MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 353Y** **Government Response** to Defense Motion to Strike AE 353V 14 April 2021

1. Timeliness

This response is timely filed. Rule of Court (R.C.) 3.7.d.(1) directs that a response is due within 14 calendar days after a motion is filed unless the Military Judge provides otherwise. Under instructions from the Commission, during the pendency of the COVID-19 pandemic, filings that include classified information, as this one does, must be submitted on Wednesdays. AE 420 at 1. Thus, because calendar day 14 following the 30 March 2021 filing of AE 353W was Tuesday, 13 April 2021, this response brief is due Wednesday, 14 April 2021. *Id.* at 1-2.

2. Relief Sought

The Commission should deny AE 353W, the Defense Motion to Strike AE 353V. A proposed order is included at Attachment D.

3. Burden of Proof

The Defense bears the burden of persuasion as the moving party. R.M.C. 905(c).

4. Overview

The Government's AE 353V filing ("Notice") fully complies with the command in the Military Commissions Act (M.C.A.) that "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . shall be admissible in a military commission . . . ." 10 U.S.C. § 948r(a). The Notice—reporting on the Government's progress in reviewing documents regarding two theoretical alternative perpetrators to the Accused named Mohsin Al-Fadhli and Abu Assem Al Makki—fulfills a requirement the Commission imposed while

regulating discovery and while considering the Defense request for dismissal of all charges based upon claims that the Prosecution has denied the Accused exculpatory evidence. There is nothing in the Notice which seeks to admit any statement of the Accused, or anyone else, that was allegedly made under the conditions described within the section 948r prohibition. Nor is there any invitation for the Military Judge, much less the panel, to arrive at any conclusion regarding Mr. Nashiri's conduct or culpability through reliance upon evidence that is allegedly tainted by torture, cruel-inhuman-degrading treatment, or coercion of any kind.

What the Notice does include is lawful and responsive information intended to be helpful to the Military Judge and opposing counsel as the Commission continues to regulate discovery, to evaluate the Government's efforts to make timely and specific requests for information pertaining to Al-Fadhli and then review that information, and to consider the other matters outlined in AE 353U, which directed the Government to submit the Notice. In AE 353U, the Commission denied an interim Defense request for production of all documents reviewed by the Government but took the step of requiring assurances both that the prosecution team had come into possession of Fadhli-related information and that currently assigned trial counsel had conducted a review of that material to determine discoverability. In light of the concerns expressed by the Commission in AE 353U, and of the drastic remedy of dismissal requested by the Defense for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963) in AE 353 itself, the Notice recounts diligent Government efforts, including in the gathering of highly sensitive "strike package" information via search requests to pertinent organizations on 2 March 2017. Those efforts could not culminate in production unless and until the Military Commission Rule of Evidence (M.C.R.E.) 505 process was available to protect non-discoverable operational secrets intertwined with potentially discoverable information.

The Notice further appropriately explains to the Commission and opposing counsel—with certain details filed via an *in camera* Addendum—why a treasure trove of discoverable information bearing upon AE 353 was unlikely ever to be found in intelligence community files despite dutiful efforts to locate what might be there. [redacted]

[redacted]

Vital to the resolution of AE 353 and response to the Commission's concerns in AE 353U is the fact that the separate line of substantive intelligence reports regarding Abu Assem Al-Makki's supposed leading role in the *MV Limburg* attack concluded in January 2003, when the rejection of Al-Fadhli's claims about that role was itself included in an intelligence report. In short, the Government could not be holding out on producing documents containing *Brady* evidence on these matters—as the Defense alleged—because the ending of substantive intelligence reporting on Al-Fadhli's claims explains why there are no further documents to find regarding those claims. Rather, what post-2003 discovery has been found, and at this point largely produced, consists of references to undisputed roles for Al-Fadhli as a Kuwaiti financier of extremist activities and for Abu Assem Al-Makki as a Yemeni extremist, sometimes accompanying echoes by others in the U.S. government of the pre-2003 claims and reporting, and involving no new information about the USS COLE or *MV Limburg* attacks. While the Notice is careful to caveat that the Prosecution does not intend to use as trial evidence statements obtained through intelligence interrogations—indeed they were gathered only to comply with discovery obligations—it is also an important fact that rejection *by the intelligence community* of

Al-Fadhli's claims was based in part upon statements reported as having been made by the Accused while in the custody of the Central Intelligence Agency (CIA) and within the CIA's former Rendition, Detention, and Interrogation (RDI) Program. The Commission in 2017 first drew the connection between such RDI information and Al-Fadhli matters in AE 353C, which ordered the Government to identify for the Military Judge all discovery related to Mr. Al-Fadhli that had previously been provided through the series of filings dedicated to producing to the Defense adequate M.C.R.E. 505 substitutes for still-classified reports of statements by the Accused and other information pertaining to his interrogations by the CIA. Further details of these important discovery-specific facts are contained in the Addendum at Attachment B. Like the Addendum to the Notice, Attachment B to this response is appropriately *in camera* not only because it contains still classified information, but because a sealing order of this Commission,[1] if not strictly section 948r and the rules of evidence, evinces that reasonable care should be taken to conduct litigation on preliminary matters such that prospective panel members will be less likely to learn details of an accused's allegedly inadmissible statements.

These limited "uses" of Mr. Nashiri's CIA interrogations necessarily have brought statements allegedly made under the conditions described within section 948r into the appellate record of this Commission and have resulted in counsel for both parties referring to the existence and contents of the Accused's statements in CIA custody in order to address interlocutory matters. None of what has heretofore occurred is prohibited, however, by section 948r. This is because the text, context, and history of section 948r and the M.C.A. confirm that section 948r(a)'s phrase, "shall be admissible in a military commission" refers to "admission of the statement into evidence[,]" and not consideration by a military judge solely to resolve preliminary questions that vindicate the accused's access to evidence and other rights.

The Commission should thus deny the motion to strike AE 353V without oral argument so that the Defense can more promptly receive, via informed regulation of discovery

[1] *See infra* note 14 and accompanying text (discussing the sealing, in AE 168M/AE 241I, of Mr. Nashiri's 2007 statement to the FBI in AE 168M/AE 241I).

by the Military Judge, all of the Fadhli-related discovery that it is entitled to and that it professes to seek. Resolution of AE 353 is prudent before the Commission takes up various evidentiary motions that, in turn, should be resolved prior to assembly of the members. Among these will be requests for suppression and other relief that the Defense, in discovery motions, has signaled it will file in pleadings that, too, have drawn upon the content of statements made by the Accused in CIA custody. In the meantime, the Commission should not strike lawfully presented information enabling it to correctly ascertain why discovery sought by the Defense does not exist and thereafter rule upon an interlocutory matter. To affirm section 948r, the Commission should neither rely upon Mr. Nashiri's statements to the CIA for any purported facts therein nor permit the panel to be heedlessly exposed, during collateral Defense presentations, to such statements. The proposed order at Attachment D would further the ongoing process of protecting these proceedings, and the record, from inadvertent legal error.

5. Facts

For purposes of resolving this motion,[2] the Government does not object to the Commission assuming that the statements made by Mr. Nashiri in CIA custody and cited in the *in camera* Addendum to the Notice fall within the section 948r(a) prohibition, a matter alleged as fact in AE 353W. The Government also agrees that the Notice proffered, "there is a need to consider the Prosecution's recitation of facts." AE 353W at 2 (quoting AE 353V at 21). Further, the Government agrees that testimony in open court by a former CIA contractor before another military commission included vivid descriptions of Mr. Nashiri being subjected to harsh, unauthorized, and improvised treatment,[3] and that the witness had been in a position to observe

[2] Like the facts proffered in the Notice, the facts included in this response are proffered pursuant to R.C. 3, which directs the parties to identify any agreed-upon facts and instructs that facts within a filing submitted for inclusion as an appellate exhibit are "*for purposes of resolving a motion*." *Trial Judiciary Rules of Court* at R.C. 3.5.b and page 24 (21 Dec. 2017) (emphasis added).

[3] The witness was James Mitchell, who testified 21-30 January 2020, *inter alia*, in connection with the issue of the voluntariness of Ali Abdul Aziz Ali's statements to the FBI in 2007, after a period of CIA custodial interrogations had ended. Aziz Ali is one of five defendants in the military commission of *United States v. Khalid Shaikh Mohammad, et al.*

Mr. Nashiri around the same time as the reported statements the intelligence community later invoked when it rejected Al-Fadhli's claims about Abu Assem Al-Makki's leadership role in the *MV Limburg* attack. AE 353W at 2. Except for the foregoing qualified areas of agreement, however, and notwithstanding the Defense desire that the facts the Government set forth in the Notice be stricken, the Government relies here, too, upon those Fadhli-related discovery facts, as highlighted and supplemented by the following:

a. 28 September 2011. Charges were referred against the Accused. As stated in the Notice, the charges were "drafted *based upon evidence gathered during extensive law enforcement investigative activities*." AE 353V at Fact 3.a. (emphasis added).

b. 9 August 2012. The Defense sent a discovery request to Trial Counsel seeking information related to Mr. Nashiri's rendition, detention, and interrogation by the CIA. Among the 75 items requested were "[c]omplete contemporaneous records of each interrogation session, including videotapes, audiotapes, and transcripts of interrogations of Mr. Al-Nashiri[,]" "[a]ll materials prepared in advance of any interrogation or questioning of Mr. Al-Nashiri[,]" and "[a] description of information sought from Mr. Al-Nashiri." AE 120, Attach. A at ¶¶ 32, 66-67. The request also sought "[a]ll [c]laims of 'effectiveness' of enhanced interrogation techniques specific to Mr. Al-Nashiri by any CIA operative or any member of the RDI program." *Id.* at ¶ 54.

