

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

UNITED STATES OF AMERICA v. ABD AL HADI AL IRAQI	AE 160 Defense Motion for Judge Libretto to Disqualify Himself Under R.M.C. 902 10 July 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 asks Military Judge Libretto to disqualify himself under R.M.C. 902 because his impartiality could reasonably be questioned in light of the fact that one of his confidential law clerks/legal advisors—[REDACTED]—had applied for jobs with the Department of Justice and Department of Defense. In addition, Mr. al-Tamir asks for additional voir dire on this topic at the upcoming hearing.

3. Overview:

As Mr. al-Tamir argued in AE 158, Defense Motion to Dismiss Because a Military Judge and Law Clerk Sought Employment with the DoD and DOJ, which he adopts fully here, a disqualifying appearance of partiality develops when a law clerk applies for employment with a party, but continues to work on matters involving the party. Under these circumstances, the judge is disqualified and must recuse himself.

The appearance of partiality here is identical to that in *In re Al-Nashiri*,¹ where the D.C. Circuit granted a writ of mandamus vacating all orders that the military judge entered after he applied for post-judicial employment as an immigration judge with the Executive Office of Immigration Review, a component of the DOJ that had no overlap with the military commission.² That job application created a “disqualifying appearance of partiality,” since the judge presiding over the military commission sought employment with one of the litigants.³ The D.C. Circuit explained, “it is beyond question that judges may not adjudicate cases involving their prospective employers.”⁴ The same is true for judges who employ law clerks who have applied for jobs with a party to cases pending before them.

4. Burden of Proof:

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted.⁵

5. Facts:

a. Mr. al-Tamir adopts the facts in AE 158 (paragraphs a through t) and in AE 157 (paragraphs a through n).

b. Judge J. Kirk Waits was detailed to this commission on 3 June 2014. Judge Peter Rubin replaced Judge Waits and was detailed to this commission on 14 October 2016. Military Judge Michael D. Libretto was detailed to the commission on 13 June 2018.

c. On 29 April 2019, Military Judge Libretto filed an under seal notice identifying certain

¹ 921 F.3d 224, 226 (D.C. Cir. 2019).

² *Al-Nashiri*, 921 F.3d at 226.

³ *Id.* at 235-36.

⁴ *Id.* at 235.

⁵ RMC 905(c)(2).

facts that he had learned that had a significant bearing on whether Judge Waits should have disqualified himself under R.M.C. 902.

d. On 6 May 2019, the government notified the defense that [REDACTED] had applied for jobs with the DOJ and DoD.⁶ The government notified the defense that Mr. [REDACTED] had served as law clerk to Judge Waits and Judge Rubin.

e. On 13 May 2019, the government filed AE 151C, which included information that Mr. [REDACTED] clerked for Judges Waits and Rubin.

f. The government did not disclose at that time that Mr. [REDACTED] had also clerked for the current military judge.

g. In AE 155A, the Government Response to Defense Motion to Compel Production of Discovery Regarding Judicial Bias and Violations of Rule for Military Commissions 902(a) (filed on 8 July 2019), the government notified the defense for the first time that “the Government understands that Maj [REDACTED], USMC, was a law clerk for the Commission during the tenure of all three judges.”

h. Military Judge Libretto has not disclosed any information about the fact that Major [REDACTED] clerked for him as well as for the other two military judges to preside over this commission.

6. Argument:

The military just should disqualify himself under R.M.C. 902 because his impartiality could reasonably be questioned in light of his law clerk’s applications for employment with parties to the commission.

“The law clerk’s duty to avoid the appearance of impropriety is equivalent to the trial

⁶ AE 155 Attachment C; AE 151C.

judge’s duty.”⁷ Because of the trust placed in clerks, “the clerk is forbidden to do all that is prohibited to the judge.”⁸ Indeed, the recusal rule “extend[s] to those who make up the contemporary judicial family, the judge’s law clerks and secretaries.”⁹

“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.”¹⁰ When a law clerk continues to work on matters involving future employers, the appearance of impropriety is enough to mandate disqualification of the judge.¹¹ “The law clerk’s continuing participation with the judge in the case in which his future employers were counsel presented a situation in which disqualification was mandated under 18 U.S.C. § 455(a).”¹²

In *In re Al-Nashiri*, the D.C. Circuit recognized that the Rules for Military Commissions (“RMC”) mirror the judicial statute and codes of conduct, holding that “the Rules for 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.’”¹³

⁷ *Miller Indus. Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980).

