MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 467CCC** **RULING** **Defense Motion** to Suppress Custodial Statements Allegedly made by Mr. Al-Nashiri in January, February, and March 2007 **18 August 2023**

1. **Procedural Background**.

a. On 17 February 2022 in AE 467, the Defense moved the Commission to suppress custodial statements made by the Accused to U.S. government officials from January to March 2007 under 10 U.S.C. § 948r. The Government opposed the motion in AE 467C on 22 March 2022. The Defense replied in AE 467F on 12 April 2022.

b. The Commission held evidentiary hearings on AE 467 from July 2022 through June 2023 and heard oral argument following the presentation of evidence on 30 June 2023 at United States Naval Station Guantanamo Bay, Cuba (NSGB).

c. Additional procedural history described in the Commission's rulings at AEs 467J, 467S, and 467SS is hereby incorporated by reference.

2. **Burden of Proof**. "When an appropriate motion or objection has been made by the defense under [Military Commission Rule of Evidence (M.C.R.E.) 304], the prosecution has the burden of establishing the admissibility of the evidence" by a preponderance of the evidence. M.C.R.E. 304(d).

3. **Findings of Fact.**[1]

I. RDI Program

a. In the aftermath of the terrorist attacks on the United States perpetrated on 11 September 2001, the Central Intelligence Agency (CIA) developed the Rendition, Detention, and Interrogation (RDI) program to gather intelligence from suspected terrorists captured during the so-called war on terror. As a part of the RDI program, the CIA developed, with the approval of the Department of Justice (DOJ), a list of "Enhanced Interrogation Techniques" (EITs) to be used during interrogations of terrorism suspects. It was assumed that the use of such techniques would assist in the gathering of useful intelligence from terrorist operatives who were otherwise trained to resist interrogation.

b. The EITs adopted by the CIA were based on techniques employed in a training environment in U.S. military SERE[2] training. SERE training was designed to expose U.S. military personnel to the types of coercive interrogation techniques that have been employed in the past by communist adversaries such as North Korea, the Soviet Union, and China. SERE training mimics the exploitative communist model in order to equip U.S. servicemembers with the ability to resist should they be taken captive. Service members in positions with increased risk of capture are trained at SERE schools. During the training, these service members are "captured" by course cadre performing the roles of enemy captors. Captured students are subjected to examples of harsh treatment and the use of coercive interrogation techniques by the simulated enemy while being subjected to other physical and psychological pressures.

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[1] *See* AE 467DDD for additional classified findings of fact.
[2] "SERE" stands for Survival, Evasion, Resistance, and Escape.

c. The goal of the communist techniques was to gain the compliance of subjects, more so than to gather useful intelligence. Instead, harsh techniques were used to extract false confessions and to create propaganda through the infliction of severe mental pain or suffering. For example, waterboarding and sleep deprivation, going back to antiquity, have been used in political or religious persecutions to elicit recantations or confessions. Such techniques do not elicit reliable information.

d. In developing the RDI program, the CIA contracted with two staff psychologists from the U.S. Air Force SERE school, Doctor James Mitchell and Doctor Bruce Jessen. During their employment at the Air Force SERE school, Drs. Mitchell and Jessen were responsible for monitoring the mental health of the cadre administering the course and the servicemembers going through the course. Both Mitchell and Jessen were highly familiar with the SERE techniques as well as the techniques used by foreign adversaries. However, neither Mitchell nor Jessen were trained interrogators.

e. The CIA employed Drs. Mitchell and Jessen to implement a program of interrogation for use on high-value detainees (HVDs) in CIA custody. The objective of the program was to service CIA intelligence requirements. In so doing, the program officers sought to put detainees in a "compliance condition"[3] and to force the detainees to answer questions from debriefers. In the event a detainee in the program was not providing the type, amount, or quality of information the agency desired, EITs would be employed—or escalated—in an attempt to extract that information.

f. In the words of Dr. Mitchell (AE 467AA), the approved EITs included:[4]

[3] Unofficial/Unauthenticated Transcript of the *United States v. Nashiri* Motions Hearing dated 2 May 2022 at 16852.
[4] The use of insects and mock burial were considered for use with Abu Zubaydah, but not the Accused.

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Below are the descriptions of potential physical and psychological pressures discussed in the July 8, 2002 meeting. The aim of using these techniques is to dislocate the subject's expectations concerning how he is apt to be treated and instill fear and despair. The intent is to elicit compliance by motivating him to provide the required information, while avoiding permanent physical harm or profound and pervasive personality change.

1. Attention Grasp:
In a controlled and quick motion, grasp the individual with both hands, one on each side of the collar opening. In the same motion, draw the individual toward you.

2.Walling: The individual is stood in front of a specially constructed flexible wall. The individual's heels touch the wall. The individual is pulled forward and then quickly and firmly pushed into the wall. The head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash. Contact with the wall is made with the individual's shoulder blades. To reduce the probability of injury, the individual is allowed to rebound from the wall.

3. Facial Hold: One open palm is placed on either side of the individual's face, fingertips well away from the individual's eyes. The goal is to hold the head immobile.

4. Facial Slap (Insult Slap): The slap is delivered with fingers slightly spread. Contact should be made with the area directly between the tip of the chin and the bottom of the corresponding earlobe. The goal of the facial slap is to induce shock and surprise, not severe pain.

5. Cramped Confinement: Individuals are placed in a confined space the dimension of which restricts movement. The container is usually dark. Individuals may be kept in larger confinement spaces for up to 18 hours, and smaller confinement boxes for one hour.

6. Wall Standing: This technique is used to induce fatigue. The individual stands approximately 4 or 5 feet from a wall, with his feet spread approximately shoulder width. With arms out stretched in front, fingers resting on the wall supporting body weight. Individuals are not allowed to move or reposition their feet or hands.

7. Stress Positions: A variety of stress positions are possible. They focus on producing mild physical discomfort from prolonged muscle use, rather than pain associated with contortions or twisting of the body. The two discussed were (1) the subject sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and (2) having the subject kneel on the floor and lean back at a 45 degree angle.

8. Sleep Deprivation: Preventing sleep is intended to have the effect of reducing the subject's ability to think on his feet secondary to fatigue and to motivate him to cooperate because of the discomfort associated with sleep debt. For most people, the effects of sleep deprivation remit after one or two nights of uninterrupted sleep. In rare circumstances, individuals predisposed to psychological problems may display abreactions, but these too generally remit after the individual sleeps. The record (Guinness Book of World Records) for voluntary sleep deprivation is 205 hours with the subject showing no significant psychological problems and quick recovery after one or two days of sleep.

9. Water Board: With this procedure, individuals are bound securely to an inclined bench. Initially a cloth is placed over the subject's forehead and eyes. As water is applied in a controlled manner, the cloth is slowly lowered until it also covers the mouth and nose. Once the cloth is saturated and completely covering the mouth and nose, subject would be exposed to 20 to 40

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seconds of restricted airflow. Water is applied to keep the cloth saturated. After the 20 to 40 seconds of restricted airflow, the cloth is removed and the subject is allowed to breath unimpeded. After 3 or 4 full breaths, the procedure may be repeated. Water is usually applied from a canteen cup or small watering can with a spout.

10: Use of Diapers: The subject appears to be very fastidious. He spend much time cleaning himself and seems to go out of his way to avoid circumstances likely to bring him in contact with potentially unclean objects or material. He is very sensitive to situations that reflect a loss of status or are potentially humiliating. One way to leverage his concerns, while helping ensure his wound doesn't become infected with human waste when in cramped confinement is to place him in an adult diaper. If soiled, care would have to be taken to keep human waste out of his leg wound.

11. Insects: The subject appears to have a fear of insects. One possibility is to threaten to place stinging insects into the cramped confinement box with him, but instead place harmless insects. The purpose of this would be to play off his fears and increase his sense of dread and motivate him to avoid the box in the future by cooperating with the interrogator's requests.

12. Mock Burial: The individual is placed in a cramped confinement box that resembles a coffin. The box has hidden air holes to prevent suffocation. The individual is moved to a prepared site where he hears digging. The site has a prepared hole, dug in such a way that the box can be lowered into the ground and shovels of dirt thrown in on top of it without blocking the air holes or actually burying the individual. This procedure would be used as part of a threat and rescue scenario where the "burial" is interrupted and the subject is rescued by a concerned party. The rescuers then use the subject's fear of being returned to the people trying to bury him as a means of pressuring the subject for information.

Hope this helps.