c. 30 August 2012. Within a production of 327 documents in discovery, the Government provided the Defense a group of summarized statements reported to have been made by Mr. Nashiri while in CIA custody. These had been approved by Judge James Pohl through the M.C.R.E. 505 process. The government had deemed

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("*KSM et al.*"), to which charges related to the attacks of September 11, 2001 have been referred and before which the parties are addressing interlocutory matters in R.M.C. 803 sessions without members. During questioning on 22 January 2020 regarding stress positions the witness understood as having been approved for use during CIA interrogations and that had been trained within the former RDI Program, witness Mitchell contrasted such approved stress positions with treatment of Mr. Nashiri he had observed under interrogator "NX2." *KSM et al.* Unoff./Unauth. Tr. 30540-53. Mitchell was scheduled to testify before Judge Spath in early 2018, when Nashiri's learned counsel absented himself claiming government intrusions into the attorney-client relationship. The Accused had previously sought Mitchell's appearance, citing expected testimony drawn from observations made by Mitchell in his 2016 book, *Enhanced Interrogation*, which included extensive descriptions of Mr. Nashiri's detention conditions and of techniques used by his CIA interrogators. AE 354C; AE 354G; *see also* Unoff./Unauth. Tr. 7528-30 (14 Dec. 2016). These conditions and techniques had recently been declassified through Government and Trial Counsel efforts to support open and fair military commission proceedings on RDI matters consistent with national security. *See, e.g.*, AE 402E at 28-30, 44-47.

the information in the summaries discoverable under R.M.C. 701(c)(3) as statements which, though not intended for use by trial counsel as evidence, were "material to the preparation of the defense," given that the subject matter overlapped with charged offenses. Two of these summarized statements are pertinent to AE 353W, the Defense Motion to Strike AE 353V. *See* Bates 10015-00076836 and Bates 10015-00076554 and classified discussion at Attachment B.

d. 11 September 2012. The Government responded to the 9 August 2012 Defense discovery request. As to the request for records of Mr. Nashiri's interrogations, Trial Counsel responded in pertinent part that while unaware of any videotapes, audiotapes, or transcripts, it had "provided and will provide the defense with information regarding the conditions of confinement of the accused . . . and any statement made by the accused while in detention . . . necessary and material to the preparation of the defense, subject to applicable any applicable privileges and protective orders." AE 120, Attach. B at ¶ 32. As to the request for materials prepared in advance of questioning and information sought, Trial Counsel respectfully declined to produce all such materials and stated that if the Defense could demonstrate how they were relevant, necessary, or material to the preparation of the defense, the Government would reassess the request. AE 120, Attach. B at ¶¶ 66-67.

e. 24 September 2012. The Defense moved to compel "information related to Mr. Al-Nashiri's detention, rendition and interrogation in all CIA secret facilities[,]" including "[a]ll statements obtained from interrogations, summary [sic] of interrogations, reports produced from interrogations, interrogation plans, interrogation logs, and agents notes of Mr. Al-Nashiri or any other co-conspirator, named or unnamed." AE 120 at 1-2.

f. 28 January 2014. The Defense moved to compel production of the full study of the CIA's former RDI Program by the Senate Select Committee on Intelligence (SSCI), which had been completed 13 months earlier but without any portion having yet been declassified or made available to the public or the Defense. AE 206 (28 Jan. 2014). The Defense stated that the SSCI study was "material and relevant to preparation of the accused's defense" because, in pertinent part, it was reported to contain "a detailed, factual description of how interrogation techniques were used, the conditions under which detainees were held and *the intelligence that was—or wasn't—gained from the [RDI] program*." *Id.* at 1, 3 (quoting Sen. Feinstein) (emphasis added). Among other arguments in the motion, the Defense emphasized that "discovery . . . is not limited to admissible evidence," *id.* at 5 (citations omitted), maintained that the SSCI study contained "information that would assist in . . . pretrial issues," *id.*, and anticipated that the study would confirm that "the RDI program generated largely useless information" that would be material to convincing "[t]he members . . . [that] the accused's torture . . . [and] the government's embrace of barbarism was all for nothing," *id.* at 8. The Defense motion further noted that "the government has already notified defense counsel that it intends to use statements taken from the accused during interview [sic] with the FBI." *Id.* at 7.

g. 12 February 2014. In its reply brief on the motion to compel the full SSCI study, the Defense stated, "[a]ccording to published statements the [study] is exculpatory because *it demonstrates that the torture inflicted on the accused was unnecessary and produced unreliable information*. This *bears upon several issues that the Commission will address including the admissibility of the accused's so called clean team statement* [to the FBI]." AE 206B at 4 (emphases added).

h. 14 April 2014. Judge Pohl substantially granted the Defense motion to compel RDI-related information, *see supra* Fact 5.e, including among ten discoverable categories of such information, "[a]ll statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogations logs, and interrogator notes of interrogations of the Accused and all co-conspirators identified in Appendix C of the Charge Sheet . . . ." AE 120C at 4. The Government moved for reconsideration, citing the apparent preclusion in the Judge's ruling of the use of M.C.R.E. 505 procedures to protect identities and other sensitive classified information. AE 120D at 7 (23 Apr. 2014). The Defense opposed reconsideration, arguing in pertinent part that the discovery sought was necessary because "[t]he prosecution has indicated that [it] intends to rely on the accused's statements to investigators, which were taken after four years of torture." AE 120E at 11 (14 May 2014).

i. 24 June 2014. Granting in part and denying in part the Government's motion for reconsideration of the RDI-related discovery order, Judge Pohl clarified the availability to the Government of M.C.R.E. 505 procedures to protect classified information. Among four theories argued by the Defense and accepted by the Commission for why the RDI-related information was both relevant and helpful, Judge Pohl found that even while "[t]he Prosecution does not intend to introduce any statement from the Accused taken in the course of administering [enhanced interrogation techniques (EITs),]" nonetheless "the use of EITs on the Accused implicates the admissibility of any subsequent statement of the Accused by directly impacting *whether the subsequent statement was tainted by the earlier statements*." AE 120AA at 7 (emphasis added). The ten categories of discoverable RDI information were retained in the amended order, thus compelling the production of many hundreds of statements by Nashiri in CIA custody dealing with matters other than the offenses charged against him. The Government subsequently filed numerous motions seeking Commission approval of its proposed substitutes of classified information within the AE 120 series of appellate exhibits. *See* AE 353V at Fact 3.w.

j. 27 February 2015. In a classified supplemental AE 206-series filing with an unclassified title, the Defense moved to "Compel Discovery of Information . . . of All Documents Cited in the SSCI Report Relating to the Arrest, Detention, Rendition, and Interrogation of Mr. Al-Nashiri." AE 206R. The filing incorporated by reference the declassified version of the 525-page executive summary of the SSCI study, *see supra* Facts 5.f and 5.g, which had recently been released to the public by the United States Government. The declassified executive summary included a 7-page section, annotated with 42 footnotes to hundreds of CIA reports and other explanatory material, on "[t]he Detention and Interrogation of 'Abd al-Rahim al-Nashiri." *SSCI*

Study Executive Summary at 66-73 (3 Dec. 2014). The classified Addendum at Attachment B sets forth in further detail some of the information that was provided by Nashiri to CIA questioners and that the Defense invoked in the AE 206 series.

k. 30 September 2016. The Government provided notice to the Commission and the Defense of its extensive discovery efforts with regard to the former RDI Program of the CIA, in general, and pursuant to AE 120AA, in particular. AE 120AAAAAA. Judge Pohl's 2014 ruling in AE 120AA had, among other things, compelled the production many hundreds of statements by Nashiri in CIA custody dealing with matters other than the offenses charged against Nashiri, a body of information that demanded extensive resources to produce in a manner that protected classified information. The Government filed numerous motions seeking Commission approval of its proposed substitutes of classified information throughout 2016. *See* AE 120XXXXXXX (reflecting filing date of Government's *ex parte* motions, date of Commission approval, and date of production of the approved substitutes to the Defense).

l. 13 December 2016. The Commission heard initial oral argument on AE 353. Unoff./Unauth. Tr. 7416-65. In discussion with Assistant Trial Counsel, the Military Judge noted that "it is helpful when the other side knows you have information you are not disclosing," Tr. 7446, and that while it must be used judiciously, *in camera* review can be helpful "to make sure we have faith in the system, they have faith in the discovery process," Tr. 7448. *See also* AE 353V at Fact 3.x.

m. 5 January 2017. The Commission ordered the Government to identify, by *ex parte* and *in camera* filing if the Government so chose, "all information related to Mr. Al-Fadhli that ha[d] previously been provided to the Commission in the AE 120 series." AE 353C at 3, *vacated on other grounds*. The Government then provided the Commission an *ex parte* notice, setting forth the information directed by the Commission in AE 353C. AE 353D (23 Jan. 2017). Though not required to do so, the Government also attached to the *ex parte* filing copies of the four prudential search requests (PSRs) to that point that had included Fadhli-related requests for information or otherwise yielded Fadhli-related documents for review. AE 353D; *see also* AE 353V at Facts 3.y and 3.z.

n. 2 March 2017. To ensure comprehensiveness in its holdings of potentially discoverable information pertaining to Fadhli and to ensure it would have available for review the "strike package" assumed to have been compiled in connection with the operation resulting in Fadhli's July 2015 death, the Government sent additional PSRs to pertinent organizations. *See* AE 353V at Fact 3.dd. In the ensuing months, returns to these PSRs were received by the Prosecution, which commenced review of the highly sensitive operational information and attempted to ascertain whether all responsive material had been acquired. *See* AE 353V at Facts 3.kk and 3.ll. The 2 March 2017 PSRs were submitted to the Commission for *in camera* and *ex parte* review as AE 353V, Attachment D.

