

**UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

	)	
	)	Case No. 18-002
	)	
UNITED STATES,	)	<b>APPELLEE’S MOTION FOR LEAVE</b>
	)	<b>TO FILE AND MOTION TO VACATE</b>
<i>Appellant,</i>	)	<b>THE RULINGS OF THE MILITARY</b>
v.	)	<b>JUDGE AND TO COMPEL</b>
	)	<b>DISCOVERY OF EVIDENCE</b>
ABD AL-RAHIM HUSSEIN AL-NASHIRI,	)	<b>RELATING TO DISQUALIFICATION</b>
	)	<b>OF THE MILITARY JUDGE AND HIS</b>
<i>Appellee.</i>	)	<b>SUCCESSOR</b>
	)	
	)	Date: 13 September 2018

**TO THE HONORABLE, THE JUDGES OF  
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

COMES NOW Appellee, Abd Al-Rahim Hussein Al-Nashiri, and moves this Honorable Court for leave to file Appellee’s Motion to Vacate the Rulings of the Military Judge and Motion to Compel Discovery of Evidence Relating to Disqualification of the Military Judge and his Successor.

According to publicly available information from the Department of Justice, at all times relevant to this appeal, Colonel Vance Spath, United States Air Force (Ret.), was engaged in employment negotiations with the Department of Justice, a party opponent, while presiding over this case. At the very least, the appearance of bias requires all of the orders currently before the court to be vacated. *See Pepsico, Inc. v. McMillen*, 764 F. 2d 458 (7th Cir. 1985) (finding that the judge in that case was required to disqualify himself when, even without his knowledge, his clerk solicited employment from one of the party’s firms).

To the extent Appellant intends to dispute the extent of Colonel Spath’s actual and apparent judicial bias, Appellee moves this Honorable Court to grant discovery, which the government has

previously denied, as to when Colonel Spath pursued and obtained employment from the Department of Justice. Additionally, Appellant should be compelled to provide discovery, which the government has also denied, as to the facts and circumstances surrounding the selection of Colonel Shelly Schools to succeed Colonel Spath as both the military judge below and the Chief Judge of the Air Force Trial Judiciary.

### **STATEMENT OF FACTS**

After years of pretrial hearings, something appeared to change on 11 April 2017, when Colonel Spath ordered what he himself would later describe as “an aggressive 2018 calendar year schedule, with significant time to be spent here at Guantanamo Bay[.]” (Trans. 12344; AE 203Q.) Where Colonel Spath had previously ordered four separate hearings totaling forty-four days in 2017, he ordered the parties to prepare for seven hearings totaling 146 days in 2018. *Compare* AE 356A *with* AE 203Q.

When the defense discovered what the government refers to as a “legacy microphone” in their attorney-client meeting room in August 2017, and later sought both discovery and an evidentiary hearing to satisfy their ethical obligations to Appellee, Colonel Spath summarily denied the defense’s requests and—oddly—dismissed them as “fake news.” (Trans. at 11558-59.) He took the unprecedented step of holding a Marine Brigadier General in contempt, a decision later found to be unlawful. *Baker v. Spath*, 2018 U.S. Dist. LEXIS 101622 (D.D.C. 2018). He then proceeded apace with his “aggressive trial schedule” for months, which included holding evidentiary hearings where Appellee was represented only by a Navy Lieutenant. And Colonel Spath repeatedly made the strange pronouncement that learned counsel was “not practicable in these proceedings” under 10 U.S.C. § 949a(b)(2)(C)(ii). (Trans. at 12345.)

**A) Before Abating Proceedings, and Ultimately Retiring, Colonel Spath Exhibited Actual Bias Toward the Defense.**

In the days before he abated proceedings, Colonel Spath disqualified himself from further participation in the military commission below by exhibiting actual bias toward the defense. He announced he was not dismissing the case because, “I am not rewarding the defense for their clear misbehavior and misconduct.” (Trans. at 12376.) “As I said, I follow the law. I follow orders. I don’t just disobey them at will, scoff at the process; but we do have a situation where people are.” (Trans. at 12377.) He accused the defense of engaging “in a revolution to the system.” (Trans. at 12373.) “And they’ve demonstrated it completely, repeatedly, and publicly with little response, encouraging them to continue to demonstrate it repeatedly, publicly, and constantly.” (Trans. at 12373.)