Jim Mitchell

Sent on 8 July 2002 at 04:15:15 PM

g. Using a combination of classical and operant conditioning, the interrogators intended to provoke compliance in the form of an involuntary stimulus response in the detainee following their cues. According to Dr. Jessen, the goal of the program was to deprive detainees of creature comforts to cause them to consider their dilemma and wonder if maybe they could find a way out. Essentially, the interrogator's goal was to cause detainees discomfort leading to compliance.

h. After a determination was made that a detainee was providing enough useful information to be considered compliant and cooperative, he would be transitioned into debriefing mode. This occurred either after an interrogation or after the application of EITs, depending on the detainee's responsiveness. Once a detainee was deemed compliant, debriefers would come in to question him and to service intelligence requirements. The debriefers were not authorized to use EITs.

i. The interrogators hoped EITs would only be necessary once; however, in practice, the techniques were used on several detainees, including the Accused, multiple times. Mitchell and Jessen believed, however, that going back to EITs after a detainee demonstrated compliance would lose a significant amount of goodwill in terms of the detainee's future compliance.

j. Mitchell and Jessen's purpose for the EITs was to impart in the detainees a belief that the detainees themselves could end or even prevent their own suffering if they would comply and answer questions from the interrogator or debriefer. For example, Mitchell explained to the Accused that the Accused could stop the waterboarding by cooperating.

k. After the EIT phase, detainees generally had a fear of going back into the EIT phase. Jessen described their program as creating a "contract" between the interrogators and detainees, whereby the interrogators made sure the detainees understood that they would not go back into

EITs if they continued to cooperate and provide intelligence. The interrogators wanted the detainee to realize that he had a "pathway" whereby, if he provided even a little information, he could start to find a way out of captivity. The interrogators tried to ensure the detainees understood the contract was valid and EITs would not happen unless the detainee became non-compliant again. Therefore, the threat of a return to the EIT phase continued to dangle over the heads of detainees such as the Accused like a proverbial sword of Damocles.

l. The first person subjected to EITs was Abu Zubaydah, a detainee who was shot in the back during his capture and nearly died from his wounds. After receiving authorization to proceed with the EITs and allowing for some physical recovery, the CIA implemented its new program, overseen by Mitchell and Jessen, with full approval of CIA Headquarters. The plan implemented on Abu Zubaydah became the template for the plan used on the Accused. Present at the site during the implementation of the EITs on Abu Zubaydah was Federal Bureau of Investigation (FBI) Special Agent (SA) Stephen Gaudin, who participated in the interrogations. Agent Gaudin would later be part of the "clean team" tasked with taking the statement of the Accused which is before the Commission in this motion.

II. The Accused's "Sojourn through Captivity"[5]

a. The Accused was captured in the United Arab Emirates in mid-October 2002.[6]

b. The Accused was suspected by the U.S. government of being an Al Qaeda operations planner who was involved in the 1998 East Africa Embassy bombings and the attack on the USS COLE in 2000.

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[5] Transcript dated 14 April 2023 at 23894.

[6] U.S. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Executive Summary at 66 (2014) (hereinafter SSCI). As stated during oral argument, the Commission takes judicial notice of the SSCI Executive Summary with the consent of the parties.

c. While still in foreign custody, the Accused provided information on multiple terrorist plots including the USS COLE and *MV Limburg*, as well as plans to attack oil tankers in the Strait of Hormuz and locations in Dubai and Jeddah. This information was disseminated in CIA intelligence reports prior to the Accused's transfer to U.S. custody.[7]

d. The Accused was rendered to U.S. CIA custody at DETENTION SITE COBALT (Location 2) in November 2002. Standard operating procedures at COBALT during this period included total darkness, standing sleep deprivation, loud music, isolation, and dietary manipulation. Dr. Jessen saw paramilitary forces there and described it as "gloomy and dark,"[8] "very unpleasant,"[9] "deplorable,"[10] and "medieval."[11] It was very cold, and detainees were shackled to metal rings mounted in concrete walls. Detainees were held naked in their cells—which Dr. Mitchell described as "like a horse stall"[12]—with only a waste bucket.

e. Detainee Gul Rahman died of exposure at COBALT after being left overnight in cold temperatures wearing only a sweatshirt and after having been doused in cold water.

f. When the Accused arrived at COBALT, he was placed in a cell and shackled for approximately one hour before Dr. Mitchell approached him. Mitchell then asked a guard to bring the Accused into the interrogation room, which was a small room constructed out of plywood. The room contained bright halogen lights that would shine into the Accused's face. Dr. Mitchell then removed the Accused's hood and asked the Accused, "[w]hat would you like me to know about you?" Initially, the Accused was "perfectly willing" to talk about the USS COLE but

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[7] SSCI at 73 n.373, 187.
[8] Transcript dated 13 April 2023 at 23743.
[9] *Id.* at 23702.
[10] *Id.* at 23751.
[11] *Id.* at 23742.
[12] Transcript dated 2 May 2022 at 16824.

refused to answer questions about future operations. Mitchell told the Accused that he wanted to hear about future threats. Mitchell told the Accused that the next time the Accused talked to someone they were going to ask him questions and if he answered those questions nothing bad would happen to him. The Accused was returned to his cell and shackled to the wall.[13]

g. The Accused was labeled as a "typical resister"[14] and Mitchell and Jessen nicknamed him "Little Shit."[15]

h. After only a few days at COBALT, the Accused was rendered to DETENTION SITE GREEN (Location 3), accompanied by Mitchell and Jessen. At GREEN, Abu Zubaydah was already being held and subjected to EITs. Upon his arrival at GREEN, the Accused was also interrogated using EITs, beginning with less-intrusive measures. The Accused was formally subjected to EITs during four periods: December 5–8, 2002; December 27, 2002 – January 1, 2003; and January 9–10 and 15–27, 2003.[16] The Government concedes that all statements of the Accused made during this time are inadmissible under 10 U.S.C. § 948r.

i. Use of EITs at GREEN included cramped confinement in large and small boxes. The Accused was often left naked in the boxes for hours at a time. The larger of the boxes was approximately the size of a coffin and the smaller was slightly larger than a miniature refrigerator. The temperature of the site was cold enough that the Accused could see condensation forming on the walls of the box. Mitchell and Jessen were actually under the impression that the Accused preferred going into the boxes because it provided a break from the lights, cold, and interrogators.

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[13] *Id.* at 16823–31.
[14] Transcript dated 13 April 2023 at 23778.
[15] Transcript dated 14 April 2023 at 23895.
[16] SSCI at 67 n.338.

j. On day one of the "aggressive interrogation phase," the Accused said he was ready to talk. Interrogators told the Accused that "they would do whatever it takes to get the information they wanted from him." *See* AE 402, Attach. C, Cable 2. The interrogators began using EITs on the Accused, including the attention grab and walling. His clothes were ripped off him by the security team. "[The Accused] whimpered that he would do anything the interrogators wanted." *Id*. Eventually interrogators warned the Accused that he would be left alone to consider the information the interrogators were seeking, and he was told that "if he refused to cooperate, he would suffer in ways he never thought possible." *Id*. Later that day, he was forcibly shaved by security staff while the Accused "moaned and wailed." He was then locked inside of the large box at 0445 hours.

k. During the second session of day one, the Accused was pulled out of the large box at 1703 hours. He was backed against the "walling panel" in his cell, a rolled-up towel was placed around his neck, and the hood was slowly removed from his head, revealing his interrogator. His interrogator stood silent for 30 seconds, then "repeated with a hiss" that the interrogators wanted complete, accurate information from him. The Accused almost immediately again confessed to his role in the attack on the USS COLE. AE 402, Attach. C, Cable 3. When he did not provide additional information the interrogators were seeking, he was walled and placed in the small box. His interrogators were left "guardedly optimistic that the aggressive procedures may already be having an impact on [the Accused's] resistance posture." *Id.*

l. So it went for the Accused. Each time the Accused was subjected to EITs, interrogators generally concluded he was "compliant and cooperative." However, CIA

Headquarters disagreed and instructed on-site officers to continue using EITs. When the Accused did not respond to certain questions, the interrogators escalated the measures.

m. Eventually, Mitchell and Jessen turned, with CIA Headquarters' blessing, to the waterboard to try to obtain more information from the Accused. Waterboarding was conducted by strapping the Accused onto a medical gurney which would be angled down at a 40-degree angle at the head, such that the Accused's feet would be higher than his head. The Accused would have a neck brace put around his neck to hold his head in place. The interrogators would then cover the Accused's face with a thin piece of cotton fabric, like a towel, and pour water over the cloth for anywhere from 2–40 seconds at a time, usually starting with shorter "pours" and proceeding to longer "pours." Between pours, Mitchell would lift the cloth and talk to the Accused, then put the cloth back and the pouring would re-commence. After they reached a long pour, which may have gone on for 40 seconds, the gurney would then be lifted upright so the detainee could clear his sinuses and take at least three breaths. The interrogators would then lower the gurney and begin pouring again. This process would continue for up to fifteen minutes. The waterboarding of the Accused was administered by Mitchell with the assistance of Jessen. Mitchell conceded during his testimony that it would not have surprised him if the Accused experienced the sensation of drowning during the waterboard episodes.

n. On one of the occasions where the Accused was subjected to waterboarding, he began to slide out of the straps onto the floor because he was too small in stature for the straps to hold him on the gurney. Mitchell described the Accused during waterboarding sessions as "anxious"[17] and "struggling."[18] Jessen described waterboarding as "visually and psychologically very

[17] Transcript dated 2 May 2022 at 16877.
[18] *Id.* at 16876.

uncomfortable for all of those involved."[19] In fact, Jessen described a waterboarding session of Abu Zubaydah in which some observers in the room cried while watching the procedure.

o. The Accused was at GREEN for approximately three weeks. That site was also dark; there was no natural light. Temperature was manipulated to leave the Accused naked in a cold cell. Loud music was played in the cells. The cells were empty except for a waste bucket. The guards dressed in all black. The Accused was subjected to sleep deprivation. There were bars on the ceiling from which to hang detainees with their arms above their heads as part of standing sleep deprivation. Detainees were also short shackled to the floor.

p. Interrogations at GREEN were videotaped, but these videotapes were taped over and later destroyed by the CIA in 2005[20] out of apparent fear of their discovery during legal proceedings.

q. Like at COBALT, at GREEN the Accused was willing to talk about past events and information, but stated he had nothing to tell interrogators or debriefers about future plots.

r. In December 2002, GREEN was closed, and the Accused and Abu Zubaydah were rendered to DETENTION SITE BLUE (Location 4). BLUE included bright lights, loud music, empty cells with waste buckets, nudity, and constant monitoring.

s. Shortly after the Accused's arrival at BLUE, officers again judged him as compliant, cooperative, engaged, and willing to answer questions. Nevertheless, CIA Headquarters believed the Accused was withholding further actionable intelligence.