o. 16 February 2018. Judge Spath abated the Commission, citing defiance of his orders by the Military Commissions Defense Organization and by the civilian defense counsel in the case. *See* AE 353V at Fact 3.oo. As of this date, Trial Counsel and supporting staff had been unable yet to culminate review of the "strike package" PSR returns with a request to the Military Judge for substitutions and other relief under M.C.R.E. 505(f). *See generally* AE 353V at Facts 3.pp through 3.tt (providing procedural history during the abatement and associated stay and noting the lifting of the stay on 11 June 2019).

p. 29 July 2019. The Defense submitted a motion for defense counsel to be permitted to attend M.C.R.E. 505(f)(2)(A) presentations by the Government. AE 402. The third of 18 CIA cables attached to the motion—which cables were declassified for public release in 2017 and 2018 through the Government and Trial Counsel efforts depicted in AE 402E at 28-30, 44-47 and were offered by the Defense as proof that similarly helpful information would be obtained were the Commission to end all *ex parte* M.C.R.E. 505 presentations by the Prosecution—described "aggressive phase interrogations" of Mr. Nashiri in November 2002 that had included "walling" and placement of Mr. Nashiri in a box. AE 402, Attach. C, Cable 3, at ¶¶ 2, 4. The cable stated that early in the questioning, Mr. Nashiri was not aware of attacks being planned during Ramadan. *Id.* at ¶ 5. The classified Addendum at Attachment B sets forth in further detail the information that was reported in this cable to have been provided by Mr. Nashiri to CIA questioners and that the Defense incorporated into its "Statement of Facts" on the motion so as to meet its "burden of persuasion by a preponderance of the evidence." AE 402 at 2. Several of the other cables and materials attached to AE 402 similarly include statements reported to have been made by Mr. Nashiri.

q. 1 April 2021. The Commission issued AE 353X, Ruling, providing direction as to what forms of summaries relating to Fadhli the Military Judge will find "provide the accused substantially the same ability to make a defense as would discovery of or access to the specific classified information" under M.C.R.E. 505(f). *See* AE 353V at Facts 3.vv through 3.rrr (detailing M.C.R.E. waypoints leading up to AE 353X, Ruling). The Government is now preparing summaries consistent with Commission direction.

r. The Defense has not filed supplements to AE 353 or AE 353F as of the date of this response. Nor—with the exception of the discovery requests forming the basis of its motions to compel and an interchange regarding the letter rogatory that had been delivered to the Government of Kuwait in April 2019, *see* AE 353V, Facts 3.nn and 3.ccc—has the Defense requested from Trial Counsel any clarifications or assistance with regard to Fadhli-related discovery already received.

s. Additional, still-classified facts proffered for purposes of deciding this motion—along with intertwined statements made by Mr. Nashiri that are appropriate at this juncture to keep *in camera* even if not exclusively classified—are contained in the Addendum at Attachment B, which in turn has nine Tabs. That Attachment is filed *in camera* but not *ex parte*. An amended summary of a CIA cable previously

summarized and approved for substitution by Judge Spath in an order that was not vacated by *In re Al-Nashiri III*, *see* AE 353V at Facts 3.tt and 3.uu, has been newly prepared using the guidance in AE 353X, Ruling. While the Government interprets R.C. 3 as precluding a request for relief under M.C.R.E. 505(f) in the present response, *see Trial Judiciary Rules of Court* at 22 ("Each motion will only address a single issue."), the original cable, line-in-line-out version, and proposed amended summary are submitted within a Tab at Attachment C and will soon be included within the next AE 353-series request for substitutions. Another original cable, line-in-line-out version, and proposed amended summary are submitted within a second Tab at Attachment C and will be included within an upcoming AE 406-series request for substitutions.

6. Law and Argument

I. The Notice Proffers Lawful and Responsive Facts for the Limited Purposes of Resolving a Pre-Trial Defense Motion Alleging Nonproduction of Exculpatory Evidence and of Answering the Military Judge's Requirements and Concerns Regarding Fadhli-Related Discovery

Within an appellate exhibit, facts are proffered by a party "for the purposes of resolving a motion." *Trial Judiciary Rules of Court* at R.C. 3.5.b and page 24 (21 Dec. 2017) (describing statement of facts to be included in a filing as part of motions practice); *see also* R.M.C. 905; R.M.C. 907. The Notice—providing the Government's progress in reviewing documents regarding two theoretical alternative perpetrators to the Accused—fulfills a requirement the Commission imposed while regulating discovery and while considering the Defense request for dismissal of all charges based upon claims that the Prosecution denied the Accused exculpatory evidence. The motions practice context of the Notice is thus essential and unambiguous. The Notice includes nothing which seeks to "admi[t] into evidence"[4] any statement of the Accused, or anyone else, that was allegedly made under the conditions described within the section 948r prohibition. It extends no invitation to the Military Judge, much less the panel, to arrive at any conclusion regarding Nashiri's conduct or culpability through reliance upon evidence that is allegedly tainted by torture, cruel-inhuman-degrading treatment, or coercion of any kind.

[4] *See also infra* section 6.IV of this response brief for analysis of what the reference in 10 U.S.C. § 948r(a) to "admissible in a military commission" means.

What the Notice does do is provide lawful and responsive information intended to be helpful to the Military Judge and opposing counsel as the Commission continues to regulate discovery. It seeks to facilitate, while respecting differing roles within the discovery process, the Military Judge's ongoing evaluation of the Government's efforts to make timely and specific requests for information pertaining to Al-Fadhli and then review that information. And it addresses other concerns outlined in AE 353U, which directed the Government to submit the Notice. In AE 353U, the Commission denied an interim Defense request for production of all documents reviewed by the Government. Still, the Commission also took the step—safely within its R.M.C. 701(*l*) authority—of requiring assurances that the prosecution team had come into possession of Fadhli-related information and that a currently assigned trial counsel had conducted a review of that material to determine discoverability.

In the overarching AE 353 motion series, the Defense seeks dismissal for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). In light of the drastic nature of the requested relief and the concerns expressed by the Commission in AE 353U (and earlier, in AE 353K), the Notice recounts how, despite many months of delays, Government efforts have been diligent. These efforts included the gathering of highly sensitive "strike package" information via additional search requests to pertinent organizations on 2 March 2017, *see supra* Fact 5.n and AE 353V, Facts 3.dd, 3.kk, and 3.ll, which for legitimate reasons had not resulted in a motion for substitutions prior to the abatement of the Commission on 16 February 2018 and which could not culminate in production after 16 February 2018 until the M.C.R.E. 505 process was available to protect non-discoverable operational secrets intertwined with potentially discoverable information. *See supra* Fact 5.o and 5.q and AE 353V, Facts 3.pp through 3.tt and 3.vv through 3.rrr.

II. By Referencing Two Statements Reported to Have Been Made By the Accused in CIA Custody, Without Relying Upon the Statements Themselves for the Truth of Any Purported Contents Therein, the Notice Provides Information Enabling the Commission and Counsel to Ascertain Why Discovery Sought By the Defense Does Not Exist

The alleged unlawful "reliance" of the Notice upon statements made under circumstances of torture or cruel, inhuman, or degrading treatment, *see* AE 353W at 1, 4, appears in the classified Addendum in Attachment E of AE 353V.[5] Detailed analysis of why the Defense allegation is mistaken is contained in the classified Addendum to this response, at Attachment B. It suffices to write here that two summaries provided to the Defense on 30 August 2012, *see supra* Fact 5.c, were helpful in demonstrating why discovery sought by the Defense does not exist.

Vital to the resolution of AE 353 and response to the Commission's concerns in AE 353U is the fact that the separate line of substantive intelligence reports[6] regarding Abu Assem Al-Makki's supposed leading role in the *MV Limburg* attack concluded in January 2003, when the rejection of Al-Fadhli's claims about that role was itself included in an intelligence report. In short, the Government could not be holding out on producing documents containing *Brady* evidence on these matters—as the Defense alleged in its demand for dismissal of all charges—because the ending of substantive intelligence reporting on Al-Fadhli's claims explains why there are no further documents to find regarding those claims. Rather, what post-2003 discovery has been found, and at this point largely produced, consists of references to undisputed roles for Al-Fadhli as a Kuwaiti financier of extremist activities and for Abu Assem Al-Makki as a Yemeni extremist, sometimes accompanying echoes by others in the U.S. government of the

[5] The Government believes the Defense reference to "AE 353V at 3" at AE 353W at 4 was intended to be "AE 353V, Attach. E at 3."

[redacted]

pre-2003 claims and reporting, and involving no new information about the USS COLE or *MV Limburg* attacks.

While the Notice is careful to caveat that the Prosecution does not intend to use as trial evidence statements obtained through intelligence interrogations, it is also an important fact for purposes of resolving AE 353 and responding to the Commission's concerns in AE 353U that rejection *by the intelligence community* of Al-Fadhli's claims was based in part upon statements reported as having been made by the Accused while in the custody of the CIA and within the former RDI Program. The Commission in 2017 first drew the connection between such RDI information and Al-Fadhli matters in AE 353C, which ordered the Government to identify for the Military Judge all discovery related to Mr. Al-Fadhli that had previously been provided through the series of filings dedicated to producing to the Defense adequate M.C.R.E. 505 substitutes for still-classified reports of statements by the Accused and other information pertaining his interrogations by the CIA. *See supra* Fact 5.m and AE 353V, Facts 3.y and 3.z. Further details of these important discovery-specific facts are contained in the Addendum at Attachment B. Like the Addendum to the Notice, Attachment B to this response is appropriately *in camera* not only because it contains still classified information, but because a sealing order of this Commission,[7] if not strictly section 948r and the rules of evidence, evinces that reasonable care should be taken to conduct litigation on preliminary matters such that prospective panel members will be less likely to learn details of an accused's allegedly inadmissible statements.