⁸ *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983); *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980).

⁹ *Hall*, 695 F.2d at 176.

¹⁰ *McCulloch v. Hartford Life & Acc. Ins. Co.*, 2005 WL 3144656 *5 (D. Conn. Nov. 23, 2005). (internal citations omitted).

¹¹ *Miller Indus.*, 516 F. Supp. at 89.

¹² *Id.* See also Judicial Conference Committee on Codes of Conduct Advisory Opinion 74 (stating that the clerk “should have no involvement whatsoever in pending matters handled by the prospective employer.”).

¹³ *Al-Nashiri*, 921 F.3d at 234 (quoting *Liljeberg*, 486 U.S. at 860-61) .

The exact same disqualifying conduct occurred here as occurred in *Al-Nashiri*: that Mr. [REDACTED] had developed personal, financial interests with parties aligned against Mr. al-Tamir. Now that these circumstances are coming to light, a reasonable person would draw the identical conclusions that the D.C. Circuit described in *Al-Nashiri*: that a military commission presided over by judges who have themselves, or who rely on individuals while making legal determinations who have applied for jobs with parties adverse to the defendant does not provide impartial justice, but instead is a system designed to “secur[e] a conviction” rather than “achiev[e] a just outcome.”¹⁴

The Navy Rules of Professional Conduct, which applied to Military Judge Libretto and Mr. [REDACTED] who was a Marine Judge Advocate, mirror these rules. Rule 1.12(b) addresses this precise situation: “A covered USG attorney serving as law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the covered USG attorney has notified the judge, other adjudicative officer, or arbitrator, and been disqualified from further involvement in the matter.”¹⁵

Neither the government nor the military judge notified Mr. al-Tamir of the fact that a disqualified law clerk also clerked for the current military judge until after he had filed his motion to dismiss. Mr. al-Tamir adopts his arguments in AE 158. Those argument apply with equal force here.

With respect to the first two judges in this commission, Mr. al-Tamir was unable to seek disqualification and recusal and, as he argued in AE 158, must seek a retroactive remedy. Now

¹⁴ *Al-Nashiri*, 921 F.3d at 240.

¹⁵ Available at https://www.jag.navy.mil/library/instructions/JAGINST_5803-1E.pdf.

that he has been belatedly informed that the same disqualification applies to the current military judge, he is able to seek prospective relief as well.

For all the reasons articulated in AE 158, the military judge should disqualify himself and vacate all orders he has entered in this commission.¹⁶ Nothing less will purge the commission of the appearance of partiality.

7. Conclusion:

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 the Third Geneva Convention 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 legal advisor/law clerk advising *all* of the 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. The military judge should disqualify himself under R.M.C. 902 and vacate all orders he has entered in this commission. Nothing less will restore public faith in this system or ensure that Mr. al-Tamir has the benefit of a neutral judge.

8. Oral Argument:

Mr. al-Tamir requests oral argument in support of this motion. This motion raises significant issues involving violations of ethical rules and due process that have a significant impact on Mr. al-Tamir's fundamental rights and the overall fairness of the military commissions. Oral argument is necessary to ensure Mr. al-Tamir receives a full hearing—and

¹⁶ See *First Interstate Bank of Arizona v. Murphy, Weir & Butler*, 210 F.3d 983, 987-88 (9th Cir. 2000).

airing—of these significant issues regarding the appearance of partiality of the individuals detailed to preside over his fate. Mr. al-Tamir also notes that the witnesses he has sought to compel relating to AE 158 will be relevant and necessary to this motion as well, as will additional voir dire of the military judge. 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:

Counsel for Mr. al-Tamir sought the government's position on this motion on 8 July 2019. More than 24 hours have passed and the government has not provided its position.

10. List of Attachments:

A. Certificate of Service, dated 10 July 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 **10 July 2019**, I filed **AE 160, Defense Motion** For Judge Libretto to Disqualify Himself Under R.M.C. 902 with the Office of Military Commissions Trial Judiciary and served a copy on the Government counsel of record.

//s//

SUSAN HENSLER
Lead Defense Counsel