

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

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE 624J RULING Defense Motion to Exclude the Deposition of Ahmed Mohammed Ahmed Haza al Darbi 9 December 2025
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1. Procedural History.

a. On 13 December 2024 the Government noticed its intent to introduce into evidence the deposition of Ahmed Mohammed Ahmed Haza al Darbi. AE 166K at 2.

b. On 14 May 2025 the Defense filed AE 624, a motion to exclude the al Darbi deposition. The Government responded in opposition on 13 June 2025. AE 624C; *see also* AE 624B. The Defense replied in AE 624F on 3 July 2025. *See also* AE 624E.

c. The Commission heard argument on AE 624 on 19–20 November 2025 during a motions hearing session at U.S. Naval Station Guantanamo Bay, Cuba, (NSGB).

2. Burden of Proof. When the defense raises grounds for exclusion under 10 U.S.C. § 948r and Military Commission Rule of Evidence (M.C.R.E.) 304(a)(3), the government bears the burden of establishing admissibility by a preponderance of the evidence. M.C.R.E. 304(d). As the moving party on additional grounds for exclusion, the defense bears the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions (R.M.C.) 905(c).

3. Findings of Fact.

a. On 17 March 2017 the Commission (Spath, J.) ordered the deposition of Mr. al Darbi. AE 369M. The Commission also ordered the Government to produce certain discovery related to the pending deposition.

b. Judge Spath appointed himself to serve as the deposition officer. AE 369M at 3.

c. On 1–4 August 2017, the Prosecution conducted its direct examination of Mr. al Darbi.

d. The Accused and his defense team were present for the entire deposition. AE 383A.

e. The Accused's defense team made numerous objections during direct examination, including 89 objections made by the Navy lieutenant serving as detailed military defense counsel (DDC).

f. Judge Spath, serving as deposition officer, ruled on numerous objections related to the form of questions being asked. Where there were more substantive objections, he simply noted the objections for the record and indicated he would address them later as military judge.

g. Mr. al Darbi's counsel was also present for the entirety of the deposition.

h. After direct examination was complete, the parties agreed that the Defense would conduct cross-examination at a later date because of outstanding discovery.

i. On 11 October 2017, Ret. Brigadier General John Baker, then-Chief Defense Counsel, relying on R.M.C. 505(d)(2)(b), terminated the representation of the Accused's civilian defense counsel, leaving only the one lieutenant as Mr. Al-Nashiri's DDC. *See generally* AE 399 series, AE 419 series.

j. On 16 October 2017 DDC filed a motion to abate the proceedings pending detailing of new learned counsel. AE 389. On 27 October 2017 the Commission denied the motion. AE 389F.

k. At pre-trial sessions on 2–3 November 2017, attended by DDC, Judge Spath ruled that the

Accused did not have a right to learned counsel at every portion of the proceedings, especially where matters related to capital punishment were not involved. Tr. at 10084.¹

l. Judge Spath also reiterated he had ruled against a defense motion to continue the deposition until learned counsel was available and indicated he would proceed with the deposition.

m. Judge Spath indicated that he found DDC qualified and competent to conduct the cross-examination, noting the Navy lieutenant's presence at the earlier deposition and the amount of time he had to prepare. Tr. at 10068.²

n. On 7 November 2017, 22 January 2018, and 12 February 2018, Mr. al Darbi was made available for cross-examination. *See* AE 383A. The Accused and DDC were present, but DDC declined to conduct cross-examination in the absence of learned counsel.

o. DDC did state for the record that he had previously conducted cross-examinations of at least 50 to 75 witnesses. AE 383A at 393.

p. Judge Spath then terminated the deposition.

q. On 16 February 2018, Judge Spath abated the commission.

r. In May 2018, Mr. al Darbi was repatriated to Saudi Arabia.

s. The Government continued producing discovery relevant to the al Darbi deposition though at least June 2018. Discovery produced in October 2018 related to post-deposition matters.

t. On 16 April 2019, the U.S. Court of Appeals for the District of Columbia Circuit vacated all of Judge Spath's orders issued after 19 November 2015 in order to "scrub the case of judicial

¹ Judge Spath later gave examples of what he considered capital matters, such as seating a capital-qualified jury or presenting findings or sentencing arguments. Tr. at 10165. He made it clear DDC was qualified and competent to represent the Accused during the pre-trial evidentiary matters at issue. Tr. at 10158, 10164.

² Judge Spath also noted that Congress could not have intended for learned counsel to be able stop the commissions process by simply vacating the premises. Tr. at 10067.

bias without imposing an unnecessarily ‘draconian remedy.’” *In re Al-Nashiri*, 921 F.3d 224, 240 (D.C. Cir. 2019). One of the affected orders was AE 369M, ordering this deposition.