The Notice was submitted in recognition of the prudence, under present circumstances, in providing the Commission and "the other side" some additional insight into how Government discovery obligations are being carried out and what discoverable information might or might not be in existence. *See supra* Fact 5.l. To the extent this can be done without undercutting the traditional roles in the criminal discovery process envisioned in the M.C.A. and Manual for Military Commissions (M.M.C.), ceding Trial Counsel's authority and

[7] *See infra* note 14 and accompanying text (discussing the sealing, in AE 168M/AE 241I, of Mr. Nashiri's 2007 statement to the FBI in AE 168M/AE 241I).

responsibilities within the discovery process, risking harmful disclosure of classified information, or inheriting a larger obligation than the law contemplates or is feasible, there is potential for such an approach to help resolve the "obviously complicated" Fadhli-related discovery matters. AE 353V at Fact 3.x. Hence the inclusion within the Notice of the explanation for why the intelligence community ceased reporting on Abu Assem Al-Makki's leadership in the *MV Limburg* attack. That explanation leverages nowhere the purported truth, or untruth, of the contents of Mr. Nashiri's statements, nor does it contemplate that those statements would ever be before the members. To the contrary, as the Defense concedes, on both occasions where the explanation for cessation of new reporting on Abu Assem Al-Makki's once suspected leadership in the *Limburg* attack appears, the Notice cautions, "[t]hese statements are not intended for use by the Prosecution . . . ." AE 353V, Attach. E at 3 n.1 and 5 n.2.

III. The Limited "Uses" of the Accused's Statements to the CIA In This Case Thus Far By the Commission and Both Parties—Including By the Prosecution in the Notice—Have Complied with Section 948r Based Upon the Text, Context, and History of That Provision

Supreme Court precedent models how a provision of law must be interpreted. To resolve the motion to strike, we must "examine the 'text, context, and relevant historical treatment' of the provision at issue." *Musacchio v. United States*, 577 U.S. 237, 246 (2016) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010)); *see also Fed. Republic of Ger. v. Phillip*, 141 S. Ct. 703, 714 (2021) (analyzing "the text, context, and history" of provision at issue).

A. Text

The M.C.A. comprises chapter 47A of the United States Code. In the subchapter on "Pre-Trial Procedure," subsection (a) of section 948r provides:

> No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

The provision at issue then proceeds in subsection (b) to generally prohibit compulsory self-incrimination at military commission proceedings convened under the M.C.A., in subsection (c) to set forth the findings that must be made by a military judge before a voluntary statement can be admitted into evidence, and in subsection (d) to list the factors that the military judge must consider to determine whether a statement is voluntary. 10 U.S.C. § 948r(a)-(d). For purposes of resolving this motion the Government does not object to the Commission assuming that the statements made by Mr. Nashiri in CIA custody and cited in the *in camera* Addendum to the Notice fall within the section 948r(a) prohibition. *See supra* note 2 and accompanying text. As a textual matter, then, the question thus narrows to whether inclusion of those statements in that manner runs afoul of the command that no such statements "shall be *admissible in a military commission* . . . ."

The "except[ion]" comprising the final clause of subsection (a) does not apply here, as Mr. Nashiri is the only person "accused" within the meaning of that term as it is exclusively used within the M.C.A. *See, e.g.*, 10 U.S.C. § 948q(a) ("Charges and specifications against an accused in a military commission under this chapter shall be signed . . . ."). He is charged with perfidy under section 950t(17), murder in violation of the law of war under section 950t(15), attempted murder in violation of the law of war under section 950t(28), terrorism under section 950t(24), conspiracy under section 950t(29), destruction of property in violation of the law of war under section 950t(16), attempted destruction of property in violation of the law of war under section 950t(28), attacking civilians under section 950t(2), attacking civilian objects under section 950t(3), and hazarding a vessel under section 950t(23). He is not charged with torture under section 950t(11), an offense that includes a "purpose of obtaining information or a confession . . . ," nor does any element of any of the charged offenses against the accused nor any aggravating factor hinge upon whether a statement was made by someone subject to harsh questioning. The need to prove such an element to the members beyond a reasonable doubt, not present in this case, defines the sole exceptional situation in which a statement derived from torture can be "admissible in a military commission."

Yet while the subsection (a) exception does not apply here, its language helps confirm that the framework of that subsection is one of a criminal prosecution, in which there is an individual who has been formally charged, and trial counsel are seeking to "*admi[t] . . . evidence*" and specifically to do so "*against* a person *accused* . . ." in order to prove guilt, and if found guilty to establish why a certain punishment should be imposed, which are the general issues raised when an accused pleads not guilty. Because the exception does not apply, the Commission need not contemplate potential questions about its precise contours, such as whether defense counsel of an accused charged with torture under section 950t(11) may be permitted to introduce into evidence and argue to the members that a statement reportedly made as a result of their client's conduct was actually made under torturous or cruel circumstances by someone other than the victim being questioned by the accused.

Other language in the text of section 948r further confirms that subsection (a) is to be interpreted as pertaining to evidence for trial on the general issues of guilt or sentencing. Subsection (b), a differently termed prohibition, forbids "requir[ing]" any "*person*"—not merely an "accused"—"to testify against himself or herself *at a proceeding of a military commission* under this chapter." This language conveys that compulsory self-incrimination is not to occur irrespective of who may be testifying and regardless whether the proceeding involves an interlocutory matter or trial on the merits. By contrast with subsection (b), and like subsection (a), the wording of subsection (c) is that of an "accused" facing charges upon which evidence must be "admitted[.]" It furthers the textual anchoring of this framework by reference to a military judge who is positioned to "find[]" whether or not "admission of the statement into evidence" should or should not occur. Subsection (d), by expressly incorporating a reference to subsection (c), signals that it, too, pertains to whether evidence will be "admitted" or not on the general issue of guilt.

In the motion to strike, the Defense attempts to expand the term "admi[t]" within the words, "shall be *admissible* in a military commission," to mean mention, use, or rely upon at any

proceeding or for any purpose. There is no authority for this expansive reading in the text of the provision at issue.

B. Context

Examination of section 948r within the context of other provisions of the M.C.A. reinforces the foregoing textual interpretation of a prohibition that precludes a military judge admitting certain statements into evidence at trial before members but may require inclusion of and reference to the statements for limited purposes in the non-evidentiary record. As mentioned at the outset of the analysis of the provision at issue, section 948r is contained within that subchapter of chapter 47A devoted to "Pre-Trial Procedures." This contextual placement indicates that section 948r's prohibition is to be applied as necessary by a military judge during and through litigation that may begin in the pre-trial phase.

A series of provisions in the next subchapter, devoted to "Trial Procedures," furthers the contextual reinforcement. Section 949a provides that military commissions will generally employ the procedures and rules of evidence applicable in modern United States courts-martial, which through operation of article 36 of the Uniform Code of Military Justice (U.C.M.J.) in turn generally follow the procedures and rules of United States district courts. The exception for rules that "may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities," 10 U.S.C. § 949a(b)(1), is a reminder that trials dealing with armed conflict will confront the military judge and parties with distinct challenges to gathering and weighing evidence. Section 949a also confirms the central role of the presiding military judge, who *inter alia* suppresses matters offered as trial evidence if they are unfairly prejudicial or would mislead the members, 10 U.S.C. § 949a(b)(2)(F), determines whether evidence is authenticated, 10 U.S.C. § 949a(b)(3), and rules on whether hearsay can be admitted, 10 U.S.C. § 949a(3)(D).

Section 949d forges the important distinction, mostly implicit in the text of section 948r, between the "issues raised by a plea of not guilty," a phrase that further study of the

M.C.A. confirms means the general issues of whether an accused is guilty of a charge and what punishment an accused found guilty should receive, and "defenses or objections which are capable of determination without trial" of such issues. 10 U.S.C. § 949d(a)(1)(B). It is the military judge who implements the distinction, as the section empowers him or her to "call the military commission into session without the presence of the members" so as to hear and rule all manner of matters other than guilt or punishment. Among these may be claims by an accused, such as the overall AE 353 motion at bar, that are grounded in the reasonable opportunity to obtain evidence guaranteed under section 949j.

Section 949*l* clarifies that a military judge alone—following consideration that may involve a section 949d session without members—shall rule upon "all questions of law, including the admissibility of evidence and all interlocutory questions . . . ." 10 U.S.C. § 949*l*(b). Meanwhile the issues of guilt and punishment are reserved to members alone, who must eventually vote on "on the findings[,]" and may eventually vote "on the sentence[.]" Taken within a context that includes section 949*l*, then, section 948r's reference to "admissible in a military commission" means that a military judge may encounter and need to weigh, for admissibility before the members and other limited purposes, a range of interlocutory questions "arising during the proceedings." *Id.*

The subchapter of the M.C.A. devoted to "Classified Information Procedures" and already subject to some analysis by the Commission in the present AE 353 series, as well as in the series of appellate exhibits dealing with motions AE 400, AE 402, AE 405, and AE 406, cements section 948r's context to be one featuring a central and pivotal role for the military judge. As the presiding officer of the military commission, *see also* 10 U.S.C. § 948j, the military judge has a unique role in assuring the conduct of a fair trial without ever ordering the release of classified information to someone not authorized to receive it. 10 U.S.C. § 949p-1(a). The military judge may hold pretrial conferences to address classified matters—*ex parte* to the extent necessary to protect the classified information discussed—and also issue orders to protect against disclosure of such information. 10 U.S.C. §§ 949p-2, 949p-3. Upon proper invocation

of the United States' classified information privilege, the military judge also applies a heightened "noncumulative, relevant, and helpful" standard for discovery, 10 U.S.C. § 949p-4(a)(2), may authorize the United States to produce substitutes in lieu of original classified information, 10 U.S.C. § 949p-4(b)(1),[8] holds hearings to determine the use, relevance, or admissibility of classified information raised by the parties, 10 U.S.C. § 949p-6(a)(1), and may approve alternative trial procedures to protect classified information while affording the accuse the ability to make every legally cognizable defense, rebut the prosecution's case, or seek to reduce the sentence, 10 U.S.C. § 949p-6(d).