[19] Transcript dated 13 April 2023 at 23682.
[20] SSCI, Foreword at 4.

t. After multiple debriefings, officers at BLUE wrote to headquarters that the Accused was providing "logical and rational" answers and that no further enhanced measures were needed. Headquarters disagreed again.

u. CIA officer NX2, who at times was referred to as "the New Sheriff,"[21] took over the interrogation of the Accused, supervising several interrogators who used a series of unauthorized techniques. They placed the Accused in a standing stress position with his hands above his head for approximately two-and-a-half days. They put a pistol to the Accused's head and also threatened the Accused with a power drill. They slapped the Accused multiple times on the back of the head and blew cigar smoke in his face. At least one interrogator told the Accused that the Accused's mother could be brought in and sexually abused while the Accused was forced to watch.[22] The Accused was forcibly washed and scrubbed, including his buttocks and genitals, with a stiff boar brush which was then forced into the Accused's mouth. The Accused reported to Dr. Crosby, a defense expert on torture, that he was sodomized with the brush. Additionally, the Accused was also placed in "improvised" stress positions that caused cuts and bruises.

v. One of these stress positions involved tying the Accused's elbows together behind his back with a belt and hanging him from them. On at least one occasion, the use of this stress position caused Mitchell to intervene because he believed the Accused's shoulders might become dislocated. Mitchell also witnessed NX2 put a broomstick behind the Accused's knees, force him to kneel, and then lean back, causing him extreme pain. He also saw people lean the Accused's head against the wall and then lean their own bodies on him, putting all the weight onto the

[21] Transcript dated 12 April 2023 at 23429.
[22] SSCI at 70.

Accused's neck. According to Mitchell, NX2 was using some of these unapproved measures not for operational reasons but because the Accused refused to call NX2 "sir."[23]

w. During the use of the unapproved stress positions, Mitchell thought the CIA officers were going to hurt the Accused unnecessarily, which surprised him because the Accused was cooperating and providing useful answers. Mitchell testified that the Accused "looked like he was in pain . . . was hollering. He looked uncomfortable . . . he was in distress, that's for sure, and he was in pain."[24] Mitchell claims he unsuccessfully tried to intervene to prevent the use of unauthorized techniques against the Accused.

x. While at BLUE, the Accused was put in a debriefing phase where he was debriefed by a female analyst. Mitchell sat in on the debriefing and encouraged the Accused to cooperate, reminding the Accused that they wanted to avoid any more "hard times"[25] if he failed to cooperate.

y. Formal guidelines were promulgated in January 2003 following the death of Gul Rahman and the use of a gun and a drill to threaten the Accused.[26]

z. Also in January 2003, Jessen arrived at BLUE to conduct a psychological assessment of the Accused for continued use of EITs. Following the assessment, Jessen developed an interrogation plan which authorized the full range of measures. According to the interrogation plan, once the interrogators had eliminated the Accused's "sense of control and predictability"

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[23] Transcript dated 2 May 2022 at 16662.
[24] *Id.* at 16663.
[25] Transcript dated 3 May 2022 at 16951.
[26] SSCI at 62.

and established a "desired level of helplessness," they would reduce the use of EITs and return to debriefing mode.[27]

aa. CIA Headquarters approved the plan to reinstitute EITs with the Accused, beginning with shaving him, cutting off his clothes, and placing him in standing sleep deprivation[28] with his arms affixed over his head. Cables describe the Accused during subsequent interrogations as nude, standing, handcuffed, and shackled.[29]

bb. After what the Accused experienced at BLUE at the hands of NX2 and his subordinates, Jessen described the Accused as angry and more unwilling to engage in dialogue. Jessen's presence and work with the Accused ultimately convinced the Accused to go down the road of cooperation again and continue fulfilling the terms of the contract between him and his debriefers.

cc. Locations 3, 4, and 5 had bright lights, empty cells with only waste cans, shackling, stress positions, loud music, and solitary confinement. Location 5 had foreign guards and no physical pressures were used.

dd. Location 6 was a black site located at Echo II on NSGB, where the Accused was held from approximately late 2003 until early 2004. Evidence demonstrates that some detainees had access to fresh air, sunlight, socialization, and outdoor recreation for the first time at Location 6. However, it is unclear whether this was actually the case for the Accused.

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[27] *Id.* at 71.
[28] Sleep deprivation—keeping the person awake—is used "to impact their will to continue to withhold information." Interrogators also used sleep interruption, whereby they allowed the detainee to sleep, but only for very short periods of time.
[29] *Id.* at 72.

ee. Jessen conducted a "maintenance visit" with the Accused at Location 6 after an incident when the Accused made a mess in his cell and refused to clean it up. As a ploy to get the Accused to clean up the mess, Jessen had Abu Zubaydah brought to the Accused's cell and ordered him to clean up the Accused's mess. This was done to manipulate the Accused into cleaning up the mess. Because the Accused apparently felt guilty about Abu Zubaydah being forced to clean up the mess, the Accused cleaned it up himself.

ff. The purpose of maintenance visits was to remind detainees to be compliant and to provide information to debriefers when requested. Maintenance visits served as a reminder to the Accused that a failure to cooperate would breach the contract and result in the possibility of returning to the "hard times," reimplementation of the EITs. Mitchell and Jessen believed their presence alone, given they had participated in the implementation of the EITs themselves, was enough to encourage compliance. They would also monitor debriefings, sometimes coming in and out of the room. Essentially, maintenance visits were intended to extend the impact of the physical duress applied to the Accused.

gg. The Accused and other HVDs were moved out of NSGB in anticipation of the U.S. Supreme Court's potential ruling related to detainees in *Rasul v. Bush*, 542 U.S. 466 (2004).

hh. Over the years, the Accused alleged that the CIA drugged his food and complained of pain and insomnia. He occasionally undertook hunger strikes, in his words, to protest being treated like an animal. At Location 6, the CIA responded to a hunger strike by "force feeding" him rectally.[30] As described in the context of his rectal feeding, "Ensure was infused into al-Nashiri 'in a forward-facing position (Trendlenberg) with head lower than torso.'"[31] Since the

[30] SSCI at 100 n.584.
[31] Unlubricated rectal examinations were part of the rendition intake process.

early twentieth century, medical knowledge has concluded that there is no medical reason to conduct so-called "rectal feeding." Although *fluids* can be absorbed through the rectum in emergencies, food or nutrition cannot.

ii. After leaving NSGB in mid-2004, the Accused was rendered to DETENTION SITE BLACK (Location 7). Conditions at BLACK included solitary confinement, constant light, sleep deprivation, attention grasp, and facial hold. Detainees could earn "amenities" and had access to showers for the first time in the program, being allowed to shower once a week.

jj. An October 2004 psychological assessment of the Accused was used by the CIA to discuss reaching an "endgame" for the program.[32] In June 2005, the Chief of Base at DETENTION SITE BLACK suspended debriefings of the Accused because it was rare for the Accused to recognize any photographs being shown to him and the repeat debriefings often caused outbursts.[33] In July 2005, the CIA was concerned that the Accused was depressed, uncooperative, and on the "verge of a breakdown."[34]

kk. In late 2005 the Accused was then rendered to DETENTION SITE VIOLET (Location 8), which also included solitary confinement and bright lights. There were no EITs, as Mitchell and Jessen concluded physical pressures were no longer necessary because the contract could be maintained with emotional and psychological coercion.

ll. Next, in mid-2006, the Accused was rendered to DETENTION SITE ORANGE (Location 9). ORANGE was an open compound, but detainees were still held in solitary confinement. Detainees had access to a library and food choices. This is where Jessen conducted

[32] SSCI at 114.
[33] *Id.* at 73 n.372.
[34] *Id.* at 114.

his last maintenance visit with the Accused sometime in 2006, the same year the Accused was transferred for the last time to Guantanamo Bay.

mm. Locations 7, 8, and 9 were an improvement compared to 3, 4, and 5. Though the detainees remained in solitary confinement with constant bright lights, they got bunks in Location 7 and a real toilet in Location 9.

nn. Over the course of the Accused's time in the RDI program, the CIA disseminated 145 intelligence reports based on his debriefings. He provided information on past plots, associates, and Al Qaeda's structure and methods.[35]

oo. The Accused was transferred to NSGB on 5 September 2006. During this time, CIA officials diagnosed the Accused with anxiety and major depressive disorder.

pp. During the entirety of his time in the black sites, the Accused had no contact with anyone that was not either an employee or agent of the United States or another detainee. The Accused never knew where he was and was essentially held in solitary confinement for the better part of four years.

qq. Between 2002 and 2006 in the RDI program, the Commission finds that the Accused was subjected by the CIA to physical coercion and abuse amounting to torture as well as living conditions which constituted cruel, inhuman, and degrading treatment.