He identified “significant flaws within the commission process, particularly within the defense organization, and it demonstrates an organization intent on stopping the system, not working within the system that they signed up to work within.” (Trans. at 12372.) He accused the defense of ignoring the “rules.” (Trans. at 12372.) “[I]magine what the Department of Defense would look like if we just violated orders willy-nilly as we went through this process?” (Trans. at 12370.) “Because we’ve seen what it would be like here in the commissions. Frankly, by the Military Commission Defense Office and their representatives.” (Trans. at 12370.)

Colonel Spath publicly complained the Deputy Chief Defense Counsel, also an O-6, appeared in the uniform of the day when summoned to appear before the military judge. (Trans. at 12366.) “I’ve never seen a judge advocate show up in Class B’s time after time. I’m not oblivious; I know what that says. What little respect you have for the commission is obvious. A short-sleeve shirt, no tie, not coat; I get it. That’s the message. That’s been the message from the defense for five months. And it’s well received. I got it. I’ve heard you.” (Trans. at 12366.)

“Over the last five months—yes, my frustration with the defense has been apparent. I said it yesterday and I’ll continue to say it. I believe its demonstrated lawlessness on their side; they don’t follow orders; they don’t follow direction; they don’t obey commission regulations, or rules, or subpoenas, as we saw.” (Trans. at 12364-65.) He accused the defense of violating “orders of the commission, violat[ing] subpoenas...frankly, rulings openly in court, defiantly.” (Trans. at 12355.) “We need to know are there going to be any actions taken against what could be viewed as kind of the lawless defense function who defy orders, defy subpoenas, and ignore rulings.” (Trans. at 12352.) Colonel Spath announced it was not his “job to press on in the face of constant roadblocks, recalcitrance, and disobedience of orders.” (Trans. at 12349.)

“No end in sight to the behavior of the Military Commissions Defense Organization, a defense community that believes it can exercise, and did, unilateral authority to excuse defense counsel at any stage of the proceeding, to include learned counsel.” (Trans. at 12347.) “What this shows me is its more information that General Baker, Mr. Kammen, and the two DoD learned counsel’s actions are both arbitrary and purposeful. They are directed at stopping or mortally harming these proceedings.” (Trans. at 12343.)

**B) The Defense has Since Learned Colonel Spath’s Bias Against the Defense is, In Fact and in Appearance, Attributable to the Fact Colonel Spath was Somewhere in the Hiring Process with the Department of Justice, a Party Opponent in this Case, at the Time He, Among Other Things, Accused the Defense of “Demonstrated Lawlessness.”**

On information and belief, Colonel Spath, the military judge whose rulings are the subject of the government’s appeal, has successfully pursued and obtained a position as an administrative law judge (“ALJ”) at the Executive Office for Immigration Review (EOIR). On 18 July 2018, Appellee sent the government a discovery request seeking information on Colonel Spath’s employment with the Department of Justice. (Attachment A.)

In a response that should illuminate all of the government’s pleadings before this Court,<sup>1</sup> the government denied Appellee’s request for discovery, primarily, on the grounds Appellee had not proven the Department of Justice had hired Colonel Spath as an employee. “This request, however, is wholly conclusory in nature and *fails to provide any evidence or proof in support.*” (Attachment B) (emphasis in original). “Based on its review of the unsubstantiated assertions provided in the Defense discovery request, the Government finds no reasonable objective basis to question the impartiality of the former presiding Military Judge and therefore no cause to act on the request.” (*Id.*)

On 10 September 2018—a mere five days after the government denied the defense’s discovery request—the Attorney General greeted his newest employees, which the Department of Justice hailed as “the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review.”<sup>2</sup> In his remarks to the new judges, the Attorney General likened the “good lawyers” who would soon appear before them, “just like they do in federal criminal court,”<sup>3</sup> to “water seeping through an earthen dam to get around the plain words of (immigration law) to advance their clients’ interests.”<sup>4</sup>