C. History

The history of section 948r and the M.C.A. demonstrates that the foregoing textual and contextual analyses of the provision are correct, and that statements falling within the section 948r(a) prohibition on admissibility are among those many matters that the military commission may confront, deal with under procedural rules for interlocutory matters, and

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[8] The military judge shall permit trial counsel to make a request for substitutions in the form of an *ex parte* presentation to the extent necessary to protect classified information. 10 U.S.C. § 949p-4(b)(2); M.C.R.E. 505(f)(2)(B). The Government is mindful of the Commission's prior direction—relying on the Seventh Circuit's decision and reasoning regarding *ex parte* proceedings under Federal Rule of Criminal Procedure 16 in *United States v. Napue*, 834 F.2d 1311 (7th Cir. 1987), and on the "to the extent necessary" proviso in section 949p-4(b)(2) itself—that broad assertions of general principles and other matters that should rightly be subjected to the adversarial process must be segregated where feasible and presented in a manner that permits the party opponent to see them. AE 402K at 12 (26 Dec. 2019). The Notice, like other filings and presentations, complies with this guidance. *See* AE 353V (segregating Attachment D as the only material in that filing to be submitted *ex parte*). Similarly, the Commission's order directing the hearing that was held 7 January 2021 occurred only after the Commission had evaluated the Government's motions and declarations to determine whether they established that *ex parte* consideration was necessary to protect classified information. AE 353N/405G/406K, Order (9 Dec. 2020). Subsequent orders confirmed the necessity for *ex parte* presentation and consideration. AE 405J (16 Mar. 2021); AE 406M (19 Mar. 2021); AE 353X (1 Apr. 2021). Notwithstanding the false attributions of sinister motives and/or heedlessness of the law to Trial Counsel by the Defense, *see* AE 353W at 3-4, the Government maintains that matters it has and will submit *ex parte* fall under statutory authority for doing so and that these matters properly bear upon the Military Judge's assessment of whether proposed substitutes are adequate, will protect national security, and are otherwise compliant with the M.C.A.

prevent from reaching the members using rules of evidence. The statutory prohibition on the admissibility of statements obtained as a result of torture first appeared in the Military Commissions Act of 2006. *See* H. COMM. ON ARMED SERVICES, MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 1, at 9-10 (2006) [hereinafter H.R. REP. NO. 109-664]. Although at that time there was already a long tradition against admitting coerced statements in courts-martial, codified in the U.C.M.J. at article 31, the 2006 M.C.A.'s section 948r(a) prohibition had no direct counterpart in article 31 or any part of the U.C.M.J.[9]

Further reflecting that coercion and related evidentiary issues would be at the forefront of challenges to be faced by law of war military commissions trying unprivileged belligerents, the 2009 M.C.A.'s section 948r(a) replaced the former section 948r(b), expanding its ban to preclude admissibility of statements obtained as a result of cruel, inhuman, and degrading treatment. *See* COMM. OF CONFERENCE, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010, H.R. REP. NO. 111-288, at 395-96 (2009) [hereinafter H.R. REP. NO. 111-288].[10] The 2009 version of section 948r, in anchoring admissibility of any statement of the accused (even ones not derived from torture or cruel-inhuman-degrading treatment) to a

[9] In its report on H.R. 6054, which introduced what would become the Military Commissions Act of 2006, the House Armed Services Committee indicated that while statements obtained as a result of torture would be excluded, "the 'fruit of the poisonous tree' doctrine (*see Wong Sun Et Al. v. United States*, 371 U.S. 471 (1963)) does not apply to this section . . . ." H.R. REP. NO. 109-664, at 9-10.

[10] In 2009, the prohibition of compulsory self-incrimination was moved from subsection (a) to subsection (b), and the prohibition against admitting statements obtained as a result of torture was moved from subsection (b) to subsection (a) and expanded to include cruel-inhuman-degrading treatment. With the addition also of a "totality of the circumstances" test for reliability, probative value, and voluntariness in a new subsection (c), and a set of factors for applying that test resembling somewhat the doctrine of *Oregon v. Elstad*, 470 U.S. 298 (1985), in a new subsection (d), the history of section 948r will require further consultation as issues arise before this military commission pertaining to derivative evidence. The implementation of section 948r's commands in M.C.R.E. 304 will also draw the Military Judge and parties into a close analysis of that rule when specific motions to suppress are made, as is indicated by the Defense citations and argument in AE 353W at 4. However, the analysis of section 948r's legislative history and of M.C.R.E. implementation in the present response (for the latter see part 6.IV *infra*) are sufficient to enable the Commission to address—and on deliberation deny—the pending motion to strike.

voluntariness test (except for narrow battlefield circumstances), also gave unprecedented statutory imprimatur to the military judge's pre-trial role in preventing coerced statements from influencing members. In courts-martial convened under the U.C.M.J., that role, though present, was substantially defined by implementing rules and by case law. In traditional law of war military commissions, there was no military judge at all. In 2009, however, section 948r expressly incorporated a "totality of the circumstances" test for voluntariness, 10 U.S.C. § 948r(c), and it further detailed factors the military judge must consider within that test, 10 U.S.C. § 948r(d). This framework was specifically considered by members of Congress at the request of the Executive Branch, and particularly The Judge Advocates General. *See, e.g.*, *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Services,* 111th Cong. 13 (statement of Sen. McCain) ("I agree with the provision calling for the military judge to evaluate the admissibility of allegedly coerced statements using a totality of the circumstances test . . . ."), 14 (statement of Vice Admiral MacDonald) ("I recommend you include [in section 948r] a list of considerations a military judge should use . . . .").

Similarly, the military judge's central and pivotal role is reflected in the history of other M.C.A. provisions pertinent to interpreting section 948r(a)'s "admissible in a military commission" phrase. Section 949d(a) of both M.C.A.s as introduced closely tracked the language of U.C.M.J. article 39(a). *See* H.R. REP. NO. 109-664, at 11; H.R. REP. NO. 111-288, at 1086. For its part, article 39(a) marked an important milestone in modern American military justice, as it first gave statutory sanction "to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge." *See* S. REP. NO. 90-1601, at 10 (1968) (highlighting also that a judge's "pretrial disposition of motions raising defenses and objections is in accordance with rule 12 of the Federal Rules of Criminal Procedure" and illustrating that role with questions of admissibility).

When it decided that a Guantanamo detainee's pre-M.C.A. military commission lacked authority to proceed, the Supreme Court placed decisive weight on the commission's deviations from court-martial rules without a requisite demonstration of practical need for doing so. *Hamdan v. Rumsfeld*, 548 U.S. 557, 647-53 (2006) (Kennedy, J., concurring). Among these deviations were that the presiding officer was not a military judge, that he did not have the power to rule upon interlocutory issues, and that the commission members could view evidence even if the presiding officer individually would have excluded it. *Id.* at 648, 649, 652-53. This irregular concentration of discretion within an "Appointing Authority" and within a commission as small as three non-lawyer officers raised "separation-of-power concerns of the highest order." *Id.* at 638. Congress responded, *inter alia*, by requiring the presiding officer of a military commission to be a military judge cloaked with powers and independence of a court-martial military judge. *See, e.g.*., *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld: *Hearings Before the S. Comm. on Armed Services*, 109th Cong. 16 (2006) (questioning of The Judge Advocates General by Sen. Levin).

The current system of military commissions is thus "the product of an extended dialogue among the President, the Congress, and the Supreme Court." *In re Al-Nashiri*, 835 F.3d 110, 114 (D.C. Cir. 2016) (quoting *In re Al-Nashiri*, 791 F.3d 71, 73 (D.C. Cir. 2015)). Pursuant to that system's structure, "Al-Nashiri faces a trial with a military judge presiding and a 'jury' that, in capital cases, generally consists of twelve members known as 'members' of the military commission." *Id.* at 122. The Defense motion to strike, in attempting to expand section 948r(a)'s "admi[t] in a military commission" to mean mention, use, or rely upon at any proceeding or for any purpose, thus seeks to erase the history by which the military judge has acquired the authority and responsibility to deal with interlocutory matters the panel should and must not hear.

D. Limited "Uses" by Defense, Prosecution, and Commission

The limited "uses" of Mr. Nashiri's statements in CIA custody have not run afoul of section 948r as properly interpreted in light of that provision's text, context, and history. Litigation leading to the Prosecution's "uses" was extensive, and is recounted above in section 5 of this response. That litigation ensued when the Accused availed himself of the full panoply of rights under the M.C.A., filing motions through counsel seeking discovery of all statements obtained from interrogations, the full SSCI study of the CIA's former RDI Program, and many other matters pertaining to Mr. Nashiri's detention and treatment. *See, e.g.*, AE 120; AE 206; *see also supra* at Facts 5.b, 5.e, and 5.f. As for Defense "uses," among the purposes stated by the Defense in obtaining these matters was specifically to show that what was gained from Mr. Nashiri was "largely useless[,]" something it wished to establish so as to demonstrate that "the accused's torture . . . [and] the government's embrace of barbarism was all for nothing[,]" *see supra* Fact 5.f (quoting AE 206 at 8), and that "the torture inflicted upon the accused . . . produced unreliable information." *See supra* at Fact 5.g (quoting AE 206B at 4). Another was to seek to suppress Mr. Nashiri's subsequent statements to the FBI. *Id.* Such "uses" by an Accused and his counsel, attentive to both the fact and content of statements made, will necessarily draw the pre-trial attention of judge and opposing counsel to such matters so as to resolve the specific motions at bar.