III. Transfer to NSGB and the Accused's 2007 Statements

a. In October 2006, after being transferred to NSGB, 14 HVDs including the Accused were allowed to meet with the International Committee of the Red Cross (ICRC). They all provided similar detailed accounts of the RDI program.[36] This was the Accused's first contact

[35] *Id.* at 73. *See also* AE 467F at 23 (stating the Accused was interrogated over 200 times).
[36] SSCI at 160.

with a person who was not an agent or employee of the United States since he was turned over to CIA custody in 2002.

b. During the intervening period between September 2006 to March 2007, confinement conditions at NSGB improved slightly. For example, the Accused was permitted joint outdoor recreation time where he could communicate with one other detainee.[37]

c. At least fifteen forced cell extractions (FCEs) of the Accused were conducted between November 2006 to March 2007. *See* AE 467ZZ. Not unlike how the contract operated in the RDI program, the guard force responded with the overwhelming physical force of FCEs to assert control over him when the Accused was non-compliant or misbehaved in some way.

IV. Law Enforcement Interview

a. FBI SA Steve Gaudin, Naval Criminal Investigative Service SA Robert McFadden, and Air Force Office of Special Investigations SA Kristen (Sendlein) Lange interviewed the Accused at Echo II, NSGB, from 31 January to 2 February 2007. During this time, an HVD prosecution task force was operating at NSGB with the goal of obtaining evidence for prosecution. Multiple detainees were being interviewed by various agencies during this time.

b. The interview team had a DOJ attorney assigned to their team. The attorney monitored the interview and consulted with the agents on breaks.

c. The agents reviewed intelligence products prior to the interviews in order to be able to demonstrate to detainees that the agents knew a lot about them. Federal agents from various organizations in the HVD prosecution task force had access to electronic systems containing intelligence products. Although some of those products included prior statements of the Accused

[37] *See* AE 467DDD for additional classified relevant facts.

and other detainees from the RDI program, many of the reports were not attributable to specific sources.

d. The room where the Accused was interviewed was a holding cell adjacent to an interview area with outdoor plastic furniture. The law enforcement agents were escorted to the interview by military members whose uniforms bore no identifying insignia. There is no evidence in the record that the Accused was given a choice about whether or not he would initially meet with the agents.

e. Inside the interview room, the Accused was shackled to the floor, but his hands were free. The Accused, however, appeared clean, healthy, and alert.

f. The agents began the interview by identifying themselves by name and agency. Gaudin was the lead, but because McFadden had so much experience in the USS COLE investigation, he was co-lead on questioning. Gaudin and McFadden both were proficient in Arabic. Gaudin took notes. Sendlein also asked some questions. FBI linguist John Elkaliouby acted as the interpreter for the interview.

g. At the start of the interview, the agents proceeded to go through a six-point admonishment form drafted specifically by the DOJ for the Accused. AE 518. The agents were instructed to verbally go through the form with the Accused but not to place it on the table or show it to the Accused.

h. The agents were instructed not to read *Miranda*[38] rights to the detainees they interviewed at NSGB, which Gaudin described as "not normal."[39] However, the agents were instructed to obtain a statement that could be used in a criminal or law enforcement prosecution

[38] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[39] Transcript dated 12 August 2022 at 19335.

in a military court.[40] The Commission concludes that the agents were instructed not to give traditional *Miranda* warnings in order to increase the likelihood of obtaining incriminating information from detainees who were being considered for possible criminal charges and trial.

i. First, the agents stated they did not work for and were independent from any organization that previously held the Accused.

j. Second, they told the Accused he was in the legal custody of the Department of Defense (DOD) and he would not return to his previous captors. However, unbeknownst to the agents, after the 14 HVDs including the Accused arrived at NSGB in September 2006, they were held separately from other detainees and "remained under the operational control of the CIA."[41]

k. Third, they told the Accused that he was not required to speak with them and that his being in the custody of the DOD was not conditional upon agreeing to speak with them. They explained to him that his speaking with the interviewing agents was voluntary and that the agents were at his pleasure as to if they would speak at all, when they would speak, as well as what they would speak about. They told the Accused they were aware he may have made prior statements but that they were "not interested" in the previous questioning or his previous answers. The agents also told the Accused that any statements he made could be used in court.

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[40] *See* AE 496 at 9, "If the detainee asks whether any prior statements can be used against the detainee at a criminal proceeding, the agent should tell the detainee that decision will be made by the court if he is charged with a crime . . . Allegations of misconduct will not be included in this LHM." *See id.* at 17, referencing "FBI policy that *Miranda* warnings generally need not be given prior to interviews of [Department of Defense] detainees held at [NSGB]."

[41] SSCI at 160.

l. Fourth, the agents advised the Accused that the room where the interview was taking place may have been familiar[42] to him from his time in the custody of a different organization but that, even so, he was in DOD custody now.

m. Fifth, the agents asked the Accused if he was willing to answer questions. The Accused agreed to do so.

n. Lastly, the agents instructed the Accused, regarding any documents or photographs shown to him, that the agents did not care what he may have said in the past and they were only interested in his current answers.

o. The Accused acknowledged each point on the form as it was read, and Gaudin placed a checkmark next to each item on the form.

p. The agents were instructed, in the event that the Accused were to ask for an attorney, to tell him he was not entitled to one.

q. The agents did not tell the Accused that prior statements he made while in CIA custody and while being abused by the CIA interrogators could not be used against him in court.

r. The agents were instructed to include any allegations of mistreatment by detainees in a separate document recorded on a separate computer.[43]

s. During the interview, the Accused did state that he had been tortured and specifically mentioned waterboarding. He stated he had been hung from the ceiling for long periods of time, left naked to soil himself, and was submerged in water to the point he felt like he was drowning.

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[42] The Accused was previously held in Echo II when it was a black site in 2003–2004. The FBI interview in 2007 actually occurred in the same complex—and perhaps even the same cell—where the Accused was subjected to abuses such as "rectal feeding."

[43] *See* AE 467, Attach. B; AE 467M.

t. The agents and the Accused shared tea and pastries during the interviews, and the Accused was permitted to and did take breaks at his discretion. The interviews lasted approximately three to six hours per day, including breaks. The atmosphere during the interviews was cordial and friendly. The Accused generally appeared to be in good spirits during the interview.

u. Throughout the interview process, the agents continued to remind the Accused after breaks that he did not have to speak with them. The Accused was generally informed that he was "in charge" or "the boss"[44] of the interview and that he could choose what they spoke about.

v. None of the interviews of the Accused were recorded via audio or visual means. Additionally, no transcript was made of the interview. The only recording of what happened during the interviews is the Letterhead Memorandum (LHM) prepared by the agents, summarizing what the Accused said during the interviews, as well as individual agents' notes.

w. During the three days of interviews, the Accused directly incriminated himself, providing extensive details regarding his direct role in the conspiracy that culminated in the attack on the USS COLE.

x. At the end of the third day of interviews, the Accused told the agents that he did not want to continue the interviews as he had nothing more to say.

V. Combatant Status Review Tribunal

a. The Accused's Combatant Status Review Tribunal (CSRT) took place on 14 March 2007 on Camp Delta, NSGB. The CSRT was a fact-finding proceeding held so that tribunal members could determine whether a detainee should be classified as an enemy combatant.