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<sup>1</sup> Indeed, it follows a long-standing pattern in which the prosecution fails to provide discovery until caught. *United States v. Stellato*, 74 M.J. 473, 481-82 (C.A.A.F. 2015) (“When contrasting the mandates of these discovery and ethics rules with the actions of the trial counsel in this case, we are deeply troubled by the amount of gamesmanship that was employed, the number of pretrial motions that were required to be filed by the defense and resolved by the military judge, and the continual surprises and delays that permeated this case.”).

<sup>2</sup> <https://www.justice.gov/eoir> (last visited 11 Sep. 18).

<sup>3</sup> The Attorney General’s reference to criminal defense attorneys appears to have been unscripted as it does not appear in his prepared remarks. *See*, <https://www.bing.com/videos/search?q=attorney+general+remarks+to+largest+class+of+immigration+judges&&view=detail&mid=FB713F51F098FC57FDD3FB713F51F098FC57FDD3&&FORM=VRDGAR> at 4:27 (last visited 12 Sep. 18).

<sup>4</sup> <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history> (last visited 11 Sep. 18).

The Attorney General then shook hands with his newest immigration judges.



Appellee expects the government will argue the man wearing the nametag “Vance Spath” is not in fact Colonel Spath, that Appellee hasn’t proven it is Colonel Spath, that the prosecution had no idea the government was hiring Colonel Spath, or that he is merely a “legacy Colonel,” but the Attorney General’s decision to hire Colonel Spath as an immigration judge invalidates all of the rulings made while he simultaneously presided in this case and negotiated employment with the Department of Justice. *Pepsico, Inc.*, 764 F. 2d at 461. Further, Appellee has more than met the low threshold required for the “liberal discovery” required to put an end to the latest government “gamesmanship.” *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

## **ARGUMENT**

“Our criminal justice system is founded on the public’s faith in the impartial execution of duties by the important actors in that system.” *Scott v. United States*, 559 A. 2d 745, 748 (D.C.

Ct. App. 1988) (en banc) (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). “The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment.” *Pepsico, Inc.*, 764 F. 2d at 461.

Colonel Spath is no mere employee of a “federal agency,” as the government appears to suggest in its response to the defense request for discovery. (Attachment B). Now an immigration judge, Colonel Spath “shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe[.]” 10 U.S.C. § 1101(b)(4). Indeed, the Attorney General chuckled during his remarks as he quoted that very provision to Colonel Spath and his fellow immigration judges on 10 September 2018.<sup>5</sup>

The conflict of interest, and accompanying ethical<sup>6</sup> and statutory breaches,<sup>7</sup> now before this Court cannot be distinguished from those in *Scott*. 559 A. 2d at 756 (“What occurred here, however, involved a trial judge who, at all times while he was presiding at Scott’s trial and sentencing, was, unknown to Scott, either seeking or had accepted employment in the executive office for all federal prosecutors while one of those prosecutors was prosecuting Scott.”); *United States v. Quintanilla*, 56 M.J. 37, 80-81 (C.A.A.F. 2001); *Wilson v. Ouelette*, 34 M.J. 798, 799 (N.M.C.M.R. 1991). And this is not the first time Colonel Spath and the judges he supervised on

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<sup>5</sup><https://www.bing.com/videos/search?q=attorney+general+remarks+to+largest+class+of+immigration+judges&view=detail&mid=FB713F51F098FC57FDD3FB713F51F098FC57FDD3&&FORM=VRDGAR> at 4:30-41 (last visited 12 Sep. 18).

<sup>6</sup> Canon 3(C)(1) of the Code of Judicial Conduct provides in relevant part: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned[.]”

<sup>7</sup>*Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 867 (1988) (“These facts create the kind of appearance of impropriety that § 455(a) was intended to prevent.”) (citing 10 U.S.C. § 455(a)).

the Air Force Trial Judiciary have failed to recuse for bias. *United States v. Vargas*, 2018 CCA LEXIS 137 (A.F. Ct. Crim. App. 2018).