More recently, in its efforts to gain defense counsel permission to attend *ex parte* M.C.R.E. 505(f)(2)(A) presentations by the Government, the Defense incorporated into its "Statement of Facts" a lengthy and detailed report of statements made by Mr. Nashiri, all within documents that by their own terms appear to also report treatment making the statements inadmissible into evidence under section 948r(a). The specifics of these older and more recent "uses" by the Defense of Mr. Nashiri's statements are contained in the *in camera* Addendum to this response at Attachment B—in part because some of the analysis is classified, but in part for prudential reasons so as to maintain the presumption of innocence prior to trial on the merits.

Meanwhile, and in direct response to issues raised by the Defense or so as to meet its R.M.C. 701 discovery obligations, the Government has necessarily gathered, reviewed, and located the discoverable or potentially discoverable information within many hundreds of reports describing Nashiri's questioning by the CIA. This has brought prosecutors and paralegals from Government ranks into close and extensive contact with statements ostensibly covered by the section 948r(a) admissibility ban. *See supra* at Facts 5.c, 5.d, 5.i, and 5.k; *see also* AE 353V, Fact 3.w. The specifics of the Government's limited use of two statements made by Mr. Nashiri in the Addendum to the Notice are contained in Attachment B, the Addendum to this response.

For their part, the Military Judges detailed to this case have also had to delve into a large body of statements of Mr. Nashiri, presumably including ones coming within the section 948r(a) admissibility prohibition. Judge Pohl ordered the production of *all* statements made by Mr. Nashiri in CIA custody, not merely those intersecting the charged offenses, and one of the Defense theories of discoverability he recognized was that "the use of EITs on the Accused implicates the admissibility of any subsequent statement of the Accused by directly impacting *whether the subsequent statement was tainted by the earlier statements*." *See supra* Fact 5.i (quoting AE 120AA at 7) (emphasis added). On AE 353 matters themselves, Judge Spath ordered the Government to identify "all information related to Mr. Al-Fadhli that ha[d] previously been provided to the Commission in the AE 120 series." AE 353C at 3, *vacated on other grounds*. This body of information included statements by Mr. Nashiri under harsh treatment. AE 353D; *see also supra* Fact 5.c; *see also* AE 353V at Facts 3.y and 3.z. The present Military Judge, in regulating discovery under R.M.C. 701(*l*) and M.C.R.E. 505(f), is necessarily reviewing statements by Mr. Nashiri to the CIA.

But all of these limited "uses" by the parties and the Commission comply with section 948r. They are safely within categories other than "admi[tting] in a military commission." Moreover, they seek to vindicate, not harm, the Accused's right to the presumption of innocence and other rights.

IV. The Motion to Strike Ignores the Military Judge's Role, Essential to Justice, of Deciding Preliminary Questions Under the Rules of Evidence While Considering Matters That Are Inadmissible As Evidence Before the Members

The provision in section 949d(a) of the M.C.A. for sessions without members gives the military judge important statutory sanction to address interlocutory issues. However, as is revealed in the legislative history of U.C.M.J. article 39(a), the direct predecessor to the similarly worded section 949d(a), the statutory provision for sessions without members is "merely . . . a grant of authority . . . and does not attempt to formulate rules for the conduct of these sessions or for determining . . . particular matters . . . ." S. REP. NO. 90-1601, at 10 (1968). Such rules were more appropriately left to the President under U.C.M.J. article 36. *See id.* Under the M.C.A., such rules are the province of the Secretary of Defense, in accordance with the rulemaking authority in M.C.A. section 949a.

The Defense cites one of the rules made pursuant to that rulemaking authority, M.C.R.E. 304, about which there is more to say below. But a particularly pertinent provision to the issue at bar that the Defense fails to cite is in M.C.R.E. 104:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, whether to protect the identity of a witness, whether to afford protective testimonial procedures to a victim or child witness, or the availability of a witness to testify either at the site of trial or a remote site, shall be determined by the military judge. In making these determinations, *the military judge is not bound by the rules of evidence*, except those with respect to privilege.

M.C.R.E. 104(a) (emphasis added). The language of the parallel provision in M.R.E. 104 is quite similar:

> The military judge must decide any preliminary question about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible. In so deciding, *the military judge is not bound by evidence rules*, except those on privilege.

M.R.E. 104(a) (emphasis added). The language in M.R.E. 104(a) matches that of the parallel provision in the Federal Rules of Evidence. *See* F.R.E. 104(a).

The Defense demand in AE 353 for dismissal due to alleged nonproduction of supposed exculpatory evidence regarding Mohsen al Fadhli and Abu Assem Al Makki is tightly

linked to the RDI Program discovery the Defense sought, in part, for the purpose of suppressing Mr. Nashiri's statements to the FBI; accordingly, the preliminary questions facing the Military Judge in AE 353 include discovery-related issues associated with the promised Defense challenge to "the admissibility of evidence." As such, matters reported to the Military Judge in the Notice come expressly within one of the examples cited in M.C.R.E. 104(a). The linkage between resolution of AE 353 and RDI Program information was recognized by the Commission in January 2017, when it ordered the Government to identify "all information related to Mr. Al-Fadhli that ha[d] previously been provided to the Commission in the AE 120 series." AE 353C at 3, *vacated on other grounds*. *See also supra* Fact 5.m. The discovery produced under the AE 120 series was specifically intended to satisfy four Defense theories of relevance and helpfulness, one of which Judge Pohl understood to be whether "any subsequent statement of the Accused . . . was tainted by . . . earlier statements." AE 120AA at 7; *see also supra* Facts 5.f, 5.g, 5.h., and 5.i.

As to whether the military judge would be separately authorized to consider otherwise inadmissible evidence on a preliminary question of discovery compliance (i.e., not linked, as here, to other discovery pertaining to upcoming suppression litigation), the answer to this question is also "yes." Each of the parallel rules in M.R.E. 104(a), M.C.R.E. 104(a), and F.R.E. 104(a) includes a list of possible preliminary questions, but these lists are neither exclusive nor exhaustive. The Advisory Committee Notes on F.R.E. 104(a) are instructive:

> The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition . . . . To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus, when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge. *In view of these considerations, this subdivision refers to preliminary questions by the broad term "questions," without attempt at specification* . . . . This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus

> the content of an asserted declaration against interest must be considered in ruling whether it is against interest.

U.S.C.S. F.R.E. 104 COMMITTEE NOTES (emphasis added). The Government herein is making a technical point about the applicability to the Notice of M.C.R.E. 104(a)'s language unbinding the military judge from the rules of evidence to determine preliminary questions. It might be argued that because torture is abhorrent and statements derived from torture are unreliable the Commission should not itself rely upon them even if technically allowed to do so. In relation to this argument it must be remembered that the Government does not intend for the Commission to rely on the two statements recounted in the Notice Addendum for the truth of any matters therein, but instead solely as a proffer of why the discovery pertaining to Fadhli and Abu Assem Al Makki sought by the Defense does not exist.

In *Lytle v. United States*, a decision that pre-dates F.R.E. 104, the United States Court of Appeals for the Sixth Circuit considered hearsay that had been elicited at trial, but then proceeded to discuss the fact that the answer was merely preliminary to the admissibility of other evidence:

> As evidence of crime, this testimony was hearsay and inadmissible. A preliminary question of fact, however, had to be heard and determined by the trial judge as to the admissibility of evidence obtained by the search and seizure. When the admissibility turns on a preliminary inquiry of fact, as whether a confession is voluntary, or a dying declaration is made under fear of immediate death and after all hope of recovery is gone, the trial judge must hear the evidence and determine that issue of fact before the evidence can be admitted.

Lytle v. United States, 5 F.2d 622, 624 (6th Cir. 1925). Because the defense had not objected at the time and not demanded that the issue be considered outside the hearing of the jury, there was no error. *Id.*

Near the time a proposed edit to F.R.E. 104(a) was submitted to Congress, the Supreme Court decided *United States v. Matlock*, holding that hearsay statements had been improperly excluded from a suppression hearing, and that otherwise inadmissible evidence can be considered on preliminary questions, citing the pre-F.R.E. case of *Brinegar v. United States*:

> In *Brinegar v. United States*, 338 U.S. 160 (1949), it was objected that hearsay had been used at the hearing on a challenge to the admissibility of evidence seized when a car was searched and that other evidence used at the hearing was held

> inadmissible at the trial itself. The Court sustained the trial court's rulings. It distinguished between the rules applicable to proceedings to determine probable cause for arrest and search and those government the criminal trial itself—"There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." *Id.* at 173. That certain evidence was admitted in preliminary proceedings but excluded at trial—and the Court thought both rulings proper—was thought to merely "illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt." *Id.* at 174.

United States v. Matlock, 415 U.S. 164, 173-74 (1974). The Court continued:

> That the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed on November 20, 1972, when the Court transmitted to Congress the proposed Federal Rules of Evidence. Rule 104(a) provides that preliminary questions concerning admissibility are matters for the judge and that in performing this function he is not bound by the Rules of Evidence except those with respect to privileges.
>
> There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.