4. Discussion.

a. “The military judge is responsible for ensuring that military commission proceedings are conducted in a fair and orderly manner....” R.M.C. 801(a), *Discussion*. The M.C.R.E. “shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, the protection of national security, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” M.C.R.E. 102; *see* R.M.C. 102(b).

b. In 2019, the D.C. Circuit held that Judge Spath’s application to be an Immigration Judge employed by the Department of Justice created an appearance of bias. *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019). Noting that Judge Spath made innumerable rulings from the bench and issued hundreds of written orders, the court reasoned, “[r]equiring Al-Nashiri to proceed under the long shadow of all those orders, even if enforced by a new, impartial military judge, would inflict an irreparable injury unfixable on direct review. Al-Nashiri thus has no adequate remedy for Spath’s conduct other than to scrub Spath’s orders from the case” *Id.* at 238. The court then vacated all orders issued by Judge Spath after 19 November 2015.

c. Since 2019, this Commission has spent years combing through the record to reconsider all of Judge Spath’s rulings and orders to “scrub” them from this case. In addition to the deposition at issue here, approximately three (3) such matters out of approximately 323 remain outstanding. *See* AE 400; AE 400N; AE 400Q at 2–4, 6 (discussing AE 400H, filed by counsel for Mr. al Darbi); *see also* Transcript at 15992–95. The Commission (Acosta, J.) declined to affirm the order directing the deposition, reasoning that it was unnecessary as the deposition had already

taken place. AE 369TTTT. The Commission declined to rule on the admissibility of the deposition because that issue was not before the Commission at that time.

d. The admissibility of Mr. Al Darbi's deposition is now squarely before the Commission. The Commission finds that Judge Spath's order granting the Government's request to depose Mr. al Darbi, his appointment of himself as the deposition officer, his rulings during the deposition, and most importantly, his ruling to continue on with the deposition after learned counsel left the case, all demonstrate that the deposition itself was inextricably intertwined with an ethically disqualified judge, even though Judge Spath was acting at times as a deposition officer rather than the military judge.

e. The Commission is confident that the D.C. Circuit's admonition to "scrub Spath's orders from the case" included all the orders related to the deposition and necessarily the deposition itself. The Commission finds that admitting the deposition under these circumstances would deprive the Accused of a fair trial. Accordingly, consistent with the order of the D.C. Circuit, the Commission finds Al-Darbi's deposition inadmissible.³ The Government is free to produce the witness or secure another deposition.⁴

³ If the deposition were not covered by the D.C. Circuit order, the Commission would have found the Accused was denied effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *United States v. Palik*, 84 M.J. 284, 293 (C.A.A.F. 2024) (citing *United States v. Cronin*, 466 U.S. 648 (1984)). DDC's failure to conduct cross-examination of Mr. al Darbi when he was present at the deposition and clearly qualified and competent to do so fell below the standard for acceptable representation and ran the serious risk of depriving the Accused of a fair trial. *See United States v. Andrews*, 77 M.J. 393, 404 (C.A.A.F. 2018) (defense counsel cannot "sit like a bump on a log"). The Commission's remedy to cure that deficient performance would have likewise been exclusion of the deposition.

⁴ Having found the deposition inadmissible, the Commission need not reach the question of whether it was obtained by or through torture or cruel, inhuman, or degrading treatment, or otherwise produced by coercion. However, the Commission would have found that it was not.

5. **Ruling.** The defense motion set forth in AE 624 is **GRANTED**.⁵

So **ORDERED** this 9th day of December 2025.

//s//
MATTHEW S. FITZGERALD
COL, USA
Military Judge

⁵ On 8 December 2025, the Defense filed AE 624H and AE 624I, Briefings on Judicial Reconsideration and Allegations of Bad Faith. The Commission did not consider these briefings in reaching its conclusion on this motion. Likewise, the Commission disregarded the Prosecution’s inappropriate argument alleging past bad faith by former counsel or (more importantly) any imputation or speculation of future bad faith by current counsel. However, again, the Commission reminds counsel for both parties to exercise the “level of courtroom etiquette ... expect[ed] of military officers, judge advocates, and all experienced trial counsel,” arguing both in court and in pleadings “on the basis of the evidence alone.” *United States v. Vorhees*, 79 M.J. 5, 14 (C.A.A.F. 2019); see AE 631C at 3, n.7 (quoting *Cody v. Boscov’s, Inc.*, 658 F.Supp.3d 779, 781 (C.D.Cal. 2023)). The parties can “be adversarial without being hostile.” 79 M.J. at 14. “Every attorney ... has a duty to uphold the integrity of the military justice system.” *Id.* at 15. See also Regulation for Trial by Military Commission, Chapter 10.