Importantly, the EOIR recently announced it hired a recent group of immigration judges “in approximately 266 days, down from an average of 742 days just one year ago.”<sup>8</sup> Thus, Colonel Spath was apparently negotiating his employment with the Attorney General for years while presiding in this case, and without disclosing this conflict to the defense. It is also near certain that all of the rulings that are the subject of the government’s interlocutory appeal were tainted by this self-evident conflict and therefore are void. To the extent the government persists in stonewalling as to when it began its surreptitious hiring of the judge in this case, this Court should invalidate at least 742 days of Colonel Spath’s rulings below.

“[I]t would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of partiality, but then to allow a judge’s ruling to stand when those standards have been violated.” *Blaisdell v. City of Rochester*, 135 N.H. 589 (N.H. 1992). “The appearance of partiality permeates the proceeding.” *Id.*

Unlike in *Liljeberg* and *Pepsico*, Colonel Spath had actual knowledge of the source of the conflict, and “an independent duty to disclose the relationship that created the conflict of interest and failed to do so.” *Verlado v. Ovitt*, 2007 VT 69, P29 (Vt. 2007). The “impropriety here is substantial and the conduct that created it is inexcusable.” *Id.* Indeed, Colonel Spath’s then-inexplicable demand last summer for haste at all costs, and his refusal to permit the defense any time or opportunity to investigate what the government now admits was at least one “legacy

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<sup>8</sup> <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-largest-immigration-judge-investiture-least> (last visited 12 Sep. 2018).



microphone” hidden in their attorney-client meeting spaces is now very much explicable. Colonel Spath was, at best, attempting to rush the proceedings forward so that he could wrap up Appellee’s case before his employment with the Department of Justice was scheduled to begin, or more nefariously, seeking to curry favor as a “reliable” employee as his application to be an immigration judge was being reviewed.

Finally, the Court of Appeals for the District of Columbia Circuit has consistently held that questions of judicial disqualification are one of the few areas warranting the issuance of extraordinary writs. *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017). “Mandamus is an appropriate vehicle for seeking recusal of a judicial officer during the pendency of a case, as “ordinary appellate review” following a final judgment is “insufficient” to cure “the existence of actual or apparent bias”—“[w]ith actual bias ... because it is too difficult to detect all of the ways that bias can influence a proceeding” and “[w]ith apparent bias” because it “fails to restore public confidence in the integrity of the judicial process.” *Id.*

Appellee respectfully requests this Court vacate the rulings of Colonel Spath that are the subject of this appeal and compel production of the discovery sought by the defense on 18 July 2018 and 13 August 2018.<sup>9</sup>

## CONCLUSION

For the foregoing reasons, Appellee moves this Court to grant this motion and vacate Colonel Spath’s rulings below and order the government to produce the discovery as listed in both attached requests.

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<sup>9</sup> Appellee also requested production of discovery related to Colonel Spath’s supervision of Colonel Shelly Schools (Attachment C), which was also denied by the government on 5 September 2018. (Attachment D). Colonel Schools was supervised by Colonel Spath for three of the past four years, and she has succeeded him as both the detailed military judge on this case and as the Chief Trial Judge of the Air Force. Relief for the judicial, ethical lapses in the case must have “prophylactic value,” and that may require Colonel Schools’ recusal as well. *Scott*, 559 A. 2d at 755.

Respectfully submitted,

/s/ Alaric Piette

Alaric Piette

LT, JAGC, USN

Detailed Defense Counsel

Military Commissions Defense Organization

/s/ Brian Mizer

Brian Mizer

CAPT, JAGC, USN

Detailed Defense Counsel

Military Commissions Defense Organization

**CERTIFICATE OF SERVICE**

I hereby certify that on 13 September 2018, I caused copies of the foregoing to be served on the counsel for Appellant via e-mail.

