights law to a fair and impartial adjudicator in his case. But from the very first stages of litigation in this commission, the presiding military judge developed a financial relationship with a party. Then a law clerk advising the first two judges on the commission also developed a financial interest with a party.

Under nearly identical circumstances, the D.C. Circuit found that conduct to constitute an impermissible appearance of partiality requiring vacatur of all orders entered after the development of that financial relationship. In the *Al-Nashiri* case, the defense learned the facts surrounding the violations of RMC 902(a) and canons of judicial conduct almost by accident after a reporter filed a FOIA request. The D.C. Circuit scolded the government and the other military judges involved the commissions (primarily at the CMCR) for abdicating their responsibility to ensure that the facts surrounding the serious breach would receive a full and fair hearing.

The defense certainly plans to file substantive motions surrounding the disqualification of the first two judges in this commission. And the government has acknowledged implicitly that their conduct falls squarely within the confines of the D.C. Circuit's decision in *Al-Nashiri.* But this commission must compel the government to produce discovery relating to the multiple employment applications at issue in order for the defense to prepare to develop facts for a motion or to exercise challenges to Captain Waits and Colonel Rubin. While the government has notified the defense of bare bones information, it has not provided the documents and information relating to the employment searches of Captain Waits, Colonel Rubin, and their judicial clerk Major [redacted] In order to prepare for the forthcoming motion to dismiss due to the fundamental unfairness of this proceeding and the military commissions system in general, the defense must have access to all facets of the employment search conducted by these three individuals.

8. Oral Argument:

Mr. al-Tamir requests oral argument in support of this motion. Oral argument is not merely legal tradition; it is a practice that focuses the issues, allows each side to respond, and reaches a higher quality and more clearly articulated judicial decision. The advantages of oral argument—flexibility, responsiveness in presenting argument, efficiency, judicial engagement, and a greater sense of transparency—are all particularly necessary on this issue, which will certainly have significance beyond this military commission's courtroom. The *Al-Nashiri* decision makes clear that a writ of mandamus to the D.C. Circuit is a possible procedural step in this case where the same issues regarding partiality of the judiciary have arisen. A full, fair, accurate, and complete development of legal arguments and principles will be required.

9. Conference with Opposing Counsel:

The government has informed counsel that it opposes this motion.

10. List of Attachments:

A. Certificate of Service, dated 24 June 2019.

B. Government Email Notice to Defense, dated 25 April 2019.

C. Government Email Notice to Defense, dated 6 May 2019.

D. Government Response to Defense 54th Supplemental Request for Discovery, dated 14 May 2019.

E. Government Response to Defense 55th Supplemental Request for Discovery, dated 14 May 2019.

Respectfully Submitted,

//s//
SUSAN HENSLER
Lead Defense Counsel

//s//
CHARLES BALL
LT, JAGC, USN
Detailed Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on **24 June 2019**, I filed **AE 155, Defense Motion** to Compel Production of Discovery Regarding Judicial Bias and Violations of Rule for Military Commissions 902(a) with the Office of Military Commissions Trial Judiciary and served a copy on the Government counsel of record.

//s//
SUSAN HENSLER
Lead Defense Counsel

ATTACHMENT B

From:	COREYSS2
To:	Thurschwell, Adam M CIV (USA); [redacted] CIV (USA); Askar, Dahoud A LT USN (USA); Newell, Katherine S CIV DLSA (US); Anderson, James P CIV DLSA (US); [redacted] CIV (USA); Donohoe, Laura A CIV (USA); Ball, Charles D LT USN OSD OMC (USA); Engling, Morgan N Maj USAF DLSA (USA); [redacted] SSgt USMC OSD OMC (US); Baker, John G BGen USMC (US); Skelton, Meghan S CIV (US); AYALA SANTIAGO, Raul A CIV OSD OMC (USA); Mayes, Shen ka T CPO USN OSD OMC (USA); Hensler, Susan A CIV DLSA (USA)
Cc:	DOUGLAS2; KEVINLF; BRIANVS; JOHNATHR
Subject:	[Non-DoD Source] Disclosure of Information - 20190425
Date:	Thursday, April 25, 2019 4:54:06 PM

Defense Counsel, good afternoon.

The Prosecution has obtained information that Captain Waits, the Military Judge who initially presided over *United States v. Abd Al Hadi Al Iraqi,* previously applied for employment with the Department of Justice and the Department of the Navy. We do not currently know when he applied or the extent of the application process. We are in the process of obtaining more information and will make appropriate disclosures when it is received.

Very Respectfully,

Corey S. Squires
Captain, U.S. Marine Corps
Prosecutor
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT C

From:	COREYSS2
To:	Thurschwell, Adam M CIV (USA); [redacted] CIV (USA); Askar, Dahoud A LT USN (USA); Newell, Katherine S CIV DLSA (US); Anderson, James P CIV DLSA (US); [redacted] CIV (USA); Donohoe, Laura A CIV (USA); Ball, Charles D LT USN OSD OMC (USA); Engling, Morgan N Maj USAF DLSA (USA); [redacted] SSgt USMC OSD OMC (US); Baker, John G BGen USMC (US); Skelton, Meghan S CIV (US); AYALA SANTIAGO, Raul A CIV OSD OMC (USA); Mayes, Shenika T CPO USN OSD OMC (USA); Hensler, Susan A CIV DLSA (USA)
Cc:	DOUGLAS2; KEVINLF; BRIANVS; JOHNATHR
Subject:	[Non-DoD Source] Disclosure of Information - 20190506
Date:	Monday, May 6, 2019 5:17:47 PM

Defense Counsel, good afternoon.