[44] Transcript dated 11 August 2022 at 18998, 19074.

b. The Accused was assigned a personal representative to assist him during the proceeding. The personal representative was not an attorney.

c. The hearing took place in a prefabricated trailer with tables and chairs. Present in the room were the presiding officer, two other voting members of the tribunal, a recorder, and a court reporter. The Accused was then brought into the room with his personal representative and a translator.

d. The Accused was advised of the following rights: the right to be present; the right to not be compelled to testify; the right to testify voluntarily either under oath or in an unsworn statement; the right to have a personal representative; the right to present evidence, including witnesses; the right to question witnesses; and the right to examine unclassified evidence. AE 467C, Attach. M.

e. The hearing was recorded, and a verbatim transcript of the proceeding was created. AE 467C, Attach. M, N.

f. The Accused appeared calm and alert at the CSRT. He was shackled, but his hands were free.

g. The presiding officer was a judge in both his civilian and military capacities.

h. During the open portion of the CSRT, the recorder read a summary of allegations of fact related to the Accused's suspected involvement in the attack on the USS COLE.

i. After the allegations were read by the recorder, the Accused was offered an opportunity to make a statement. The Accused opted to have his personal representative read a prepared statement on his behalf. The Accused was offered the opportunity to take an oath to tell

the truth, but he was advised that he was not required to do so. The Accused opted to take the Muslim oath prior to the presentation of his statement.

j. The Accused's personal representative then read the Accused's prepared statement. It began by asserting that the Accused was "tortured into confession and once he made a confession his captors were happy and they stopped torturing him." In the statement, the Accused also asserted that he "made up stories during the torture in order to get it to stop." AE 467C, Attach. M. Thereafter, the statement responded to the individual factual allegations previously read by the recorder. As a part of the statement, the Accused denied any involvement in the USS COLE bombing. While the Accused admitted that he knew people who were involved in the USS COLE bombing, he insisted that he only had a business relationship with them and did not know what they were planning to do.

k. Following his statement, the president of the CSRT asked the Accused about his allegations of torture. The Accused described some of the abuse he endured. After that discussion, the president asked the Accused if he was under any pressure or duress at the CSRT proceeding. The Accused answered "no, not today." *Id.*

l. The president and other panel members proceeded to ask the Accused questions about his statement, including about the allegations that the Accused participated in the attack on the USS COLE. During the questioning the Accused admitted meeting Usama Bin Laden on many occasions, but he generally denied involvement in the conspiracy that led to the attack on the USS COLE.

m. The open portion of the CSRT lasted for about two hours, including breaks.

n. A subsequent, closed, classified portion of the CSRT occurred outside the presence of the Accused and his personal representative in which the Government presented further alleged evidence against the Accused without any opportunity for rebuttal.

VI. Effects of Trauma

a. The Accused was diagnosed with Post-Traumatic Stress Disorder (PTSD) by a Rule for Military Commissions (R.M.C.) 706 sanity board in 2013,[45] as well as by defense expert Dr. Sandra Crosby in 2014.[46]

b. The Commission finds that the Accused's PTSD is likely related, at least in part, to the abuse he experienced in the RDI program.[47] There is no evidence of the Accused having ever received any treatment specifically for PTSD.[48]

c. Significant physical and psychological effects of torture can last for ten years or more.

d. If a captive faces a choice between compliance and "extreme pain or suffering, then that's not a real choice."[49] A subsequent interviewer cannot know whether the results of their interview are the product of their current questioning or prior coercion.[50]

4. **Law & Analysis**.

a. "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment [] whether or not under color of law, shall be admissible in a military commission . . . ." 10 U.S.C. § 948r(a); *see* M.C.R.E. 304(a)(1). M.C.R.E. 304(a)(2) provides:

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[45] AE 467C, Attach. R.
[46] Dr. Crosby has previously been recognized by the Commission as an expert in the diagnosis and treatment of torture victims, as well as on the appropriate standard of medical care.
[47] *See* AE 467DDD.
[48] *See generally* AE 467WW, para. 49.
[49] Transcript dated 20 April 2023 at 24476 (testimony of Government Expert Dr. Welner).
[50] Transcript dated 16 June 2023 at 25433–34 (testimony of Defense Expert Kleinman).

> A statement of the accused may be admitted in evidence in a military commission only if the military judge finds—(A) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) that—(i) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (ii) the statement was voluntarily given.

b. M.C.R.E. 304(a)(5)(A) addresses the admissibility of evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment. It states:

> Evidence derived from a statement that would be excluded under section (a)(1) of this rule may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that—(i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice.

see also M.C.R.E. 304(a)(5)(B); AE 335N at 8–16.

c. "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944). Some interrogations can be "so inherently coercive that [their] very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom [the government's] full coercive force is brought to bear." *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). "The Court's role when faced with an allegedly coerced confession is to 'enforce[] the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *United States v. Karake*, 443 F.Supp.2d 8, 89 (D.D.C. 2006) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

d. The Supreme Court recognized almost 90 years ago that statements obtained from an accused through torture or physical coercion should not be admitted at trial. In *Brown v. Mississippi*, 297 U.S. 278, 280 (1936), the Supreme Court held that it was error for the trial court to receive into evidence statements coerced from the defendants by torture. In that case, the defendants were mercilessly whipped by a mob that included a deputy sheriff until their backs were "cut to pieces with a leather strap with buckles on it." *Id.* at 282. The Court went on to further describe the defendants' ordeal as follows:

> [T]hey were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present . . . When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.
>
> Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

Id. The next day, two officials came "to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it." *Id.* at 283. "Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and . . . used in court to establish the so-called confessions." *Id.*[51]

[51] *See also Brooks v. Florida*, 389 U.S. 413 (1967), in which the Supreme Court reversed a conviction based upon a confession given by an inmate almost immediately after having been held for two weeks in a small punishment cell with no windows, no bed, little food, and with only a hole in the floor to use as a commode. The Court noted that for "two full weeks he saw not one friendly face from outside the prison, but was completely under the control and domination of his jailers." *Id.* at 414. The Court commented that "the record in this case documents a shocking display of barbarism which should not escape the remedial action of this Court." *Id.* at 415.

e. The Government concedes here that "the military commission should assume that statements petitioner made while he was in U.S. -- while he was in CIA custody should be treated as statements -- quote, statements obtained by the use of torture or by cruel, inhuman, or degrading treatment under 10 U.S.C. Section 948r(a), which provides that such statements are not admissible in a military commission."[52] The Government has not sought to introduce those statements at the Accused's military commission. However, the Government argues that the statements made by the Accused in early 2007 to law enforcement agents and to the CSRT should be admissible at trial because they were not obtained through torture or coercion and because the circumstances surrounding the making of those statements are sufficiently attenuated from the taint of the abuses inflicted upon the Accused between 2002–2006.

f. The significant distinction between *Brown* and this case is the four-year gap between the worst of the abuses suffered by the Accused and the interviews and proceedings that led to the statements being offered by the Government.[53] The Government's position begs the question of whether, if the *Brown* defendants had continued to be held in jail for four years, without access to an attorney or anyone other than members of the sheriff's department, while periodically being paid "maintenance visits" by the mob that tortured them to remind them that they better continue answering questions or risk a return to the "hard times," similar confessions made to a different sheriff's deputy, with minimal rights advisement, would be sufficiently attenuated from the torture. Having found that the Accused made incriminating statements to CIA interrogators while being subjected to torture and cruel, inhuman, or degrading treatment,

[52] Transcript dated 30 June 2023 at 26684.
[53] This is not to say that all of the Accused's abuse ceased in 2003. The Accused continued to be subjected to confinement conditions and treatment that qualify as inhuman and degrading up until 2006, long after the use of EITs was terminated.

this Commission must address how long the taint of that torture and abuse lasts and under which circumstances it may be considered attenuated.

g. In *Lyons*, 322 U.S. 596, the Supreme Court addressed a case where the defendant had given an initial confession under physically coercive circumstances. Then, eleven days later, he gave another confession. In assessing the admissibility of the second confession, the Court observed, "the voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or to deny a suspected participation in a crime." *Id*. at 602 (citing *Ashcraft*, 322 U.S. at 154). The Court also explained:

> The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test -- is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary.

Id. at 603.

h. In *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), the Supreme Court again addressed the question of whether a second confession given by an accused was admissible at trial. However, in that case, the first confession was not the product of physical coercion. In eliciting the first confession, law enforcement officers did not inform the accused of his *Miranda* rights. The Court concluded that a prior unwarned confession that was voluntarily given did not preclude the admissibility of a subsequent voluntary confession given after a proper rights advisement. The Court cited its own ruling in *United States v. Bayer*, 331 U.S. 532, 540–541 (1947), for the proposition that "this Court has never gone so far as to hold that making a

confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *Elstad*, 470 U.S. at 311.

i. Distinct from the instant case, *Elstad* did not deal with a situation where the initial confession was the product of coercion. Instead, the Court recognized the crucial difference between an unwarned statement and a coerced statement. The Court noted, "[w]hen a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Id*. at 310. Ultimately the Court held that, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id*. at 314. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admissibility of the earlier statement. In so holding, however, the Court acknowledged that a second confession could be considered the fruit of a previous confession that was obtained by improper means. *Id*. at 308.

j. The Court of Appeals for the Armed Forces has held that, "[w]here a confession is obtained at a lawful interrogation that comes after an earlier interrogation in which a confession was obtained due to *actual* coercion, duress, or inducement, the subsequent confession is presumptively tainted as a product of the earlier one." *United States v. Cuento*, 60 M.J. 106, 108–09 (C.A.A.F. 2004) (quoting *United States v. Phillips*, 32 M.J. 76, 79 (C.M.A. 1991) (emphasis in original)). If the first statement was unwarned, the absence of a "cleansing

warning"[54] before a subsequent statement is a factor to be considered in determining voluntariness. *Cuento*, 60 M.J. at 109. However, the absence of a cleansing warning has generally not been fatal to a finding that a subsequent confession was given voluntarily. *See, e.g.*, *United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006); *United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2019).

k. Mirroring the Supreme Court's holding in *Elstad*, M.C.R.E. 304(a)(4) provides:

> [i]n determining whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following: (A) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities; (B) the characteristics of the accused, such as military training, age, and education level; and (C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

This multi-factor inquiry addresses whether there has been a sufficient break in the stream of events separating the coercion from the statement. *Clewis v. State of Texas*, 386 U.S. 707, 710 (1967).[55] "[L]ess traditional forms of coercion, including psychological torture, as well as the conditions of confinement have been considered by courts in their assessment of the voluntariness of the statements." *Karake*, 443 F.Supp.2d at 51 (citing *Brooks*, 389 U.S. at 313–15). "The critical question with respect to attenuation is not the length of time between a previously coerced confession and the present confession, it is the length of time between the

[54] A "cleansing warning" serves to advise a suspect that statements they previously made cannot be used against them in court.