Respectfully submitted,

/s/ Alaric Piette \_\_\_\_\_

Alaric Piette

LT, JAGC, USN

*Counsel for Appellee*

# ATTACHMENT

A



**DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620**

18 July 2018

MEMORANDUM FOR Trial Counsel

From: LT Alaric A. Piette, JAGC, USN, Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY OF AND PRESERVATION OF MATERIALS AND COMMUNICATIONS REGARDING THE APPLICATION FOR AND EMPLOYMENT OF COLONEL VANCE SPATH, USAF, AS AN ADMINISTRATIVE LAW JUDGE

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in al-Qaeda and responsibility in the attacks on the USS COLE. Charges were referred as capital by the Office of the Convening Authority for Military Commissions and accordingly Mr. Al-Nashiri faces the ultimate sentence of death if convicted of the alleged crimes. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(1)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents and/or information and/or communications (in hardcopy or digital) in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al Nashiri's defense.
  
2. On information and belief, the Defense understands that Colonel Vance Spath, USAF, the military judge overseeing Mr. Al Nashiri's capital trial before a military commission, has pursued and obtained a position as an administrative law judge (ALJ) at the Executive Office for Immigration Review (EOIR). EOIR is "an agency within the Department of Justice. Under delegated authority from the Attorney General, immigration judges and the Board of Immigration Appeals interpret and adjudicate immigration cases according to United States immigration laws."<sup>1</sup> Pursuit of employment with the Department of Justice, a party to this case, raises good faith concerns over whether Judge Spath operated under an actual or apparent disqualifying conflict of interest while concomitantly presiding over this case. *Pepsico, Inc. v. McMillen*, 764 F. 2d 458 (7th Cir. 1985).
  
3. In light of the facts stated above, the defense requests the following be preserved and provided as discovery:

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<sup>1</sup> <https://www.justice.gov/eoir/pr/eoir-announces-new-administrative-law-judge>

- a. Any and all emails and/or files and/or data concerning the pursuit of the ALJ position by Colonel Spath. This request includes the request for immediate seizure, search, and preservation of Colonel Spath's government computers, phones, email accounts, internet history, to determine whether any of this relevant material of his pursuit of this position is present on government-owned devices.
- b. Any and all communications and files between any member of the DOJ (or other government agencies), any attorneys general, member of the prosecution, convening authority's office, and/or the trial judiciary regarding Colonel Spath's pursuit of the ALJ position.
- c. Any application, records, communications, notes etc... regarding Colonel Spath's application process for this ALJ position held by any agency.
- d. Any other material not specifically mentioned regarding and relevant to Colonel Spath's pursuit of the ALJ position.

4. This also serves a preservation request for the materials requested above. Please take immediate steps to locate and preserve the material regardless of the government's position regarding the discoverability of the requested material. Further, this is a request for all material currently in digital or electronic form to be produced or preserved in the original "raw" format.

5. Thank you for your prompt attention to this matter. If you have any questions about this request or would like to discuss it further, please feel free to contact me.

Very Respectfully Submitted,

//s//

A.A.PIETTE

LT, JAGC, USN

Detailed Defense Counsel

The above discovery request was delivered to trial counsel via email on 18 July 2018.

# ATTACHMENT

B

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

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UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

**Government Response to  
Defense Request for Discovery**

5 September 2018

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1. For the reasons below, the Government denies the Defense request of 18 July 2018 (copy enclosed) to preserve and to discover information about the post-military-retirement employment prospects of the former presiding Military Judge.

2. Based on its review of the unsubstantiated assertions provided in the Defense discovery request, the Government finds no reasonable objective basis to question the impartiality of the former presiding Military Judge and therefore no cause to act on the request.

a. The Defense request asserts a possible conflict of interest if the former Military Judge sought employment with the Department of Justice (“DoJ”) as an administrative law judge based on “information and belief.” This request, however, is wholly conclusory in nature and fails to provide any evidence or proof in support.