It is the Prosecution's understanding, upon information and belief, that Mr. [redacted] former law clerk with the Military Commissions Trial Judiciary, accepted a position as an Assistant United States Attorney immediately following his employment with the trial judiciary as a civilian DoD employee. Prior to his being hired by the trial judiciary in a civilian capacity, he served the same function with the trial judiciary while on active duty in the U.S. Marine Corps. The Prosecution has no other information regarding Mr. [redacted] employment search while he was an active duty clerk or civilian clerk for the military commissions.

Very Respectfully,

Corey S. Squires
Captain, U.S. Marine Corps
Prosecutor
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT D

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

OFFICE OF THE
CHIEF PROSECUTOR

14 May 2019

MEMORANDUM FOR Defense Counsel ICO *United States v. Abd al Hadi al-Iraqi*

SUBJECT: Government Response to Defense Fifty-Fourth Supplemental Request for Discovery Dated 30 April 2019

1. Reference: Fifty-Fourth Supplemental Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi*

2. In paragraph 11, the Defense stated that "On 29 April 2019, the Government filed AE 151 under seal notifying the Commission of one instance of Captain Waits' application process."

> **Government Response**: This statement is not accurate. Rather, the Military Commission, on its own accord, filed AE 151 under seal.

3. In paragraph 12, the Defense requested "any and all documents, correspondence, and other information regarding any job application or job offer for a U.S. government executive branch position, whether successful or not, to include but not limited to the Department of Justice, Federal Bureau of Investigation, National Security Agency, Central Intelligence Agency, the Office of the Director of National Intelligence, and the Department of Defense, or any component within those agencies, that Captain Waits submitted or received while presiding over [the Accused's] case.

> **Government Response**: On 26 April 2019, before the submission of this defense request for discovery, the Government submitted a Prudential Search Request ("PSR") to the Executive Office for Immigration ("EOIR"), Department of Justice, requesting that they conduct a "diligent and complete search for any and all records and other information . . . related to Captain John Kirk Waits' contacts, employment inquiries, application materials, and similar records between June 2, 2013 and November 15, 2016." The Government will produce any discoverable information obtained from this PSR. Additionally, the Government will provide any additional discoverable information the Government obtains resulting from due diligence.

4. In paragraph 13, the Defense requested "all information regarding any job applications to or offers from any other federal government entity Captain Waits submitted or received while presiding over [the Accused's] case."

> **Government Response**: The Government respectfully declines this request because it is overbroad and does not seek relevant information. Per paragraph 3 above, the Government will produce discoverable information that the Government obtains resulting from its due diligence.

SUBJECT: Government Response to Defense Fifty-Fourth Supplemental Request for Discovery Dated 30 April 2019

5. In paragraph 14, the Defense requested "any and all information regarding communication, to include emails, records of telephone calls, or any other documentation of communication, between Captain Waits and any of the entities he submitted job applications to or received while presiding over [the Accused's] case."

Government Response: The Government respectfully declines this request because it is overbroad and does not seek relevant information. Per paragraph 3 above, the Government will produce discoverable information that the Government obtains resulting from its due diligence.

//signed//
DOUGLAS J. SHORT
Commander, JAGC
Trial Counsel

ATTACHMENT E

OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

14 May 2019

MEMORANDUM FOR Defense Counsel ICO *United States v. Abd al Hadi al-Iraqi*

SUBJECT: Government Response to Defense Fifty-Fifth Supplemental Request for Discovery Dated 1 May 2019

1. Reference: Fifty-Fifth Supplemental Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi*

2. In paragraph 11, the Defense requested "any and all documents, correspondence, and other information regarding any job application or job offer for a U.S. government executive branch position, whether successful or not, to include but not limited to the Department of Justice, Federal Bureau of Investigation, National Security Agency, Central Intelligence Agency, the Office of the Director of National Intelligence, and the Department of Defense, or any component within those agencies, that former judge, Colonel Peter Rubin, submitted or received while presiding over [the Accused's] case."

Government Response: This request is denied as it seeks information that is not in the possession of the Government. On 7 May 2019, the Colonel Rubin advised the Government via telephone that he did not apply for any outside employment during his tenure as a military commission judge. Therefore, the Government is not in possession, or aware, of any information responsive to this request.

3. In paragraph 12, the Defense requested "all information regarding any job applications to or offers from any other federal government entity Colonel Rubin submitted or received while presiding over [the Accused's] case."

Government Response: See Response in paragraph 2 above.

4. In paragraph 13, the Defense requested "any and all information regarding communication, to include emails, records of telephone calls, or any other documentation of communication, between Colonel Rubin and any of the entities he submitted job applications to or received while presiding over [the Accused's] case."

Government Response: See Response in paragraph 2 above.

//signed//
DOUGLAS J. SHORT
Commander, JAGC
Trial Counsel