[55] The test has already been applied in the context of Guantanamo Bay litigation. *See Al Rabiah v. United States*, 658 F.Supp.2d 11, 36–37 (D.D.C. 2009) (approximately two years was not long enough to dissipate coercion); *see also Anam v. Obama*, 696 F.Supp.2d 1, 7 (D.D.C. 2010) ("The Court is particularly concerned that the interrogators at Guantanamo relied on, or had access to, Petitioner's coerced confessions from Afghanistan.").

removal of the coercive circumstances and the present confession." *Id*. at 89 (citing *Lyons*, 322 U.S. at 597).

l. Consideration of the details of the taking of the January–February 2007 statements includes not only the specific manner in which the agents conducted the interviews in 2007, but also the totality of the circumstances surrounding the Accused's detention beginning in 2002. The Government bears the burden of producing sufficient evidence that the coercive circumstances of the Accused's confinement by the CIA from 2002 to September 2006, including the extreme abuse inflicted upon the Accused in 2002 and 2003, his continuous interrogation, continued isolation, detention, and psychological abuse, were attenuated over the course of the few short months between September 2006 to January 2007 when the law enforcement interviews were conducted. During the litigation of the motion, the Government offered no significant evidence to demonstrate that the coercive circumstances which began in October 2002 changed in any significant way through late 2006, when he was finally ostensibly turned over to the DOD.

m. The Government concedes the Accused was tortured by the CIA. As part of the psychology-based EIT program, the Accused was conditioned through torture and other inhumane and coercive methods by trained psychologists—who also participated in the torture—to become compliant during interrogations and debriefings. This conditioning was continued through repeated maintenance visits to ensure the Accused remained compliant. Therefore, although the EITs may have ceased in 2003, the Accused was subjected to constant reminders by his original tormentors of the unwritten contract, and the fact that a failure to cooperate with debriefers upon demand could lead to a return to the "hard times." Unsurprisingly, the Accused

continued to make statements while in CIA custody from late 2002 until September 2006. These statements, made during the course of scores[56] of interrogations and debriefings over four years, were not merely unwarned, but instead were actually coerced, with the constant looming threat of "hard times" to come if the Accused failed to live up to his end of the "contract." As in *Karake*, "here, the coercion was a product of both discrete beatings, as well as the general conditions of confinement." *See* 443 F.Supp.2d at 89. The Government has failed to establish that there was any meaningful relief from those conditions prior to the FBI interview.

n. Having found that the Accused was subjected to torture and other physical and mental abuse which created the coercive conditions in which he gave numerous incriminating statements to the CIA over four years, any subsequent statements made by the Accused are presumptively tainted by the prior statements obtained by torture. It is for the Government to prove that the statements at issue in the instant motion are sufficiently attenuated from that taint.

o. Following four years of essentially solitary confinement[57] in a series of CIA-controlled black sites—including the very location where the LHM statement was taken—the Accused was "transferred" to DOD custody in September 2006.[58] The LHM was taken four months later. Four months is a considerable amount of time; however, it is a small fraction of time compared to the years the Accused spent held incommunicado in inhumane and degrading living conditions. Surely, the Supreme Court that described the conditions in *Brooks* as

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[56] *See supra* note 20.
[57] *See, e.g.*, *In re Medley*, 134 U.S. 160, 167–69 (1890) ("solitary confinement bears 'a further terror and peculiar mark of infamy'"); *Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting); *Gallina v. Wilkinson*, 988 F.3d 137 (2d Cir. 2021); *Porter v. Pennsylvania Dep't of Corr.*, 974 F.3d 431 (3d Cir. 2020); *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), as amended May 6, 2019; *Grissom v. Roberts*, 902 F.3d 1162 (10th Cir. 2018); *Williams v. Sec'y Pennsylvania Dep't of Corr.*, 848 F.3d 549 (3d Cir. 2017); *United States v. King*, 61 M.J. 225 (C.A.A.F. 2005).
[58] *See* Classified Addendum, AE 467DDD.

"barbarism," would likely struggle to find adequate words to describe what the Accused endured in this case.

p. Additionally, the Accused's conditions of confinement improved only incrementally and in small measures from the time he was in CIA custody to the time he was in DOD custody. Aside from two visits with the ICRC once he was returned to NSGB, the Accused was still held in the same location as the former CIA black site where he was previously held and subjected to forced "rectal feeding." Additionally, he was still under the complete domination and control of his captors as demonstrated by forced cell extractions and forced grooming.[59] Under those circumstances, it is difficult to conceive how the Accused would have believed that his circumstances had significantly changed or that "the contract" was not still in full effect.

q. With this backdrop, U.S. law enforcement agents arrived in January 2007 with the purpose of obtaining incriminating statements from the Accused. A prosecution team was in place and likely knew that the Accused's prior statements during the RDI program would never be admissible in any trial. The solution to that problem was to obtain new incriminating statements. To obtain new statements that could be used in court, the prosecution team came up with a rights advisement for the agents to provide to the Accused, which was carefully constructed to strike a balance between avoiding outright coercion but also leaving the Accused in the dark in several important respects. Despite demonstrating, on numerous occasions, the ability to provide a full rights advisement to other detainees in foreign countries, including during interviews of alleged Al Qaeda operatives Owhali, Badawi, and Quso,[60] the U.S.

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[59] *See* AE 467ZZ.

[60] When Jamal Al-Badawi was interviewed by U.S. law enforcement agents, including FBI SA Ali Soufan, he was provided the standard FBI FD-395 Advice of Rights form prior to each interview. AE 327, Attach. A; AE 319MM, Tabs 47–48; Transcript dated 12 June 2023 at 24887 ("similar to our *Miranda* warnings"). When Fahd Al-Quso was

government, including the DOJ and the CIA, chose to create a specific and limited rights advisement for the Accused. AE 518. For example, the Accused was not to be advised that he could consult counsel. That right would have to wait until after he further incriminated himself and the Government got around to charging him with crimes.[61] Additionally, the rights advisement failed in one major respect: it did not notify the Accused that his prior statements, which were obtained through torture, could not be used against him at any future trial.[62]

r. The Government cites to two somewhat comparable cases in *United States v. Elsheikh*, 578 F. Supp. 3d 752 (E.D. Va. 2022) and *United States v. Khweis*, 971 F.3d 453, 459-64 (4th Cir. 2020) as instances where courts did not suppress statements made by terrorism suspects to law enforcement agents after the suspects had previously given unwarned confessions during interrogations. In both cases, the primary issue was whether the men had been subjected to what amounted to two-part interviews which were designed to obtain confessions from the men before they were later read their rights and provided additional confessions, a technique rejected in *Missouri v. Seibert*. The Court in *Elsheikh*, for example, rejected the accused's

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interviewed by NCIS SA Robert McFadden, he was also advised of his rights as set forth in the FD-395. AE 319MM, Tabs 55–56; Transcript dated 11 April 2023 at 23096–97 ("Almost like a full *Miranda* warning"). And when Mohammed Al-Owhali was interviewed by FBI SA Steve Bongardt, he was provided a printed copy of the Advice of Rights document prepared by Assistant United States Attorney Pat Fitzgerald including "full *Miranda* rights." Owhali was read the form at the beginning of each interview session. AE 482, Attach. D; AE 482M, Attach. B; AE 319MM, Tab 74; Transcript dated 11 March 2023 at 22637–38.

[61] This is not to imply that the Accused is entitled to a *Miranda* warning or that he is entitled to suppression of his statements due to the lack of such a warning. Clearly, the Military Commissions Act does not require such a warning and the Commission does not find that *Miranda* applies to unprivileged alien enemy belligerents held at NSGB while awaiting trial for alleged law of war violations. However, the nature of the rights advisement provided to the Accused by the law enforcement agents can be considered among the totality of the circumstances surrounding the January–February 2007 interviews.