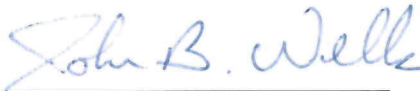
b. The DoJ website link cited in the Defense request (at footnote 1) is a Department of Justice Press Release dated 2 December 2014 announcing only the selection of another person as an administrative law judge. There is no mention of the former military judge specifically or generally. Likewise, a search of the DoJ website for the former military judge’s name yields no information.

c. The circumstance described by the Defense request provides no reason to believe that a conflict of interest exists. The Defense request offers no basis to believe that the former presiding military judge has applied for a position with the DoJ or even contacted the DoJ regarding employment. Therefore, the appearance of a financial conflict of interest with a party appearing before the judge is not present, as in the *Pepsico* case cited in the Defense request. Further, the circumstance of a judge moving from one federal agency to a different judicial position with another federal agency does not present the type of conflict of interest concern addressed in *Pepsico* or *Scott v. United States*, 559 A.2d 745 (D.C. Ct. App. 1988) wherein a District of Columbia Superior Court trial judge sought a management position in a sector with DoJ completely disassociated with the U.S. Attorney’s Office for the District of Columbia.

d. Since the announcement of abatement until the public announcement of the former Military Judge's prospective retirement, no adverse action toward the Defense has occurred that could remotely be subject to a claim of bias or partiality. On 16 February 2018, the former Military Judge ordered an indefinite abatement of all proceedings, which was a favorable ruling to the Defense granting the relief the Defense sought in AE 389. Then, on 26 March 2018, in response to an Order from the U.S. Court of Military Commission Review (USCMCR) to answer specific questions related to lifting the abatement, the former Military Judge again re-affirmed complete abatement of the case and informed that he would not re-open trial proceedings even if additional military defense counsel were detailed. This was likewise a favorable position to the Defense as it was consistent with the multiple filings of the Accused before the USCMCR seeking to keep the Commission proceedings closed.

e. Finally, the Defense request fails woefully to establish the appearance of any conflict of interest or adverse consequence to warrant intrusion into the personal affairs of the former Military Judge.

3. Accordingly, unless ordered, the Government denies each of the specific and general requests for disclosure of information identified in paragraphs 3 and 4 of the Defense request of 18 July 2018. The Government also declines, unless ordered, to take action to preserve such information because the information sought is neither relevant nor material and helpful to any matter at issue before the Commission as contemplated by 10 U.S.C. § 949j and Rules for Military Commissions 701(c)(1) and 701(e)(1)(C) or 902.

  
\_\_\_\_\_  
2018 Mark A. Miller  
Trial Counsel





DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

18 July 2018

MEMORANDUM FOR Trial Counsel

From: LT Alaric A. Piette, JAGC, USN, Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY OF AND PRESERVATION OF MATERIALS AND COMMUNICATIONS REGARDING THE APPLICATION FOR AND EMPLOYMENT OF COLONEL VANCE SPATH, USAF, AS AN ADMINISTRATIVE LAW JUDGE

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in al-Qaeda and responsibility in the attacks on the USS COLE. Charges were referred as capital by the Office of the Convening Authority for Military Commissions and accordingly Mr. Al-Nashiri faces the ultimate sentence of death if convicted of the alleged crimes. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(1)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents and/or information and/or communications (in hardcopy or digital) in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al Nashiri's defense.

2. On information and belief, the Defense understands that Colonel Vance Spath, USAF, the military judge overseeing Mr. Al Nashiri's capital trial before a military commission, has pursued and obtained a position as an administrative law judge (ALJ) at the Executive Office for Immigration Review (EOIR). EOIR is "an agency within the Department of Justice. Under delegated authority from the Attorney General, immigration judges and the Board of Immigration Appeals interpret and adjudicate immigration cases according to United States immigration laws."<sup>1</sup> Pursuit of employment with the Department of Justice, a party to this case, raises good faith concerns over whether Judge Spath operated under an actual or apparent disqualifying conflict of interest while concomitantly presiding over this case. *Pepsico, Inc. v. McMillen*, 764 F. 2d 458 (7th Cir. 1985).