Id. at 174-75. The Court in *Matlock* specifically noted that the evidence the trial judge had excluded from consideration was reliable, and there was little reason to distrust its substance, even though it was hearsay.

In the military context, *United States v. Yanez* discusses the change in the standard for consideration of evidence on preliminary questions from requiring the application of the rules of evidence, to those rules not applying:

> Prior to the adoption of the Military Rules of Evidence, documentary evidence submitted in connection with interlocutory matters such as the admissibility of evidence was required to be authenticated in the same manner as documentary evidence submitted on the merits. However, Military Rule of Evidence 104(a) substantially changed military practice, by providing that the military judge is not bound by the rules of evidence when determining preliminary questions such as the admissibility of evidence. Military Rule of Evidence 104(a) is based on Federal Rule of Evidence 104(a). In civilian federal courts, the trial judge may consider hearsay or unauthenticated documents to decide a question of admissibility.

United States v. Yanez, 16 M.J. 782, 783-84 (A.C.M.R. 1983) (internal citations omitted). While there are numerous cases in both civilian and military courts that affirm the inapplicability of the rules of evidence to hearings on preliminary questions, many opinions also take care to point out

that judges should still carefully consider the reliability of otherwise inadmissible information before considering it. One of these was *Matlock*, mentioned above. Another was *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982), in which the court cited the holding in *Matlock* in determining that the evidence was excluded by the trial court improperly because there was little doubt that it was reliable, even if hearsay. *See also United States v. Jachimko*, 905 F. Supp. 540, 543 (N.D. Ill, 1995) ("It is true that under Federal Rule of Evidence 104, hearings on a motion to suppress do not require the rigid use of the Federal Rules of Evidence and all of its exclusionary apparatus. However, this does not mandate the trial judge's uncritical acceptance of evidence adduced in violation of those rules. It is recognized in this context that a 'trial judge's experience and legal training can be relied upon to winnow the chaff from the wheat.' 1 WEINSTEIN'S EVIDENCE ¶ 104[2] (1994).").

In light of judicial care regarding the reliability of the otherwise inadmissible information, it bears repeating that that the Government does not intend for the Commission to rely on the two statements recounted in the Notice Addendum for the truth of the matters therein, but instead solely as a proffer of why the discovery pertaining to Fadhli and Abu Assem Al Makki sought by the Defense does not exist. *For this purpose*—one that it should be pointed out is part of ensuring the Accused has access to evidence in discovery, thereby giving effect to his other rights—the statements reported by the intelligence community to have been made by Mr. Nashiri are reliable. That is, upon examination of the relevant reports—which are attached to this response and because of their classification must be examined *in camera*—there is little reason to distrust their limited use *for this purpose*, in that they indeed appear to have been part of the *reason the intelligence community* curtailed reporting on Fadhli's claims of a leading role for Abu Assem Al Makki in the *Limburg* attack.

The lack of authority in section 948r(a) itself for the Defense attempt to expand "admi[t]" to mean mention, use, or rely upon at any proceeding or for any purpose is matched by the lack of judicial authority for such a view. Meanwhile, in *United States v. Evans*, the United

States Court of Appeals for the Ninth Circuit made it clear that consideration of a preliminary question of admissibility is predicate to actual admissibility:

> Thus, Rule 104(a) provides the trial court with the authority to decide questions that might make evidence inadmissible under some other rule of evidence (or under the Constitution, a federal statute, or other Supreme Court rules), but it does not itself provide a substantive basis for excluding the evidence . . . . [T]he trial court uses its Rule 104(a) authority to determine "the existence of a condition," which in turn determines "[t]he applicability of a particular rule of evidence." Fed. R. Evid. 104(a) advisory committee notes. We have not previously considered whether a trial court can exclude evidence pursuant to Rule 104(a) without relying on some substantive basis outside of Rule 104(a), such as another rule of evidence, a federal statute, or the United States Constitution. We now hold that it cannot.

United States v. Evans, 728 F.3d 953, 960-61 (9th Cir. 2013). *Evans* also makes clear, in the first sentence of the quoted passage above, that preliminary questions are not limited to decisions based in the rules of evidence alone and may apply to decisions implementing a federal statute, such as section 948r. *See also United States v. Brewer*, 947 F.2d 404, 409 (9th Cir. 1991) ("Rule 104 . . . is limited to the preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied."); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998) ("Rule 104(b) allows a district court to determine preliminary questions of fact necessary to apply the Federal Rules of Evidence. The rule itself, however, does not provide a ground for the exclusion of any evidence as inadmissible under the Rules.").

Each of the cases cited in the Defense motion was a case in which the court considered, on the record, the ultimately inadmissible statements of the accused in determining whether they should be suppressed. The statements were used even if later suppressed, even for coercion amounting to torture. In the same way, it would be impossible to evaluate a statement under 10 U.S.C. § 948r without also using that statement in a motion on the preliminary question.

In *Brown v. Mississippi*, 297 U.S. 278 (1936), the Court overturned murder convictions because the confessions of the accused admitted at trial were obtained by torture. Cutting against the Defense's argument that admissibility and use are the same, the Court wrote of the defense counsel's actions, "Counsel for the accused, who had objected to the admissibility

of the confessions, [failed] to move for their exclusion after they had been introduced and the fact of coercion had been proved," clearly noting the distinction between determining potential admissibility and actually introducing the evidence against an accused. 297 U.S. at 286. *See also Blackburn v. Alabama*, 361 U.S. 199, 205 (1960) ("Consequently the conviction must be set aside, since this Court, in a line of decisions beginning in 1936 with *Brown v. Mississippi*, 297 U.S. 278, and including cases by now too well known and too numerous to bear citation, has established the principle that the Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and *introduced into evidence in a criminal prosecution which culminates in a conviction*." [emphasis added]); *United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D.Va. 2005) (renouncing torture and coerced confessions before rejecting appellant's claims that the confession offered against him at trial was the product of torture).

M.C.R.E. 304, cited by the Defense, does not contradict the foregoing analysis of M.C.R.E. 104 and related judicial authority. M.C.R.E. 304(c), devoted to "Procedure," prominently assigns to the military judge the role of hearing and ruling upon admissibility of statements objected to "under this rule[,]" M.C.R.E. 304(c)(2)(A), without distinguishing between objections made under M.C.R.E. 304(a)(1)—the verbatim counterpart in M.C.R.E. 304 to section 948r(a)—and objections made on involuntariness grounds. M.C.R.E. 304(c) also restates, nearly word-for-word, trial counsel's obligation under R.M.C. 701(c)(3) to disclose to the Defense "the contents of all relevant statements, oral, written, or recorded, made or adopted by the accused, that are within the possession, custody or control of the Government; the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense under R.M.C. 701 or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial." M.C.R.E. 304(c)(1). The authority of the Commission to address and deal with statements of the accused potentially falling within the section 948r(a) and M.C.R.E. 304(a)(1) prohibition is therefore made express

in the very rule devoted to the prohibition on admissibility of such statements.[11] Moreover, M.C.R.E. 304 also expressly refers to M.C.R.E. 505, thereby acknowledging the role of the military judge in discovery and pre-trial hearings under the M.C.A.'s classified information procedures. M.C.R.E. 304(c)(1) & (c)(3).[12]

V. While the Motion to Strike Should Be Denied, the Commission Should Nevertheless Protect Against Inadvertent Error That Might Tend to Follow From the Stated Defense Intention to Focus Upon the Accused's Time in CIA Custody, Including Upon Statements the Accused Made to CIA Interrogators

The Commission should deny the motion to strike AE 353V so that the Defense can receive, via informed regulation of discovery by the Military Judge, all of the Fadhli-related discovery to which it is entitled. Resolution of AE 353 is prudent before the Commission takes up various evidentiary motions that, in turn, should be resolved prior to assembly of the members. Among these will be requests for suppression and other relief that the Defense, in discovery-related motions, has signaled it will file in pleadings that, too, have drawn upon the content of statements made by the Accused in CIA custody. *See, e.g.*, Facts 5.f, 5.g & 5.p; *see also* the *in camera* Addendum to this response, at Attachment B.[13] Also among these, depending

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[11] The Defense has itself emphasized that "discovery . . . is not limited to admissible evidence . . . ." AE 206 at 5 (citations omitted); *see also supra* Fact 5.f.

[12] The Defense citation to M.C.R.E. 304(a)(5) indicates that the Commission and parties will engage in substantial further analysis of M.C.R.E. 304 in other motions practice. The analysis in this response is adequate to resolve the Defense Motion to Strike, however. *See supra* note 10.

[13] Trial Counsel has already informed the Commission and opposing counsel of its intent to seek to introduce Mr. Nashiri's 2007 statement to the FBI as evidence in the prosecution case-in-chief at trial. AE 168H/AE 241D at 19-20 & Attach. E. Admissibility of this or any contested statement to the members will not be determined by the presence or absence of warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) or U.C.M.J. Article 31 warnings. 10 U.S.C. § 948b (making U.C.M.J. Article 31 inapplicable to M.C.A. military commissions). Nevertheless, the inclusion of an *Oregon v. Elstad*-like list of factors in section 948r(d)'s totality-of-the-circumstances test for voluntariness, *see supra* note 10, and specifically the factor of "the details of the taking of the statement," make it foreseeable that the Defense will argue that Mr. Nashiri's statement to the FBI, in covering topics that may have been raised in earlier CIA questioning, was thereby more likely to have been involuntary due to the "cat being out of the bag." Judge Pohl anticipated this likelihood when he ordered production of all statements made by the Accused in CIA custody in part to facilitate later litigation regarding "whether the

upon where the Defense's multiple exploratory alternative perpetrator theories ultimately lead it, may well be one or more Government motions *in limine* to require that any alternative perpetrator evidence offered by the Defense is based on more than mere speculation and that the Defense has first demonstrated a nexus between a crime charged and the asserted alternative perpetrator. *See, e.g.*, *United States v. Hendricks*, 921 F.3d 320, 321 (2d Cir. 2019) (holding that "a criminal defendant generally has the right to introduce at trial evidence tending to show that another person committed the crime, *so long as the evidence sufficiently connects the other person to the crime*") (emphasis added) (citations and quotations omitted). In such follow-on litigation, confidence that discovery efforts have been complete will be important, *see, e.g.*, AE 353V, Fact 3.x & *supra* Fact 5.l, a context that justifies the information provided in the Notice about whether more discovery is likely to be found.