[62] *See, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 612 (2004) ("Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible statement.").

argument, noting that "any reasonable person in Defendant's position would have readily 'appreciate[d] that the interrogations had taken a new turn.'" *Elsheikh*, 578 F. Supp. 3d at 38.

s. *Elsheik* and *Khweis* are easily distinguishable from the instant case. Neither case involved allegations of significant abuse suffered by the accused, much less conditions or treatment that amounted to torture, during their initial interviews. Neither man was held for four years, incommunicado, in what amounted to solitary confinement. In both cases, prior to the second sets of interviews, the accused were given at least modified *Miranda* warnings, wherein they were advised of the rights to remain silent and to consult with an attorney. In *Elsheikh*, the accused was even advised that his prior statements would likely not be usable against him in court. *Id.* at 14–15. In *Khweis*, agents advised him of the right to counsel, told him his family had retained counsel for him in the United States, and told him "he did 'not need to speak with [them] today just because [he] h[ad] spoken with others in the past.'" *Khweis*, 971 F.3d at 458.

t. While a deficient cleansing statement alone does not require suppression, it is appropriate for the Commission to consider under the totality of the circumstances surrounding the January–February 2007 interviews. As discussed above, the rights warning for the Accused was drafted with the input of the same agency that coerced the Accused and conditioned his compliance to obtain the previous statements. This rights warning was crafted to omit notice to the Accused that his prior coerced statements might not be admissible against him. The Military Commissions Act of 2006, which was in effect at the time of the 2007 interviews, did not specifically prohibit the admission of involuntary statements.[63] M.C.R.E. 304 was added after

[63] Pub.L. 109-366, October 17, 2006, 120 Stat 2600, § 948r(c)–(d). These provisions allowed for the admission of coerced statements without regard to voluntariness. *See also id.* at 949a(b)(2)(C) ("A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.").

the promulgation of the Military Commissions Act of 2009.[64] The Commission is left to conclude that the warning given to the Accused was designed to fit the rules in effect in 2007, which were drafted with the specific intent to leave an open question as to the admission of involuntary statements. Under these circumstances, the Commission finds that at the time of the January–February 2007 interviews the Accused was given no reason to believe that his many prior incriminating statements made over the years under torture or cruel, inhuman, or degrading treatment would not eventually be used against him if he ever saw the inside of a courtroom.

u. The Government urges the Commission to conclude that the Accused should have been or was aware that his conditions had changed in some meaningful way. While it is true and the Commission finds that the agents that conducted his January–February 2007 statements treated the Accused with fairness and respect and did not subject him to any form of coercion, this fact alone does not necessarily erase all that had come before. The Accused, having been required to answer the questions of various debriefers over the years under the threat of return to the "hard times," could not be expected to ascertain whether Agents Gaudin, McFadden, and Sendlein were actually from a different agency than the one that had tortured him for years. He was in no position to know whether Drs. Mitchell and/or Jessen were watching the interviews in the next room and prepared to intervene with more abusive treatment should he violate the contract. He had no reason to doubt that he might, without notice, suddenly be shipped back to a dungeon like the ones he had experienced before. He had no real reason to know whether NX2

The Act also made inapplicable the portions of the Uniform Code of Military Justice relating to compulsory self-incrimination. § 948b(d)(B). The words "voluntary" and "voluntariness" do not appear in the bill's text.

[64] 10 U.S.C. § 948r. Added Pub.L. 111-84, Div. A, Title XVIII, § 1802, Oct. 28, 2009, 123 Stat. 2580.

lurked nearby with a pistol, a drill, or a broomstick in hand in the event he chose to remain silent or to offer versions of events that differed from what he told his prior interrogators.

v. In essence, when the agents finally provided the Accused with some form of a rights advisement, he had to ask himself whether he was willing to risk that he could say nothing, without harsh ramifications, or whether he would just continue to abide by the contract, as he was conditioned to do for several years, and repeat the same incriminating statements he had made numerous times. Given all he had experienced before and with the understanding that he had already incriminated himself numerous times in the past, the Commission is unsurprised that the Accused chose not to gamble by immediately putting his faith and trust in yet another group of U.S. officials who showed up at a former black site to "debrief" him.

w. The Government also points to statements made by the Accused after interview sessions on 1 and 2 February 2007 in arguing that the Accused knew that his situation had changed, that he had rights, and that he did not have to speak to the agents.[65] The Government notes that the Accused stated that he was "denying everything." However, a quick review of the LHM belies any suggestion that the Accused denied everything when speaking to the agents. Throughout the LHM, the Accused thoroughly implicates himself in the conspiracy that led to the attack on the USS COLE. The Accused's statement that he was denying everything may have been little more than wishful thinking or braggadocio designed to make him feel better about once again complying with the "contract" and incriminating himself to U.S. personnel.

x. The Government has a stronger argument with respect to the Accused's statements on 2 February 2007. At that time, the Accused indicated his understanding that meeting with the

[65] AE 467C at 6, 19, 22; see AE 467C, Attach. H, I; *see* AE 467DDD.

agents was actually optional. By that time, of course, the Accused had also made clear that he understood that fact by telling the agents that he did not want to talk to them anymore. The agents documented in the LHM that they would have preferred to continue the interviews past the third day. But by the end of the third day, the Accused apparently trusted what the agents told him starting on day one, that he was not required to speak to them. Although the Commission is convinced that by the end of the third day of the interviews, the Accused understood that he was not required to speak to the agents and that he was confident that he would not suffer a return to the "hard times" by refusing to speak, the Commission cannot find that he understood that fact when the interviews began. Further, because the interviews were not recorded and the LHM does not reflect a timeline of when statements certain admissions were made, the Commission cannot assume that the incriminating statements reflected therein were only made after the Accused finally came to the realization that he could trust what Agents Gaudin, McFadden and Sendlein had told him about his right to refuse to talk.

Admissibility of LHM Statements

y. As noted previously, in determining whether an accused's will was overborne in a particular case, courts consider the totality of all the surrounding circumstances, regarding both the characteristics of the accused and the details of the interrogation. *Schneckloth*, 412 U.S. at 226–27 (listing cases). The Commission has considered, among others, the following factors in the analysis of the voluntariness of the Accused's statements to investigators in January–February 2007:

1. Youth. From the time the Accused was taken into custody until the 2007 statements

were made, he was approximately in his late twenties to early thirties. Therefore, this factor does not weigh heavily in the evaluation.

2. Education and intelligence. The Accused has a high school education but finished school sometime into his twenties. There is evidence in the record to suggest that he may be of below-average intelligence. However, there is also evidence suggesting that he is clever and skilled in logistics. Dr. Jessen testified the Accused may be smarter than others give him credit for. This factor does not tip the scale in either direction.

3. Lack of rights advisement. As discussed previously, the U.S. agents who interviewed the Accused in 2007 were specifically directed not to advise the Accused that he could consult an attorney. Although he was told that he did not have to speak to the agents, the Accused had no reason to think that his prior confessions would not seal his fate in any future judicial proceedings as he was not informed that his prior statements could not be used against him. This weighs toward suppression.

4. Length of detention. At the time of the 2007 statements, the Accused had been in U.S. government custody for over four years. For the vast majority of that time, he was held incommunicado in solitary confinement. This weighs heavily toward suppression.

5. Repeated and prolonged nature of the questioning. Prior to the 2007 interviews, the Accused had been interrogated or debriefed somewhere between 145 to 200 times. The record indicates that, especially from 2005 on, these debriefings were repetitive and unfruitful, leading to concerns about the Accused's mental health. These interrogations were repeated over the four years of the Accused's detention. The 2007 interviews themselves took place over several days, multiple hours each day. This weighs heavily toward suppression.

6. Use of physical punishment such as the deprivation of food or sleep. The Commission has previously addressed the horrific abuses inflicted upon the Accused during his years in CIA custody and need not belabor the point here. While the Accused was no longer experiencing most of the abuses he had previously been subjected to by 2007, he was still under the complete domination and control of the U.S. government under circumstances not entirely dissimilar to those he had experienced the previous several years. This weighs heavily toward suppression.

7. Circumstances of the statement. The circumstances of the interviews in 2007, evaluated on their own merit, were not actually coercive in nature. The agents involved in the 2007 interviews acted professionally and in no way coerced the Accused. This weighs against suppression. However, the agents, perhaps unknowingly, could not help but benefit from the terms of the contract established by the CIA and Drs. Mitchell and Jessen years before.

8. Psychological impact on the accused. This factor is perhaps the most important and weighs most heavily towards suppression. The entire goal of the RDI program and the contract created by Drs. Mitchell and Jessen was to provoke an involuntary response to stimuli which would condition compliance from the Accused. The compounding effects of the program—both physical and psychological—could not be removed by the law enforcement agents in 2007 and cannot be ignored by the Commission.

z. The Commission has carefully considered the aforementioned factors among the totality of the circumstances surrounding the 2007 LHM statements, to include the treatment of the Accused from the time his detention began in late 2002 until 2 February 2007. The Commission has also considered the limited advisement of rights given the Accused by the interviewing agents as well as the non-coercive environment of those interviews. The

Government, although conceding the Accused was tortured during the RDI program, argues the 2007 statements were sufficiently attenuated from that mistreatment. The Commission is not convinced.

aa. Any resistance the Accused might have been inclined to put up when asked to incriminate himself was intentionally and literally beaten out of him years before. For years, the Accused was coerced and psychologically conditioned to cooperate with questioners—dozens, if not hundreds of times. To refuse to cooperate was to face the prospect once again of experiencing drowning, the fear of summary execution, days of sleeplessness while shackled naked in a cell, confinement to small boxes, forced rectal feeding, or other physical and mental abuse. Through all that, the Accused implicated himself again and again. The Commission finds that the limited changes in the Accused's circumstances from September 2006 until February 2007 were not meaningful enough to erase the effects of what came before. The change of interlocutors also means little under these circumstances as the Accused was met by numerous different debriefers over the years. From his perspective, Agents Gaudin, McFadden, and Sendlein were merely the newest faces. Further, the Government has done little to establish that the Accused's circumstances materially changed from 2003 until his arrival at NSGB in September 2006.