3. In light of the facts stated above, the defense requests the following be preserved and provided as discovery:

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<sup>1</sup> <https://www.justice.gov/eoir/pr/eoir-announces-new-administrative-law-judge>

- a. Any and all emails and/or files and/or data concerning the pursuit of the ALJ position by Colonel Spath. This request includes the request for immediate seizure, search, and preservation of Colonel Spath's government computers, phones, email accounts, internet history, to determine whether any of this relevant material of his pursuit of this position is present on government-owned devices.
- b. Any and all communications and files between any member of the DOJ (or other government agencies), any attorneys general, member of the prosecution, convening authority's office, and/or the trial judiciary regarding Colonel Spath's pursuit of the ALJ position.
- c. Any application, records, communications, notes etc... regarding Colonel Spath's application process for this ALJ position held by any agency.
- d. Any other material not specifically mentioned regarding and relevant to Colonel Spath's pursuit of the ALJ position.

4. This also serves a preservation request for the materials requested above. Please take immediate steps to locate and preserve the material regardless of the government's position regarding the discoverability of the requested material. Further, this is a request for all material currently in digital or electronic form to be produced or preserved in the original "raw" format.

5. Thank you for your prompt attention to this matter. If you have any questions about this request or would like to discuss it further, please feel free to contact me.

Very Respectfully Submitted,

*//s//*

A.A.PIETTE

LT, JAGC, USN

Detailed Defense Counsel

The above discovery request was delivered to trial counsel via email on 18 July 2018.

# ATTACHMENT C



**DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620**

13 Aug 2018

MEMORANDUM FOR Trial Counsel

From: LT Alaric Piette, JAGC, USN, Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY OF AND PRESERVATION OF MATERIALS AND COMMUNICATIONS REGARDING THE SUPERVISION AND CONTACT BETWEEN COLONEL VANCE SPATH AND COLONEL SHELLY SCHOOLS  
*ICO UNITED STATES V. AL-NASHIRI*

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in al-Qaeda and its alleged attack on the USS COLE (DDG-67). The Convening Authority for Military Commissions referred the charges capitally, and Mr. Al-Nashiri faces a potential death sentence if convicted of the alleged offenses. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(1)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents and/or information and/or communications (in hardcopy or digital) in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al-Nashiri's defense. This request (and all future and past requests) include a request that all material currently (or originally) in digital form be produced in the raw digital form without alteration to the content or metadata.

2. On 6 August 2018, Colonel James Pohl, USA, Chief Trial Judge of the Military Commissions, detailed Colonel Shelly W. Schools, USAF, as the new military judge in this case. Colonel Schools served as a military judge for three of the last four years, and she was subject to Colonel Spath's rating and supervision during the time period in which Colonel Spath was both the Chief Trial Judge of the Air Force and likely suffering from a conflict of interest in this case (see *Al-Nashiri* discovery request dated 10 August 2018). If so, Colonel Schools may be laboring herself under an apparent or actual conflict, especially if asked to find that her direct supervisor and rater acted improperly.

3. In light of the facts stated above, the defense requests the following be preserved and produced as discovery:

- a) All material pertaining to the supervision of Colonel Schools by Colonel Spath;
- b) All materials regarding any and all ratings and/or endorsements and/or recommendations of Colonel Schools by Colonel Spath including the documents themselves;
- c) All communications between Colonel Schools and Colonel Spath of a supervisory and/or advisory character;
- d) All communications between Colonel Schools and Colonel Spath regarding the Military Commissions and/or this case;
- e) All materials related to Colonel Spath's involvement in Colonel Schools' selection to serve on the Office of Military Commissions Trial Judiciary;
- f) All materials or communications regarding any knowledge Colonel Schools had of Colonel Spath's post-retirement employment search; and

g) Any and all materials, records, and/or communications regarding Colonel Schools' opinions, perceptions, commentary, etc., of the current abatement in this case.

4. Thank you for your prompt attention to this matter. If you have any questions about this request or would like to discuss it further, please feel free to contact me.

Respectfully submitted,

/s/ Alaric Piette  
ALARIC PIETTE  
LT, JAGC, USN  
*Detailed Defense Counsel*

The above discovery request was delivered to trial counsel via email on 13 August 2018.