Due to the interest shown by the Defense in statements the Accused made to the CIA—and to the windfall that would occur if legal error were introduced in these proceedings due to how the Commission and parties deal with such statements when brought up by the Defense in some way—continued attentiveness to section 948r is called for. Still, the Commission should not strike information enabling it to correctly ascertain why discovery sought by the Defense does not exist and thereafter rule upon an interlocutory matter. To affirm section 948r, the Commission should neither rely upon Mr. Nashiri's statements to the CIA for any purported facts therein nor permit the panel to be heedlessly exposed, during collateral

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subsequent statement was tainted *by the earlier statements*." AE 120AA at 7 (emphasis added); *see also supra* Fact 5.i; *see generally Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (Souter, J.) (plurality opinion) (suggesting that factors that bear on whether warnings delivered subsequent to an unwarned interrogation could be effective included "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first"). The intent in mentioning this here is not to foreshadow in detail the expected litigation over admissibility of Mr. Nashiri's statement to the FBI; rather, it is to point out that such litigation will almost certainly require the Military Judge to examine the contents not just of the statements to the FBI, but also any earlier statements containing common subject matter.

Defense presentations, to such statements. The proposed order at Attachment D would further the ongoing process of protecting these proceedings, and the record, from inadvertent legal error. Precautionary measures may well become necessary because of the requirements in M.C.R.E. 104(c) that "[h]earings on the admissibility of statements of an accused shall in all cases be conducted out of the hearing of the members[,]" and that "[h]earings on other preliminary matters shall be so conducted when the interests of justice require . . . ." But there may be prudential considerations that commend precautionary measures by the Military Judge even in situations not strictly or expressly covered by M.C.R.E. 104(c).[14]

7. Conclusion

For the foregoing reasons, and those included in the Attachments, the Defense motion should be denied.

8. Oral Argument

The Commission should deny the motion to strike AE 353V without oral argument so that the Defense can more promptly receive, via informed regulation of discovery by the Military Judge, all of the Fadhli-related discovery that it is entitled to and that it professes to seek, and so that litigation dependent upon such discovery may commence.

9. Witnesses

None.

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[14] For example, although not required to do so, the Prosecution moved in 2014 for the sealing of Nashiri's 2007 statement to the FBI. AE 168H/AE 241D at 20, 25, Attach. E, Attach. U (1 Aug. 2014). In light of the potential for public attention to the contents of the statement during the unprivileged belligerency status hearing or appellate litigation that were foreseeable at the time, the Government sought the sealing of the statement to reduce the potential difficulties such attention might create for the seating of a panel following *voir dire*. *See id.* at 20. When oral argument before the U.S.C.M.C.R. of the government's interlocutory appeal of AE 168K/AE 241G was pending, Judge Spath sealed the statement. *See* AE 168M/AE 241I (20 May 2016) ("[T]he Commission finds that an order sealing Attachment E is necessary to preclude unnecessary disclosure of the matters set forth therein prior to trial on the merits."). That sealing order was vacated by the D.C. Circuit's decision in *In re Al-Nashiri III* (No. 18-1279). The Commission reaffirmed the sealing order in AE 400 at 9.

10. Attachments

A. Certificate of Service, dated 14 April 2021 (1 page).

B. Addendum to Response With Nine Tabs (classified attachment filed *in camera* but not *ex parte*) (60 pages). (TS//HCS//OC/NF)

C. Classified *Ex Parte* Submission With Two Tabs, Consisting of Two Summaries Soon Also To Be Produced in a Request to the Military Judge, Revised To Comport With Guidance in AE 406M and AE 353X (39 pages). (S//HCS//OC/NF)

D. Proposed Order (3 pages).

Respectfully submitted,

//s//
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Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 14th day of April 2021, I filed AE 353Y, the Government Response to Defense Motion to Strike AE 353V, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
John B. Wells
Managing Trial Counsel

ATTACHMENT B

United States v. Al-Nashiri

APPELLATE EXHIBIT 353Y

(Pages 40 - 97)

In Camera

Classified

Attachment B

APPELLATE EXHIBIT 353Y is located in the classified annex of the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions

ATTACHMENT C

United States v. Al-Nashiri

APPELLATE EXHIBIT 353Y

(Pages 99 - 139)

Ex Parte

Classified

Attachment C

APPELLATE EXHIBIT 353Y is located in the classified annex of the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions

ATTACHMENT D

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 353_** **DRAFT ORDER** **Defense Motion** to Strike AE 353V for Inclusion of Statements Obtained by Torture or Cruel, Inhuman, or Degrading Treatment **__April 2021**

1. The Military Commissions Act (M.C.A.) commands that "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . shall be admissible in a military commission . . . ." 10 U.S.C. § 948r(a). This prohibition, instituted in its current wording by Congress in 2009, follows a long and important tradition in American military justice whereby trials before members sitting in judgment are to be protected against the influences of statements by the accused that have been obtained through coercion.

2. The Defense requested that a notice pleading filed by the Government on 19 March 2021 to comply with a Commission order regulating discovery be stricken from the appellate record for inclusion of statements by Mr. Nashiri obtained through torture as well as cruel, inhuman, and degrading treatment. AE 353W. The Government responded, not objecting to the two statements at issue being assumed as resulting from treatment described within the section 948r(a) prohibition, but maintaining that its notice complied with both the text and the intent of that prohibition. Specifically, the limited and *in camera* references in the notice to statements contained in two intelligence reports of harsh interrogations were made not to prove the truth of the matters therein as admissible evidence, but instead as a proffer to a military judge ruling upon interlocutory matters of why certain discovery pertaining to Mohsen Al-Fadhli and Abu Assem Al Makki sought by the Defense does not exist. AE 353Y.

3. The Commission, sitting as a military judge alone and pursuant to M.C.R.E. 104(a), has carefully examined the two statements in Attachment E of the Government's notice and the entire notice filing itself, as well as other instances in which similar statements have necessarily been included and referred to within the appellate record to resolve various preliminary questions before trial. As the Government response highlights, some of these limited uses have been by the Defense, and virtually all have resulted from the Accused requesting—as is his right, affirmed by this Commission in AE 120AA—evidence regarding his treatment by the Central Intelligence Agency (CIA) that is discoverable under applicable law. The Government has repeatedly stated it does not intend to use any statements obtained during such treatment to prove Mr. Nashiri committed the charged offenses.

4. The Commission finds that neither the Government's notice nor the other heretofore limited uses of Mr. Nashiri's statements referred to in the briefs of the parties contravene the section 948r(a) prohibition. As a matter of textual, contextual, and historical analysis, none of these limited uses have made such statements, nor intended them to be, "admissible in a military commission" under the correct interpretation of that language.

5. However, the Commission does not here seek to unduly confine the section 948r(a) prohibition through technical statutory construction. The parties and the Commission are united that "torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings." *United States v. Abu Ali*, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005). For this reason, motions practice and proceedings on interlocutory matters must continue, mindful that the circumstances of this case present formidable challenges. Without needing to rule upon the precise contours of the statutory provision, the Commission finds that section 948r(a) is not violated by the Government's references to statements of Mr. Nashiri in AE 353V for purposes of explaining why the intelligence community appeared to curtail reporting on subject matter that is now discoverable to Mr. Nashiri's counsel under section 949j(b).

6. As trial on the merits approaches, there is risk that knowledge of statements or purported statements by the Accused regarding matters described in the charge sheet could become widespread, making it more difficult to fully protect trial proceedings on the general issue of guilt or innocence from harmful influences. Accordingly, the parties are ordered to follow the practice, modeled by the Government in AE 353V—and previously, in AE 168H/AE 241D, with regard to a non-CIA statement that trial counsel seeks to introduce as evidence in the prosecution case-in-chief at trial—of initially including, raising, or referring to the contents of such statements *in camera*. The sealing order of this Commission in AE 168M/AE 241I, if not strictly section 948r and M.C.R.E. 104(c), evinces that reasonable care should be taken to conduct litigation on preliminary matters such that prospective panel members will be less likely to learn details of an accused's contested or allegedly inadmissible statements. The Commission further orders that all statements or purported statements of Mr. Nashiri appearing in the Defense motion AE 402, Attachments C and D, within pages 22 to 369 of the 371 pages of that filing, be sealed, and that a redacted version—omitting these specific statements but leaving other text disclosed—be prepared jointly by the Defense and the Government for public posting on the military commissions website. The Commission appreciates that many of these pages, and thus certain purported statements by the Accused, are otherwise publicly available to those who might search for them; however, this reality shall not dissuade the Commission against removing the statements from the publicly available portions of its own appellate record prior to trial on the merits. Future trial conduct orders may be issued to further address the risk described in this paragraph.

7. The Defense motion is **DENIED**.

So **ORDERED** this ____ day of April, 2021.

LANNY J. ACOSTA, JR.
Colonel, JA, USA
Military Judge