bb. Most, if not all, Supreme Court and U.S. Court of Appeals for the Armed Forces cases dealing with the issue of subsequent statements made following an initial unwarned or coerced statement deal with a *single* prior inadmissible statement being made before a second warned or uncoerced statement. As discussed above, here, the Accused was in U.S. custody for four years prior to the "second" statement. During those four years, the Accused was coerced and

psychologically conditioned to cooperate with questioners—dozens of times. If there was ever a case where the circumstances of an accused's prior statements impacted his ability to make a later voluntary statement, this is such a case.[66]

cc. Considering the totality of all relevant circumstances, the Commission is most persuaded by the contract established and maintained by Drs. Mitchell and Jessen. The contract required the Accused to speak to the agents in January and February 2007. The Accused had no reason to believe the contract had lapsed. He therefore had only the Hobson's choice of refusing to talk and risking the consequences or continuing to comply and implicating himself for the 201st time. The Commission finds this to be no choice at all and cannot be confident the Accused believed he was free to remain silent on 31 January 2007.

dd. The Commission finds that the Government has not met its burden to establish that the statements made by the Accused between 31 January 2007 and 2 February 2007 were made voluntarily. Even if the 2007 statements were not *obtained by* torture or cruel, inhuman, and degrading treatment, they were *derived from* it. The Commission is not convinced that the 2007 statements would have been obtained if not for the Accused's prior experience with being tortured and abused in the RDI program. On the facts presented, the Commission does not find that the Accused should or could have reasonably believed that his circumstances had substantially changed when he was marched in to be interviewed by the newest round of U.S. personnel in late January 2007. The limited rights advisement given was insufficient to attenuate

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[66] *See, e.g.*, *United States v. Bayer*, 331 U.S. 532, 540 (1947) ("Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first."). Though *Elstad* found this theory inapplicable as to that case, it is helpful here in evaluating the totality of the circumstances.

the lingering taint of the torture, the psychological abuse associated with incommunicado and solitary confinement for years, and the constant threat of a return of the "hard times" if the Accused were to fail to live up to the contract.

ee. Returning to the words of the Supreme Court in *Lyons*, "the effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary." 322 U.S. at 603. The Commission concludes that the Government has not proven by a preponderance of the evidence that the presumed taint from the prior years of physical and psychological torment was dissipated when the Accused was again confronted with interrogators in January–February 2007. Instead, the evidence supports a conclusion that the Accused did what he was trained to do: comply. Compliance is not the same as the "mental freedom" addressed by the Supreme Court in *Ashcraft*. Compliance is not enough to establish the voluntariness of the Accused's statements. The LHM statements must be suppressed pursuant to 10 U.S.C. § 948r and M.C.R.E. 304.

ff. Exclusion of such evidence is not without societal costs. However, permitting the admission of evidence obtained by or derived from torture by the same government that seeks to prosecute and execute the Accused may have even greater societal costs. Permitting admission of this evidence would greatly undermine the actual and apparent fairness of the criminal proceeding against the Accused in this case and infect the trial with unfairness sufficient to make any resulting conviction a denial of whatever process is due. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

Admissibility of CSRT Statements

gg. The Commission does not reach the same conclusion with respect to the Accused's statements made during the CSRT hearing on 14 March 2007, as the CSRT statements are distinguishable in a number of important respects. Once again, the Commission has considered the totality of the circumstances surrounding the making of the statements during the CSRT hearing on 14 March 2007, to include the Accused's experiences in CIA and DOD custody from 2002 to 2007.

hh. The crucial difference between the LHM and the CSRT statements is what happened over the course of the three days of the LHM interviews. When the Accused was brought in to talk to the agents, the Commission finds that the Accused was likely in compliance mode. He was trained to comply or face harsh consequences, so he initially complied even despite limited warnings that suggested he could refuse to talk. After all, he had little to risk by repeating what he had already said many times; he had much to risk if he refused to talk and faced a return to the "hard times." After day three of the LHM interviews, however, likely based upon the relaxed and cordial interactions between himself and the agents and the repeated reminders that he was "the boss" during the interviews, the Accused reached a point where he was willing to assert his right to terminate the interview. When he terminated the interview after three days, he presumably did so because he no longer feared unknown consequences that might follow. By the time of the CSRT hearing, the Accused knew for sure that he did not suffer any consequences for terminating the interview in early February. In other words, the Accused would have known after the LHM interviews that he had an actual choice whether or not he would speak.

ii. There are other substantial differences between the interview that began on 31 January 2007 and the CSRT. Where the Accused had no advance warning that he would again be debriefed at the end of January 2007, in preparation for the CSRT he was assigned a personal representative to explain the nature of the CSRT and assist during the proceeding. This would have been a clear signal to the Accused that the situation was substantially different from debriefings and interrogations he experienced with the CIA.

jj. Among other substantial differences for the Accused were the location, the forum, the formality, and the personnel involved in the CSRT. Rather than his prior experiences of being interrogated in a cell in front of a walling wall with a towel ominously draped around his neck or while trying to avoid drowning, the CSRT was conducted as an official proceeding in a hearing room presided over by a military judge with two other military officers sitting as panel members. The Accused had a personal representative to speak for him and to assist him during the proceeding. While the personal representative was not an attorney, the availability of a representative marked a sea change in what the Accused had previously experienced and clearly signaled that the Accused had rights. Further, the personal representative was a Lieutenant Commander in the United States Navy, someone who clearly would have had significant military training and experience, as well as advanced education.

kk. When the proceeding began, the president clearly explained the purpose of the hearing and advised the Accused that he could not be compelled to testify at the tribunal, but instead had the choice to either testify or not to testify, including the right to make an unsworn statement if he so chose. He was also advised of his right to present evidence at the hearing and to question witnesses that might testify. When asked, the Accused indicated that he understood

the purposes of the proceeding as well as his rights. When asked if he had any questions concerning the tribunal process, he responded "[n]o."

ll. During the hearing, the allegations were read to the Accused. The allegations referenced statements made by individuals other than the Accused, to include Mohammed Al 'Owhali and Jamal Al-Badawi, which implicated the Accused in the conspiracy to attack the USS COLE. None of the allegations read to the Accused made reference to any statements previously made by the Accused. In other words, there was no mention of the fact that the Accused had previously admitted his involvement in the USS COLE operation.

mm. Finally, when asked if he would like to make an oral statement to the Tribunal, the Accused opted to have a written statement presented by his personal representative. He was then asked if he wished to take an oath but was told that he was not required to do so. He chose to take the oath. He was even offered the option of a Muslim oath, which he accepted.

nn. Perhaps one of the most significant considerations in determining that the Accused believed by the time of the CSRT that he faced no further danger from his former interrogators came during the Accused's sworn statement, when he denied much of what he previously told interrogators and investigators from 2002 through 2007. He denied having anything to do with the bombing of the USS COLE. He also denied being a member of Al Qaeda. He denied allegations made by Al-Badawi, insisting that his interactions with Al-Badawi and others related to the USS COLE bombing were simply a business relationship in the fishing industry. The Accused further insisted that incriminating statements he made to the CIA were the product of torture. He then went on to apparently discuss the torture he endured.[67] The president then

[67] This portion is redacted from the transcript of the proceedings at AE 467C, Attach. H at 16 of 36.

acknowledged the Accused's assertion that he was tortured and asked the Accused if he was "under any pressure or duress today." The Accused responded, "No. Not Today."[68]

oo. The Accused went on to answer questions from the president and the other tribunal members. Although some of his statements tend to incriminate him in certain respects, he continued to insist that he was not knowingly involved in the plan to attack the USS COLE and that he was involved only in a plan to run a fishing business.

pp. Considering the totality of the circumstances, it is clear that the Accused understood by 14 March 2007 that he had rights, to include the right not to incriminate himself further. He apparently no longer feared potential ramifications as reflected in his denial of involvement in the USS COLE operation or with Al Qaeda, along with his insistence that his admissions in the past were obtained due to torture. He was clearly informed of his right not to testify at the tribunal and indicated that he understood that right. He was also asked whether he was under duress and denied that he was. The fact that he complained of prior torture indicates that he would have been willing to reveal if he was under duress at the CSRT hearing. Further, the CSRT allegations and evidence focused not on any statement previously made by the Accused, but only on allegations made by others as well as other forms of evidence.

qq. The Commission finds, based on the totality of the circumstances, that the Accused's statements to the CSRT were made voluntarily and were not obtained through or derived from torture or any other form of coercion or abuse he was subjected to at the hands of his former captors and interrogators.

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[68] *See* AE 467C, Attach. H at 16 of 36.

6. **Ruling**. The defense motion to suppress set forth in AE 467 is **GRANTED in part** and **DENIED in part**. That portion of the motion related to the LHM statements made by the Accused to investigators during the January–February 2007 interviews is **GRANTED**. That portion of the motion that seeks to suppress the Accused's statements to the CSRT is **DENIED**.

So **ORDERED** this 18th day of August 2023.

//s//
LANNY J. ACOSTA, JR.
COL, JA, USA
Military Judge