# ATTACHMENT D

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

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UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

**Government Response to  
Defense Request for Discovery**

5 September 2018

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1. For the reasons below, the Government denies the Defense request of 13 August 2018 (copy enclosed) to preserve and to discover information regarding the supervisory or other relationship between the former military judge and the prospective detailed military judge announced on 6 August 2018.
2. Neither the existence of a senior-subordinate relationship by military rank or position or unit of assignment, nor a direct supervisory responsibility, establish the existence of the appearance of a conflict of interest in the impartial and unbiased execution of judicial responsibilities, even where a subordinate military judge must rule on controversial matters that may implicate his or her former superiors. *See United States v. Norfleet*, 53 M.J. 262 (2000).\*
3. When the Commission re-opens for trial conduct, the detailed Military Judge will be available to the Defense at which time it may request to *voir dire* the military judge, seek the items identified in paragraph 3 of the its discovery request and thereafter challenge for recusal. Accordingly, unless ordered by the Commission, the Government will not seek to preserve nor disclose the information and documents identified in paragraph 3 of the Defense request.



*pol*  
\_\_\_\_\_  
Mark A. Miller  
Trial Counsel

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\* *See also* the Government's denial response to the Defense discovery request of 18 July 2018 suggesting, without reasonable proof, a conflict of interest in the former presiding Military Judge's post-retirement employment (which is incorrectly identified in this subject discovery request as a Defense discovery request dated 10 August 2018).





DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

13 Aug 2018

MEMORANDUM FOR Trial Counsel

From: LT Alaric Piette, JAGC, USN, Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY OF AND PRESERVATION OF MATERIALS AND COMMUNICATIONS REGARDING THE SUPERVISION AND CONTACT BETWEEN COLONEL VANCE SPATH AND COLONEL SHELLY SCHOOLS *ICO UNITED STATES V. AL-NASHIRI*

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in al-Qaeda and its alleged attack on the USS COLE (DDG-67). The Convening Authority for Military Commissions referred the charges capitally, and Mr. Al-Nashiri faces a potential death sentence if convicted of the alleged offenses. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(1)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents and/or information and/or communications (in hardcopy or digital) in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al-Nashiri's defense. This request (and all future and past requests) include a request that all material currently (or originally) in digital form be produced in the raw digital form without alteration to the content or metadata.
2. On 6 August 2018, Colonel James Pohl, USA, Chief Trial Judge of the Military Commissions, detailed Colonel Shelly W. Schools, USAF, as the new military judge in this case. Colonel Schools served as a military judge for three of the last four years, and she was subject to Colonel Spath's rating and supervision during the time period in which Colonel Spath was both the Chief Trial Judge of the Air Force and likely suffering from a conflict of interest in this case (see *Al-Nashiri* discovery request dated 10 August 2018). If so, Colonel Schools may be laboring herself under an apparent or actual conflict, especially if asked to find that her direct supervisor and rater acted improperly.
3. In light of the facts stated above, the defense requests the following be preserved and produced as discovery:
  - a) All material pertaining to the supervision of Colonel Schools by Colonel Spath;
  - b) All materials regarding any and all ratings and/or endorsements and/or recommendations of Colonel Schools by Colonel Spath including the documents themselves;
  - c) All communications between Colonel Schools and Colonel Spath of a supervisory and/or advisory character;
  - d) All communications between Colonel Schools and Colonel Spath regarding the Military Commissions and/or this case;
  - e) All materials related to Colonel Spath's involvement in Colonel Schools' selection to serve on the Office of Military Commissions Trial Judiciary;
  - f) All materials or communications regarding any knowledge Colonel Schools had of Colonel Spath's post-retirement employment search; and



g) Any and all materials, records, and/or communications regarding Colonel Schools' opinions, perceptions, commentary, etc., of the current abatement in this case.

4. Thank you for your prompt attention to this matter. If you have any questions about this request or would like to discuss it further, please feel free to contact me.

Respectfully submitted,

/s/ Alaric Piette  
ALARIC PIETTE  
LT, JAGC, USN  
*Detailed Defense Counsel*

The above discovery request was delivered to trial counsel via email on 13 August 2018.